



Since 1977

TO: Whom It May Concern

DATE: September 1, 2009

FROM: Kayla A. Bower, JD, Oklahoma Disability Law Center, Inc.

RE: The Role of the Law Center in Abuse and Neglect Investigations
Conducted in the School Setting

Overview

The Oklahoma Disability Law Center, Inc. (“ODLC”) has advocated on behalf of students with disabilities in the Oklahoma school setting for decades. Most school districts view ODLC as providing individual legal representation to ensure that children with disabilities receive a free appropriate public education and providing technical assistance and training to families and students with disabilities. Traditionally, schools have not dealt with ODLC outside this context and may not be aware of ODLC’s role as Oklahoma’s Protection and Advocacy system for people with disabilities. Moreover, school districts are not likely to be aware of ODLC’s responsibility and authority as the Protection and Advocacy System to (1) protect people with disabilities, including students, from abuse and neglect; and (2) investigate complaints regarding the abuse and neglect of individuals with disabilities. This memorandum will address ODLC’s authority in this latter role and will:

- ▶ clarify ODLC’s role as the Protection and Advocacy system;
- ▶ detail ODLC’s legal responsibility and authority to conduct abuse and neglect investigations;
- ▶ outline what school districts can expect if an investigation is conducted in their schools; and
- ▶ address the school district’s responsibilities during an abuse and neglect investigation.

ODLC acknowledges that just as school districts and school staff want to ensure students receive appropriate educational services they certainly also want to protect students from harm. It is likely, therefore, that in many if not all cases involving allegations of abuse or neglect of a student with a disability, the school district will have conducted its own investigation. A key factor, however, in ODLC’s role as the Protection and Advocacy System is its independence from service providers. As ODLC proceeds with an abuse and neglect investigation, it will work with school districts and school staff to minimize the impact of the investigation on the school environment.

ODLC: Oklahoma’s Protection and Advocacy System for People with Disabilities

ODLC is part of a federally mandated system with the authority under federal law to protect and advocate for the human and legal rights of individuals with mental illness, developmental or other disabilities. Congress created the Protection and Advocacy system in response to Congressional hearings that documented a history of abuse and neglect of people with disabilities. Under federal law, a state may not receive federal funds for services to persons with disabilities unless it has an established Protection and Advocacy system. ODLC was

designated as Oklahoma's Protection and Advocacy system in 1977 giving ODLC both a federal mandate and the authority to protect and advocate for people with disabilities.

ODLC: Abuse and Neglect Investigations

As the Protection and Advocacy System ODLC must be independent from agencies providing services and must have the authority to (1) pursue legal, administrative and other appropriate remedies to protect and advocate for the rights of people with disabilities in Oklahoma and (2) investigate incidents of abuse and neglect of individuals with disabilities that are reported to ODLC if there is probable cause to believe the reported incidents occurred.

The term "abuse" includes actions that cause psychological harm as well as death or physical injury. Where a restraint is improperly utilized, it may be considered a form of abuse. Neglect may arise as a result of the failure to provide necessary services.

ODLC has investigated complaints regarding abuse and neglect of individuals with disabilities in both the developmental disability and mental health systems. In its 32 years as the Protection and Advocacy System, ODLC has investigated many complaints including placement of children with developmental disabilities in steel cage-like structures, restraint or seclusion of persons with developmental disabilities and persons with mental illness, over medication of residents and medication errors, failure to provide needed medication, improper use of mechanical restraints, sexual assaults by staff, failure to provide adequate food and clothing, and lack of adequate medical, dental and mental health care.

ODLC is required to conduct abuse and neglect investigations in all settings that serve people with disabilities. Recognizing that schools provide disability services, the school setting is one in which an abuse and neglect investigation may occur. Thus, ODLC's protection and

advocacy system responsibility and authority includes responding to complaints of abuse/neglect that occur within schools serving students with disabilities. A copy of the Second Circuit Court of Appeals opinion explaining this authority is attached, along with the U. S. Department of Justice's amicus brief filed in the case. *State of Connecticut Office of Protection and Advocacy for Persons with Disabilities v. Hartford Board of Education*, 464 F.3d 229 (2d Cir. 2006).

ODLC: School Based Abuse and Neglect Investigations

ODLC has received a number of complaints regarding the use of restraint and seclusion of students with disabilities in schools. The improper use of seclusion and restraint can be considered abuse and neglect. Consequently, ODLC will likely be conducting more abuse and neglect investigations in the school setting.

The extensive use of restraint and seclusion of students with disabilities in schools has been documented by two national reports:

- ▶ *SECLUSION AND RESTRAINTS: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers*, Government Accounting Office (GAO-09-719T), May 19, 2009 (located online at <http://www.gao.gov/new.items/d09719t.pdf>)
- ▶ *School is Not Supposed to Hurt: Investigative Report on Abusive Restraint and Seclusion in Schools*, National Disability Rights Network, January 2009 (located online at <http://www.ndrn.org/sr/SR-Report.pdf>)

ODLC: Commencing an Abuse and Neglect Investigation

An abuse and neglect investigation usually begins with ODLC's receipt of a complaint alleging the mistreatment of a person with a disability. A complaint may come from a variety of sources. It may be in the form of a direct communication with ODLC or it may be based upon our review of newspaper articles, television reports and other sources. Upon receiving the

complaint, ODLC will conduct a preliminary review of the information to determine whether sufficient probable cause exists to commence an abuse and neglect investigation.

Probable cause means that there are reasonable grounds to believe that an individual with a disability has been or is at risk of being abused and neglected.

Once ODLC establishes that it has probable cause, it will request various records relating to the allegations of abuse/neglect from the school district. ODLC will designate at least one person, who will be the individual a school or district can contact when questions arise about an investigation.

ODLC: Records Access

In many situations, ODLC will initiate an abuse and neglect investigation by obtaining a release from the parent (or guardian or other appointed representative), followed by a request to the school for student records and related documents. In some cases ODLC will not have parent contact information (*i.e.* where information is obtained through a source other than a parent) but, as the Protection & Advocacy System, ODLC is still required to investigate complaints of abuse and neglect.

ODLC will request and is entitled to parent contact information from the district. The school district will have three days to respond to our records request, including the provision of the parent contact information. If the school district does not provide the requested contact information, the school district must promptly tell ODLC why in writing.

When the Student's Health or Safety is at Serious Risk

Where ODLC determines there is probable cause to believe that the health or safety of a student is in serious and immediate jeopardy, ODLC is entitled to access all records not later than

twenty-four (24) hours after making the request. In this circumstance, since the health and safety of the student is in immediate jeopardy, ODLC is not required to obtain parental consent to access student records.

As a matter of practice, ODLC will make a good faith effort to obtain parental consent, or at least notify parents of its investigation and any intent to interview students.

In order to adequately complete an abuse/neglect investigation, ODLC may need access to information beyond that contained in the student's records. For example, it is likely that the district has conducted its own investigation of the incident, similar incidents, or the district has looked into district wide practices regarding the use of seclusion and restraint. ODLC may need to review documents and records containing that information.

If the complaint of abuse is against an individual district employee, the district may have investigated and taken action to improve the employee's performance or ensure similar incidents do not recur. ODLC may seek and is entitled to information documenting the district's action as it relates to the incident of alleged abuse or neglect. Since these records are not student records parents cannot authorize access to them and parent consent is not appropriate or necessary for ODLC to obtain access to this information.

Confidentiality

ODLC must keep confidential information it receives in the course of an abuse/neglect investigation, confidential. ODLC is held to the same confidentiality standards as the school district providing the records. Thus, ODLC must comply with the requirements of FERPA, HIPAA, and the IDEA with regard to protecting the confidentiality of records it receives from a school district.

Since Protection and Advocacy Systems are required to keep the information they receive confidential, Courts have found that preventing a protection and advocacy system from accessing records directly contradicts Congress' mandate that the protection and advocacy system protect the rights of people with disabilities. Thus, schools should not deny ODLC access to records based on confidentiality arguments made under FERPA, HIPAA, IDEA or any state statute. *Center for Legal Advocacy v. Hammons*, 323 F.3d 1262, 1270 (10th Cir. 2003); *Oklahoma Disability Law Center, Inc. v. Dillon Family and Youth Services*, 879 F.Supp. 1110 (N.D. Okla. 1995)

ODLC: Facility, Staff and Student Access

ODLC is authorized to visit a school setting and have unaccompanied access to the school facility to conduct interviews with individuals during reasonable hours. Additionally, while conducting an investigation, ODLC may interview any student or employee who may have knowledge of the incident under review, as well as inspect the school and photograph areas associated with the investigation. If the school district denies ODLC access to its facility, staff or students when ODLC is acting under its abuse and neglect authority, the school district must promptly provide a written justification for its denial.

ODLC will make an effort to contact the school to arrange a time that is not too disruptive or overly inconvenient for the school, students, and staff before visiting a school.

ODLC: Post -Investigation Action

After completing its investigation, ODLC will make a determination as to whether it believes the student has been abused or neglected and why. ODLC will rely on relevant standards of compliance applicable to use of restraint and seclusion in public schools.

ODLC will work with the school in developing a plan that can be used to ensure the prevention of future incidents of abuse/neglect. In some cases it may not be possible to determine whether abuse or neglect occurred. ODLC may still recommend changes in policies, practices and procedures that will benefit students and the school district in the future. Finally, in some cases, depending upon the severity of the incident and the school district's response, it may be necessary for ODLC to pursue other legal actions.

Conclusion

As Oklahoma's Protection and Advocacy System, ODLC has the responsibility to protect people with disabilities from abuse and neglect. ODLC is, therefore, required to investigate complaints regarding the abuse and neglect of individuals with disabilities, including students. ODLC has received complaints regarding the improper use of seclusion and restraint in schools. Thus, ODLC anticipates that it will have a greater presence in school districts investigating abuse and neglect complaints involving students with disabilities.

In order to adequately conduct an abuse and neglect investigation federal law gives ODLC the obligation and the authority to access otherwise confidential information to protect students with disabilities. It is likely that ODLC will be using this authority to access information in order to appropriately conduct investigations into complaints of the improper uses of restraint or seclusion of students with disabilities.

Finally, ODLC acknowledges that school districts and school staff also want to ensure that students are not abused or neglected and ODLC will work with school districts and school staff to minimize the impact of the investigation on the school environment.