

IN THE IOWA DEPARTMENT OF EDUCATION

EDIE BOGACZYK,)
NATHAN KIRSTEIN, DISABILITY RIGHTS IOWA)
MARY RICHARD,)
DAVID C. ROSTON,) CLARIFICATION
LEONARD A. SANDLER, CLINICAL PROFESSOR)
PROFESSOR OF LAW, UNIVERSITY OF) OF
IOWA CLINICAL LAW PROGRAMS,)
CURT SYTSMA,) PETITIONER REPRESENTATION
DANIEL ZENO, ACLU OF IOWA,)
PETITIONERS FOR THE ADOPTION)
OF RULES REVISING IOWA ADMIN.)
CODE CH. IAC 281—103)

Petitioner, ACLU of Iowa, submits the following clarification to the June 24, 2017 Petition for Rulemaking filed in the name of Edie Bogaczyk, Nathan Kirstein, Disability Rights Iowa, Mary Richard, David C. Roston, Leonard A. Sandler, Clinical Professor of Law, University of Iowa Clinical Law Programs, Curt Sytsma, and Daniel Zeno, ACLU of Iowa, regarding the adoption of rules revising Iowa Administrative Code 281-103.

1. The ACLU of Iowa is the Petitioner, and not Daniel Zeno in his individual capacity as an attorney. Daniel Zeno represents the ACLU of Iowa as its policy counsel.
2. The ACLU of Iowa supports, in whole, the proposed rules and intends to file comments in support of the proposed rules during the appropriate comment period. We deeply appreciate the hard work of Attorney Mary M. Richard and the many dedicated attorneys and advocates who drafted the proposed rules to ensure that all children are accorded the full panoply of their constitutional rights. However, Attorney Mary M. Richard does not represent the ACLU of Iowa.
3. The ACLU of Iowa requests that the Department and any and all parties direct any questions to the undersigned.

Respectfully submitted,

/s/Daniel Zeno

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Pursuant to Iowa Administrative Code 281—2.18(17A), by and through the undersigned counsel, Petitioners request the adoption of the proposed revisions to Iowa Administrative Code 281—103 Corporal Punishment Ban; Restraint; Physical Confinement and Detention (“Chapter 103”). The proposed revisions are contained in the attachment to this Petition labeled Exhibit 1, and hereby incorporated into this Petition by reference.

1. Petitioners are attorneys licensed in the state of Iowa who have devoted a substantial portion of their practices to advocating for the legal rights in education of school-age children with disabilities, and have experience representing or advising students or families in regard to education and special education, including the use of restraints and seclusion.
2. The Iowa Department of Education (“Department”) has authority to promulgate administrative rules codified in Chapter 103; the Department also oversees compliance with those rules.
3. Iowa schools are required to report data on incidents of restraint and seclusion to the United States Department of Education (“USDOE”) Office of Civil Rights (“OCR”) for the purposes of the Civil Rights Data Collection (“CRDC”). See 34 CFR 100.6(b), 34 CFR 106.71, 34 CFR 104.61. Data on incidents of physical restraint and seclusion is reported to the OCR pursuant to the following definitions:
 - a. *Physical restraint refers to a personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely. The term physical restraint does not include a physical escort. Physical escort means a temporary touching or holding of the hand, wrist, arm, shoulder or back for the purpose of inducing a student who is acting out to walk to a safe location. See <http://ocrdata.ed.gov/datadefinitions>*

- c. Emphasize that corporal punishment and chemical, mechanical, and prone restraints are prohibited in all circumstances
- d. Emphasize that seclusion and physical restraint are methods of last resort to be used exclusively when other techniques have failed or would be futile, to resolve emergency situations in which a child's behavior poses an immediate threat of serious bodily injury to the child or others, and are subject to diligent assessment, monitoring, documentation and reporting by trained employees;
- e. Define terms and behavior management techniques, such as time-out, physical restraint (and other types of restraints), seclusion, and emergency situation, such that creative use or modification of terminology shall not be allowed to define or justify the use of a restricted or prohibited technique.
- f. Apply to as many individuals who have contact with students as possible, including employees, contract personnel, and paid or unpaid individuals who provide services or support;
- g. Clarify what actions constitute corporal punishment, physical restraint, seclusion, time-out, etc. and if, when, how, and by whom they may be utilized;
- h. Detail the minimum requirements for rooms or spaces that are used for seclusion, including dimensions, lighting, ventilation, building materials, etc.;
- i. Detail the precipitating events, emergency situations, maximum time limits, monitoring, recording, debriefing and parental notification requirements that apply to any use of physical restraint or seclusion.
- j. Require that all incidents of physical restraint and seclusion be recorded in a child's education records;
- k. Require that a child be evaluated when the school employs behavior management techniques so frequently that they interfere with a child's access to education;
- l. Encourage the pro-active use of effective, evidence and research-based strategies and best practices to reduce the occurrence of challenging behaviors, and increase meaningful instructional time for all students;
- m. Emphasize that all actions and policies be based on research/evidence-based, and trauma-informed practices.

5. The proposed revisions contained in Exhibit 1 include updating content; removing ambiguities, clarifying language, defining and describing restraint, seclusion and other terms, gap-filling and stating rules with greater specificity where needed to promote better understanding and compliance and better protect the rights of Iowa school children and their parents.
 - a. Examples of facts demonstrating the need to update Chapter 103 rules.
 - i. Because seclusion poses great risk to children and can escalate challenging behaviors rather than prevent them, states that have updated their statutes and rules to prohibit seclusion or have restricted its use to emergencies in which a child's behavior poses an imminent threat of various degrees of physical harm to the child or others.
 - ii. Only five states, including Iowa, still permit the use of seclusion when no person's physical safety is threatened (e.g., for threats, disruptive behavior, destruction of property). (Arkansas, Iowa Montana, New York, Illinois).
 - iii. Four states have prohibited all use of school seclusion with all children (IDEA and non-IDEA children). (Alabama, Georgia, Hawaii, Rhode Island). See Exhibit 2.
 - iv. Five states have prohibited all use of seclusion with all IDEA children. (California, Nevada, New York, Pennsylvania, Texas). See Exhibit 2.
 - v. Twenty-three states have prohibited seclusion of both IDEA and non-IDEA children except when a child's behavior poses an immediate threat of physical harm to the child or others. (Alaska, Arizona, Colorado, Connecticut, Delaware, Illinois, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, Utah, Vermont, Virginia, Washington, Wisconsin, Wyoming). See Exhibit 2.
 - vi. Tennessee and Louisiana prohibit the use of all use of seclusion with IDEA children except when their behavior poses a danger of physical injury to the child or others. See Exhibit 2.
 - vii. At least 29 states have enacted statutes and/or regulations stating affirmatively that seclusion and restraint cannot be used to discipline or punish children. (Alaska, Alabama, Arizona, California, Colorado,

Connecticut, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Michigan, Mississippi, New Hampshire, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, West Virginia, and Wyoming).

- viii. At least twenty-three states restrict the use of physical restraint with IDEA children to emergency situations when a child’s behavior poses an imminent threat of physical harm (or a higher standard) to the child or others. See Alaska, Alabama, Arizona, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, and Wisconsin).
- ix. Twenty states currently prohibit the use of physical restraint with non-IDEA children except for emergency situations involving threats of imminent physical danger. (Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Kansas, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, Ohio, Oregon, Rhode Island, Vermont, and Wisconsin).

b. Examples of areas where ambiguities should be removed and language clarified.

- i. The current language of Chapter 103 refers to seclusion as “physical confinement and detention,” and defines seclusion as *the confinement of a student in a time-out room or some other enclosure, whether within or outside the classroom, from which the student's egress is restricted*. See Iowa Admin. Code r. 103.6.
 - (1) No other state statute or regulation in the nation other than Chapter 103 refers to school seclusion by the term “confinement and detention.”
 - (2) The term “confinement and detention” is ambiguous because among other things, it does not specify that a “confined and detained” child is considered to be alone inside a room, it does not differentiate between seclusion and “detention” (a term commonly used by schools to refer to after-school detention in a group setting), and it does not differentiate between seclusion and “time-out” (a procedure that does not require the involuntary confinement of a child in a seclusion room).

- (3) In its May 30, 2017 state complaint decision, the Department noted that time outs may take place in locations other than seclusion rooms, and that clarifying this language would reduce the likelihood that children who need time out or time away are not placed in seclusion in a “time-out room.”
- (4) The term “confinement and detention” does not conform to the definition of seclusion under which Iowa school districts are required to report seclusion incidents to the CRDC. See USDOE Office for Civil Rights. (March 2014). Issue Brief: Civil Rights Data Collection.

- ii. The following proposed definition of seclusion contained in Exhibit 1 removes the ambiguous language, clarifies that a secluded child is alone, differentiates “time-out” from seclusion, and conforms the definition to the CRDC reporting definition:

Seclusion” means the involuntary confinement of a child alone in a room or area from which the child is prevented from leaving. Seclusion does not include time outs, which are behavior management techniques that involve the monitored separation of the child in a non-locked setting, and are implemented for the purpose of calming. Seclusion does not include reasonable periods of detention, not in excess of school hours, or brief periods of detention before or after school, in a seat, classroom, or other part of a school facility, unless the detention takes place in a seclusion room or amounts to seclusion or physical restraint. Exhibit 1. Proposed 281–103.2(9).

- c. Examples of matters that demonstrate the need for gap-filling and stating rules with greater specificity.

- i. Although Chapter 103 states that it regulates the use of physical restraint, the current language does not include a definition of physical restraint.
- ii. The proposed revised language in Chapter 103 includes the following definition of physical restraint:

Physical restraint refers to a personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely. The term physical restraint does not include a physical escort. Physical escort means a temporary touching or holding of the hand, wrist, arm,

shoulder or back for the purpose of inducing a student who is acting out to walk to a safe location. See Exhibit 1 Proposed 281–103.2(9).

- iii. The current language of Chapter 103 does not state with specificity the circumstances in which restraint and seclusion may be used.
 - (1) In the Department’s May 30, 2017 state complaint decision, the Department stated:
 - (a) *For most children, seclusion is effective only as a means to protect safety. As a general rule, seclusion is not an effective way to teach pro-social replacement behavior.*
 - (b) *The susceptibility of a particular student to trauma because of seclusion is a legitimate factor in determining whether secluding the child is reasonable, and must be determined on an individual basis.*
 - (c) *There is no evidence that seclusion is effective in reducing the occurrence of problem behaviors that frequently precipitate the use of seclusion.*
 - (d) *The risk of stigma is one of the many reasons to restrict the use of seclusion to instances of great magnitude. . . . If a child may injure self or others, then the risk of stigma must yield to the need to protect human health and life.*
- iv. The current language of Chapter 103 states that its rules may be violated when physical restraint and seclusion are used as discipline for minor infractions, but does not define what conduct constitutes a “minor infraction. See Iowa Admin. Code r.r. 281–103.4 and 281—103.7.
 - (1) This increases the likelihood that school districts will improperly use restraint and seclusion to punish children for minor infractions.
 - (2) For guidance in regard to what types of conduct constitute minor infractions,” Petitioners looked to the Department’s May 30, 2017 state complaint decision, in which the Department gave the following example of minor infractions: stepping out of a line of students,

having an “attitude,” being out of instructional control,” foul language, and saying “I’ll kill you” without the means to do so.

- v. The Petitioners, the USDOE, and a variety of professional associations strongly recommend that seclusion and physical restraint be used only in emergency situations, when a child’s behavior poses an immediate threat of serious bodily injury to the child or others, and not when behavior might result in damage to property or disruption of a class or education program.¹

- (1) The proposed language contained in Exhibit 1 states: *Physical restraint and seclusion may be utilized only when: a. doing so is necessary to prevent or terminate an emergency situation; and b. less restrictive alternatives to seclusion or physical restraint would not be effective, or have failed, in preventing or terminating the emergency situation; and c. the physical restraint and seclusion complies with all of the rules of this chapter. Exhibit 1 Proposed 281–103.8(1).*

- (2) The proposed language contained in Exhibit 1 defines “emergency situation” as *a situation in which a child’s behavior poses an immediate threat of serious bodily injury to the child or others. Exhibit 1 Proposed 281–103.2(3).*

- vi. Chapter 103 does not clarify that its rules may be violated whether or not a parent gives consent to the use of restraint or seclusion for their child. The proposed language in Exhibit 1 provides: *These rules must be complied with whether or not a parent consents to the use of restraint or seclusion for their child. Exhibit 1 Proposed 281–103.8(7).*

- d. The current language of Chapter 103 provides little guidance in regard to when the use of restraint or seclusion may deny the right to a free appropriate public education (“FAPE”) under federal and state special education laws, of a student who is an

¹ See e.g., U.S. Dept. of Education, Restraint and Seclusion: Resource Document, 2012, Retrieved from <http://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf>; Duncan, A. (2009, July 31). Letter from Education Secretary Arne Duncan to the Council of Chief State School Officers (CCSSO). Retrieved from <http://www2.ed.gov/policy/elsec/guid/secletter/090731.html>; Council for Children with Behavioral Disorders.(2009). Physical restraint and seclusion procedures in school settings. Retrieved from <http://www.ccbd.net/sites/default/files/CCBD%20Summary%20on%20Restraint%20and%20Seclusion%207-8-09.pdf>; Statement of the Council for Exceptional Children, 2009, Retrieved from <https://www.cec.sped.org/~media/Files/Policy/CEC%20Professional%20Policies%20and%20Positions/restraint%20and%20seclusion.pdf>.

entitled individual under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq.

- i. Decisions filed with the Department demonstrate that since the adoption of Chapter 103, some Iowa school districts have used restraint and seclusion in an unreasonable manner in light of the circumstances. See, e.g., IDEA State Complaint decided May 30, 2017; IDEA State Complaint, 25 D.o.E. App Dec 192 (2009); 24 D.o.E. App Dec 193 (2007).
- e. In its state complaint decision filed May 30, 2017, the Department found that during the period of December 2015 through December 2016, the ICCSD sometimes used seclusion in a manner that did not meet the minimum compliance standards of the applicable state regulations.
 - i. One necessary element of a FAPE is an education consistent with state standards. Iowa Admin. Code r. 281–41.17. This includes state regulations concerning seclusion and restraint. IDEA State Complaint, 25 D.o.E. App Dec 192 (2009).
 - (1) Revisions in Chapter 103 should address violations such as those documented by the Department in its May 30, 2017 state complaint decision.
 - (2) The proposed language provides: *If a child’s Individualized Education Program (IEP), Behavior Intervention Plan (BIP), Individual Health Plan (IHP) or safety plan includes either or both restraint or seclusion measures, those measures must be individualized to the child, described with specificity in the child’s IEP, BIP, IHP, or safety plan, and be reasonably calculated to enable the child to make progress appropriate in light of the child’s circumstances.* See Exhibit 1 Proposed 281–103.8(6).
 - (3) The proposed language also provides: *Corporal punishment does not include actions consistent with and included in an individualized education program developed under the Individuals with Disabilities Education Act, as reauthorized, Iowa Code chapter 256B, and 281–Chapter 41; however, under no circumstance shall an individualized education program violate the provisions of this chapter.* See Exhibit 1 Proposed 281–103.4.

6. The people who are most likely to be affected by and interested in the proposed action that is the subject of this petition are:
 - a. Parents whose children have disabilities, histories of trauma, and challenging behaviors,
 - b. Students with challenging behaviors who are entitled individuals under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq., and students with histories of trauma,
 - c. Special education teachers who work directly on a daily basis with students in Level III classrooms.

7. Pursuant to Rule X.7(17A), Petitioners request a brief and informal meeting between themselves, the Iowa Department of Education, and all interveners, if any.

WHEREFORE, the Petitioners hereby request that the Iowa Department of Education adopt the proposed revised and amended language to Chapter 103 contained in the attachment to this Petition, labeled as Exhibit 1.

Respectfully submitted,



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