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September 1, 2006

Honorable Gary L. Sharpe  
United States District Judge  
United States District Court  
James T. Foley U.S. Courthouse  
440 Broadway, Room 441  
Albany, New York 12207

Re: *Alleyne et al v NYS Education Department et al*  
Northern District of New York  
06-CV-994 (GLS/RFT)

Dear Judge Sharpe:

At the conclusion of oral argument on Plaintiffs' application for a preliminary injunction, the Court gave permission to Defendants to submit further documentation in opposition. Enclosed please find the Declaration of James P. DeLorenzo, with exhibits.

Defendants rely in full upon their earlier submissions in opposition to preliminary relief, but emphasize here Plaintiffs' failure to demonstrate a likelihood of success on the merits. As noted by the Court, Defendants have the authority to promulgate regulations and set standards with respect to education issues. Indeed, Defendants have the duty to do so. See 20 U.S.C. § 1412(a). The use of aversive intervention is plainly controversial. A review of the public comments received by SED during the Public Comment period demonstrates that a significant number of organizations and individuals believe that the use of aversives should be banned completely. See DeLorenzo Declaration, Exhibit D. Plaintiffs on the other hand, appear to contend that the use of aversive intervention should be unfettered by regulatory standards. The regulations represent a recognition of both positions: while aversive intervention may be appropriate for specific children, its unfettered use presents a danger to the health and safety of New York students. Notably, Massachusetts, the state in which JRC is located, has regulations similar to those at issue here. See 115 CMR § 5.14(4)(b)(5).

Because the regulations at issue were within the authority of Defendants to promulgate, are consistent with Massachusetts law and are consistent with the IDEA, Plaintiffs cannot demonstrate a likelihood of success on the merits of their IDEA claim. See Defendants'

Memorandum of Law, Dkt. #13, Point II, Point III-B and Point IV-B. Plaintiffs' state law claim is similarly infirm. See Does v. Mills, 2005 U.S. Dist. 6603, \*16-21 (S.D.N.Y. Apr. 19, 2005). Plaintiffs are therefore not entitled to any relief.

Should the Court nevertheless grant the extraordinary remedy of preliminary relief, Defendants respectfully request that it be narrowly tailored to apply only to named Student Plaintiffs as of September 1, 2006 who: (a) have demonstrated irreparable harm; (b) have a current individualized education program (hereinafter "IEP") that expressly permits Level III aversives and that permitted Level III aversives on June 23, 2006, the effective date of the new regulations; (c) have a current behavioral intervention plan (BIP) that specifies the aversive intervention appropriate for each targeted behavior; and, (d) have a current Massachusetts Probate Court order that authorizes the use of Level III aversives and had such an order in effect on June 23, 2006. Defendants further request that any preliminary relief be limited to staying enforcement of that part of the regulations expressly alleged in the complaint to have caused harm. Specifically, Defendants ask that any preliminary relief be limited to staying enforcement of 8 NYCRR § 200.22(f)(2)(vi)<sup>1</sup>, which limits the use of aversives to aggressive and self-injurious behavior and 8 NYCRR § 200.22(f)(2)(ix), which prohibits the combined use of aversive interventions with mechanical restraints.

"Injunctive relief should be narrowly tailored to fit specific legal violations." Patsy's Brand, Inc. v. IOB Realty, Inc., 317 F.3d 209, 220 (2d Cir. 2003). Here, Plaintiffs seek relief that far transcends their own claims.<sup>2</sup> Indeed, Plaintiffs seek relief from complying with the regulations in any manner, yet allege actual or imminent irreparable harm only with respect to the limitation of aversives to self-injurious or aggressive behavior and the prohibition on the combined use of aversive interventions and mechanical restraints. See Complaint, ¶¶ 92-158. Plaintiffs do not offer a single example of harm or imminent harm as a result of the regulations' other provisions. For instance, Plaintiffs fail to even suggest harm based upon the requirement that an independent panel review an application to include aversive intervention, 8 NYCRR § 200.22(e), or the requirement that schools submit quarterly reports on students who receive aversive interventions 8 NYCRR § 200.22(f)(3)(iii) or the requirement that each student's CSE convene a meeting at least once every six months and annually observe the student in the school setting, 8 NYCRR § 200.22(f)(7)(ii) or the requirement that IEPs include specific behaviors and aversive interventions, 8 NYCRR § 200.22(e)(7). Rather, the only evidence before the Court as to these requirements demonstrates that they provide a benefit to New York students. See DeLorenzo Decl. ¶¶ 7-9. Should the Court grant Plaintiffs the extraordinary remedy of preliminary relief, it should be narrowly tailored to enjoin only the two sections of the regulations that are alleged to cause irreparable harm.

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<sup>1</sup> For the Court's convenience, a copy of the new regulations is annexed. The Court may also access the regulations on VESID's website: <http://www.vesid.nysed.gov/specialed/behavioral/amendments.pdf>

<sup>2</sup> Plaintiffs' lack of standing to seek relief on behalf of non-party students was addressed in oral argument and in Defendants Memorandum of Law. See Dkt. #7, Point II. Accordingly, it is not addressed here.

Honorable Gary L. Sharpe  
September 1, 2006  
Page 3

The over-breadth of the relief sought by Plaintiffs is illustrated by TD, one of the Student Plaintiffs. As noted during oral argument and in Defendants' Memorandum of Law, Plaintiffs fail to allege any harm or imminent harm on behalf of TD. See Dkt. #13, Point III-A-2 (p.11). Moreover, during oral argument, counsel for Plaintiffs acknowledged TD's authorship of a letter in which TD compellingly pled with her CSE chairperson to remove her from the GED program. Cort Declaration, Exhibit I. TD's CSE subsequently recommended her removal from JRC. See DeLorenzo Declaration, Exhibit E. According to Plaintiffs' counsel, TD "has been faded from the GED" as of August 1, 2006. See DeLorenzo Declaration, Exhibit E, p.3. Yet, even in the absence of harm or imminent harm and despite the fact that TD has been faded from GED, Plaintiffs seek relief that would deprive TD of the protections afforded by the amended regulations. It is settled law that preliminary relief may not be granted in the absence of irreparable harm. Kamerling v. Massanari, 295 F3d 206, 214 (2d Cir. 2002). Accordingly, should the Court grant Plaintiffs preliminary relief, it should be narrowly tailored to exclude TD and any other Plaintiff for whom irreparable harm has not been established.

It is anticipated that Plaintiffs will amend their complaint to include plaintiffs who are new students at JRC and/or who do not have IEPs that permit Level III aversives, and/or did not have IEPs that permit Level III aversives as of June 23, 2006. However, the substance of Plaintiffs' complaint is based upon allegations that "[t]he IEPs of the Students all provide for Level III aversives, including the GED devices, to treat their severe problematic behaviors." Complaint, ¶ 161; see also Complaint, ¶¶ 92-158. Plainly, this does not apply to students who did not, as of the effective date of the amended regulations, have IEPs that permitted Level III aversives. Moreover, any allegations of harm based upon the limited prohibitions in the amended regulations are at best speculative and premature.

Not having seen the amended complaint, I obviously cannot meaningfully respond to a request for relief based upon it. Accordingly, should the Court consider granting preliminary relief to any new plaintiffs, I reserve the right to submit further opposition to such applications in order to specifically address the new claims and plaintiffs.

Based upon Defendants' submissions in opposition to preliminary relief and the foregoing, Plaintiffs' application for a preliminary injunction should be denied. In the event the Court grants preliminary relief, it is respectfully requested that it be limited to enjoining only the enforcement of 8 NYCRR §§ 200.22(f)(2)(vi) and 200.22(f)(2)(viii) and further limited to the class of Student Plaintiffs set forth above.

Honorable Gary L. Sharpe  
September 1, 2006  
Page 4

Your attention to this matter is appreciated.

Respectfully,

*/s/ Kelly L. Munkwitz*

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Enclosure

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