COMMENTARY

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BY LAURA A. ATHENS

The new Michigan emergency seclusion and restraint law and the role of the mediator

Imagine your boss came into your office, tied you to a chair with bungee cords and duct taped your hands to the chair, then hit and kicked you. Now imagine this happening to your child at school. This scenario is not fiction. In 2014, a Senate Majority Committee described a case involving a Pennsylvania special education teacher who repeatedly hit, kicked, and used bungee cords and duct tape to restrain seven elementary students who had developmental disabilities. ("Dangerous Use of Seclusion and Restraints in Schools Remains Widespread and Difficult to Remedy: A Review of Ten Cases" (February 14, 2014)). Classroom aides waited two years before reporting the abuse to administration due to fear of retaliation. Thereafter, teachers at the school refused to allow the aides in their classrooms. The special education teacher was convicted of child abuse. Ultimately, the parents obtained a $5 million settlement. However, the school district refused to admit any wrongdoing. Sadly, conduct that would be considered criminal if committed by private parties often remains unaddressed if it occurs in a school setting.

Seclusion and Restraint in the Schools

This is not an isolated case. According to United States Department of Education, Office of Civil Rights (OCR) data collection for the 2013-14 school year, more than 100,000 students were placed in seclusion, involuntary confinement or were physically restrained at school, including almost 69,000 students with disabilities. Students with disabilities were subjected to seclusion and restraint at rates that far exceeded other students. While special education students served under the Individuals with Disabilities Education Act (IDEA) represent 12% of all students, 67% of them were subjected to restraint or seclusion. Unfortunately, the practice is perpetuated because the students involved in these cases frequently cannot communicate their pain and suffering due to their age, disabilities and emotional distress.

It is common for special education students to be secluded for prolonged periods of time in closet-sized rooms with concrete walls without adult supervision. Seclusion has resulted in students soiling themselves, screaming, banging on walls, engaging in self injurious behaviors and committing suicide. A seclusion led to the tragic death of a 13-year-old boy who had attention deficit with hyperactivity disorder and depression. He hung himself with a rope his teacher had given him to hold up his pants after being repeatedly locked into a seclusion room that resembled a prison cell.

After a thorough review of the research and ten sample cases, the Senate Majority Committee concluded that parents face five common challenges in these situations: (1) frequently parents are not aware or notified of the seclusion and restraint and school records documenting seclusion and restraint often are inaccessible or unreliable; (2) legal hurdles make filing and bringing a case to trial arduous and very expensive, (3) psychological harm is difficult to prove; (4) schools and publicly employed personnel have sovereign or qualified immunity; school staff tend to adopt a "code of silence" at the first sign of trouble with a parent; and courts often give deference to school personnel due to the "halo effect" surrounding educators; and (5) existing remedies fail to offer adequate relief.

Michigan's Emergency Seclusion and Restraint Standards and Law

In 2006, the Michigan State Board of Education adopted a Positive Behavior Support policy requiring all public schools to develop a system of school-wide positive behavioral supports. Later that year, the State Board of Education published standards for the emergency use of seclusion and restraint. Unfortunately, the standards did little to curb seclusion and restraint in public schools. Although the standards contained many requirements, school districts and their counsel frequently argued that the standards did not have the binding force of law and were more precatory than mandatory.

Recently, Michigan enacted statutory provisions to ensure that seclusion and restraint is used only in emergency situations and as a last resort in public schools. MCL 380.1307-380.1307h. In accordance with the statute, the State Board of Education developed a policy incorporating the statutory provisions in March 2017. Public school districts and public chool academies are required to adopt and implement a local policy, consistent with the state policy, by the beginning of the 2017-2018 school year.

The emergency seclusion and restraint statutory provisions are comprehensive and highly prescriptive. Sections address the purpose, duties, prohibited and permitted practices, training, definitions, documentation, reporting, data collection and analysis. The overall statutory purposes are to eliminate seclusion and restraint, increase meaningful instructional time and protect the safety, welfare and security of the school community and dignity of each student.

Under the statute, emergency seclusion and physical restraint may be used only as a last resort in emergency situations and only if essential to provide for the safety of the student or another. Seclusion and restraint must not be used for:

- the convenience of school personnel.
- as discipline or punishment.
- as a substitute for an appropriate educational program.
- in place of adequate staffing or less restrictive inventions.

School personnel are prohibited from subjecting students to corporal punishment, child abuse, mechanical or chemical restraint, prone restraint, deprivation of basic needs, seclusion, other than emergency seclusion and physical restraint. Physical restraint should be used no longer than necessary to allow the student to regain control of his or her behaviors. If a restraint lasts more than 10 minutes additional safety precautions must be instituted.

During an emergency seclusion, school personnel must continuously observe the student, the room or area must comply with state and local fire and building codes, the room must not be locked, must provide adequate space, lighting, ventilation, viewing, and protect the safety and dignity of the student. Emergency seclusion must not be used to confine preschool children or students who are severely self-injurious or suicidal. Lockdowns and fire drills are not considered seclusion.

Emergency physical restraint does not include and the statute does not prohibit:

- Briefly holding a student to prevent an impulsive action, such as running in front of a car.
- Using safety equipment such as a seat belt.
- Breaking up a fight, stopping a physical assault or taking a weapon from a student.
- Actions integral to a sporting event, such as a referee pulling football players off a pile.

The statute requires public schools to develop policies to encourage proactive, effective, evidence-based strategies and best practices to reduce challenging behavior. Each seclusion and restraint must be performed in a manner, based on research and evidence, that is safe, appropriate, and proportionate to and sensitive to the student's severity of behavior, chronological and developmental age, physical size, gender, physical condition, medical condition, psychiatric condition and personal history. Emergency seclusion should generally be no longer than 15 minutes for an elementary school student and no longer than 20 minutes for a middle school or high school student.

Each use of seclusion or restraint and the reason for its use must be documented in writing and reported to the school building administration and the student's parent immediately with a written report to parent within 1 school day or 7 calendar days, whichever is sooner.

After any seclusion or restraint, school personnel must make reasonable efforts to debrief and consult with the parent and student. If a student exhibits a pattern of behavior posing a substantial risk of creating an emergency situation in the future, school personnel are encouraged to conduct a functional behavioral assessment and develop or revise a positive behavioral intervention and support plan to facilitate the elimination of seclusion and restraint.

Schools must collect and report data on restraint and seclusion to the Michigan Department of Education (MDOE). Data must be disaggregated by race, age, grade, gender, disability status, medical condition, identity of the student; the school personnel initiating the use; and the name of the school or program where the seclusion or restraint was used. The data should be analyzed by the school in light of attendance, suspension, expulsion, and dropout data and for continuous improvement of training toward the elimination of seclusion and restraint.

In accordance with MDOE guidelines, public schools must develop and implement a comprehensive training framework, that includes awareness training for all school personnel who have regular contact with students. Comprehensive training is mandated for key identified personnel who will be implementing behavior intervention. Key identified personnel must receive training on:

- proper implementation of proactive strategies and de-escalation techniques.
- positive behavioral intervention and support strategies.
- identification of behaviors and events that may trigger emergency situations.
- proper use of emergency seclusion or physical restraint and the effects of seclusion and restraint on all students.
- obtaining appropriate medical assistance, cardiopulmonary resuscitation and first aid, conflict resolution, mediation, social skills training.

The Role of the Mediator and Facilitator

Inevitably, controversies will arise under the new emergency seclusion and restraint law. During the implementation phase, while school districts are struggling to develop policies and train personnel, mistakes are bound to occur.

Unfortunately, seclusion and restraint has become part of the culture of many public schools. Successfully reducing and eliminating seclusion and restraint will require a change in attitude. School staff will need to shift from negative to positive reinforcement and acknowledge prosocial behaviors, rather than focus on negative behaviors. They must ascertain the meaning behind disruptive behaviors to address the student's underlying needs more effectively. A new mindset is necessary; one that reframes the question from should we restrain or seclude to how do we keep students and staff safe.

After any use of seclusion or restraint, the statute requires school personnel to debrief and consult with the parent and the student to determine future actions. A facilitator may be very helpful during the debriefing process, which is likely to be highly emotional. These sessions can be facilitated by an impartial, knowledgeable, third party neutral who can diffuse the situation, help the parties understand what led up to the conflict and help them develop alternatives to seclusion and restraint. Some of the alternatives include:

- scheduled movement breaks.
- one-on-one time with a trusted adult.
- a quiet place, or a sensory room, for de-escalation.
- separation of students who have frequent altercations.
- engaging in a calming activity, such as listening to music, drawing or writing.

A simple accommodation such as changing a student's assigned seat can be very effective. Some students respond very favorably to having a service animal that may provide physical assistance, companionship, comfort and promote the student's self-esteem.

Seclusion and restraint can result in psychological harm, physical injuries and death. Not only is seclusion and restraint dangerous, frequently, it is ineffective and increases the behaviors that staff are attempting to control or eliminate. Prone or facedown restraint that blocks air to the lungs can be deadly.

Parents have filed, on behalf of their children who have been subject to seclusion or restraint, disability-related claims under IDEA and Section 504 of the Rehabilitation Act; tort claims, such as gross negligence, false imprisonment, assault and battery, intentional infliction of emotional distress; and Constitutional claims for violation of the Fourth and Fourteenth Amendment right to be free from unreasonable seizures and Fourteenth Amendment right to be free from deprivation of liberty without due process. Legal actions have led to judgments including fines ranging from several thousand dollars to multimillion dollar settlements as well as incarceration.

Mediation is the preferred forum for resolving conflicts related to seclusion and restraint. A private, confidential and timely mediation is much more likely to result in an effective and expeditious resolution than litigation in court.

Through mediation, the parties may discover that staff needs training on early positive behavior intervention, de-escalation strategies, communication techniques, positive behavior intervention support plans and the proper use of emergency seclusion and restraint. Parent training may also be required to facilitate consistent implementation of positive behavior interventions across all settings.

During mediation, skilled mediators can make schools aware of studies that prove elimination or reduction in seclusion and restraint leads to positive outcomes for staff, including: (1) a significant reduction in staff injuries; (2) decreased staff turnover; (3) increased staff satisfaction; (4) reduced employee lost time and lost expenses; (4) reduced number of worker's compensation claims; (5) reduced total cost of worker's compensation claims; (6) reduced liability premiums; and (7) substantial cumulative savings.

Involvement of older students in mediation can be very productive. Frequently, the student can provide insight as to the early warning signs of agitation, what triggers the behaviors, when and where the behaviors are most likely to occur, what types of responses are most calming and effective and what coaching or instruction is needed to manage their behaviors in a more positive manner.

Conclusion

To be effective in cases involving seclusion or restraint, mediators must have a thorough understanding of the new statutory requirements regarding the use of emergency seclusion and restraint in the schools, MDOE policies and guidance and school policies. They also must be familiar with the potential legal causes of action and defenses. Mediators must be highly skilled at dealing with the emotional reactions and defensiveness likely to arise in conflicts involving seclusion and restraint. Mediators must also be mindful of maintaining neutrality, and not making judgments or taking sides. Finally, they must be familiar with the more compassionate and humane alternatives to seclusion and restraint.

**Author's Note: I have tremendous respect for special education personnel, the vast majority of whom are highly skilled and incredibly dedicated to promoting their students' academic and social development, dignity and wellbeing.*

Laura A. Athens is an attorney, mediator and arbitrator in Farmington Hills. Her practice focuses primarily on education law and disability rights. She previously served as a hearing officer in special education due process hearings and in vocational rehabilitation matters. Athens provides alternative dispute resolution (ADR) services in special and general education, vocational rehabilitation, faculty grievance, family law, guardianship and disability rights cases. As an adjunct professor at Wayne State University Law School, Athens taught education law, health law and bioethics. She also taught Legal Research and Writing at Washington University School of Law. She is an associate of Professional Resolution Experts of Michigan, LLC (PREMi, http://premiadr.com/) and has served on the State Bar of Michigan Alternative Dispute Resolution Council and as a former chair of the Oakland County Bar Association ADR Committee. Athens has published numerous articles on education law and ADR issues and frequently lectures on school-related topics.

under analysis

BY THE LEVISON GROUP

Patrick Berry

Breaking up is Uber hard to do

Breaking up is hard to do. Divorces, separations, dissolutions, splits, "amicable un-couplings." No matter the type of break up or what you call it, they're inevitably challenging, and frequently contentious. Often, the more public the break up, the more painful the process becomes, and the more likely it is that lawyers will get involved.

Break ups take many different forms. The American public is currently captivated by one particular type of separation: the divorces happening within the Trump administration. Upper echelon executive branch officials have been dropping like lemmings off a cliff. The first, Michael Flynn, was ostensibly forced out because he lied to the Vice President. He subsequently retained a high-powered team of Washington lawyers to aid in defending his pre-departure activities. To date, his fancy legal team has advised him to beg for immunity and plead the Fifth Amendment.

The list goes on: Sean Spicer, who, by the end, had lost significant credibility with the press and public due to his frequent gaffes and inaccurate statements, was unceremoniously forced to resign. He has since hired famous television lawyer Bob Barnett to help him secure a TV gig, so I don't think we've seen the last of Spicey (to the delight of Saturday Night Live and Melissa McCarthy, I'm sure). Reince Priebus, the constantly embattled chief of staff who never seemed to fit with the President's style, was killed off by his rival, Anthony "the Mooch" Scaramucci shortly after his arrival. Then, the Mooch himself was shown the door after his profanity-laden interview with the New Yorker. Stephen Bannon is the most recent casualty, and he seems intent on making this as difficult and public of a separation as possible. Interviewed immediately after the firing, Bannon reportedly said: "If there's any confusion out there, let me clear it up: I'm leaving the White House and going to war." I'm sure Bannon's rivals in the White House spent their weekend interviewing lawyers experienced in defamation and libel law.

Many Americans, and a certain segment of the legal community, also love a good celebrity divorce. Wildly popular tabloids, online websites and magazines such as Us Weekly, TMZ, and the National Enquirer all rush to be the first to break news of a celebrity split. Details of Angelina Jolie's separation from Brad Pitt, and the unfortunate associated custody battle, have graced the covers of grocery store check-out line tabloid magazines for months. Before that, it was Johnny Depp's nasty divorce from Amber Heard in the midst of domestic abuse allegations. Depp's legal team argued Heard was falsely making the accusations for financial gain, and Heard responded by withdrawing her request for spousal support and donating the proceeds of the settlement to charity. Touché. Famous celebrity divorce lawyers like Laura Wasser (who has represented Johnny Depp, Angelina Jolie, and Britney Spears, among others) and Neal Hersh (Brad Pitt, Halle Berry, Kim Basinger) rush to set up meetings with these kind of prospective high profile clients.

But as a corporate attorney, I encounter a different kind of dissolution: the corporate divorce. These break ups can get just as contentious and personal as the types discussed above. Consider the fight taking place at the most valuable startup in the U.S., Uber. It is about as contentious and captivating as it gets.

On June 20th, after months of internal turmoil stemming from legal and ethical troubles — including allegations of sexual harassment within the company and a nasty lawsuit by Waymo, Google's self-driving car offshoot—one of Uber's biggest shareholders, the venture capital firm Benchmark, confronted Uber's CEO, Travis Kalanick. Following hours of contentious negotiations and discussions, Kalanick agreed to step down from his position as CEO. It was a dramatic move by Benchmark, particularly because Silicon Valley V.C. firms go out of their way to appear "founder friendly," which doesn't typically include forcing the founder out of his company, particularly one he built into a $70 billion behemoth (and that has made Benchmark and its owners a ton of money along the way).

The drama didn't end with the forced resignation. In an even more unprecedented move by Benchmark, the prestigious V.C. firm proceeded to sue Kalanick for fraud, breach of contract and breach of fiduciary duty stemming from Kalanick's pre-resignation activities. Apparently, last summer, Kalanick convinced the board of directors (including Benchmark) to expand the number of voting directors from 8 to 11, with Kalanick able to designate those three extra seats. Following the firing, Kalanick had been using the board seats to hold on to power and, according to some, sabotage the search for a replacement CEO and clear the path for his eventual return. In light of the recent turmoil at Uber, Benchmark's attorneys claim that Kalanick had withheld material information—including information about Uber's internal sexual harassment issues—in seeking its consent to expand the board. Benchmark now wants the board expansion vote invalidated. It's clear that Kalanick is not willing to go quietly into the night from the company he co-founded. His lawyers are currently fighting to move the case out of public view (Delaware state court) and into private, confidential arbitration.

Breaking up is never easy, but sometimes proves unavoidable. You can choose to leave with your head held high and your pride intact (ala Amanda Heard), or you can go out in a blaze of glory, badmouthing your critics and vowing revenge (in the vein of Stephen Bannon or the Mooch). Whatever your style, there is one important thing to keep in mind: When the negotiations have finally concluded, the documents have been signed, and you've made your parting remarks, it's probably a good idea to make sure you have enough cell phone juice to call an Uber so you don't have to ask for a ride home from your ex-husband or former business partner.

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