

Coalition for Transparency in Public Education

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Amended Statement of the Coalition for Transparency in Public Education on the Use of Aversive Behavioral Interventions in New York Schools

The Coalition for Transparency in Public Education (the "Coalition") is a newly formed organization advocating for educational integrity, effectiveness, and safety for the children of New York State. For reasons described below, we urge the Regents to withdraw the emergency regulations recently promulgated regarding the use of aversive behavioral interventions, restraints, and time out/seclusion rooms. Not only should these regulations be withdrawn, but they should not be revised and reissued until professional, disability and parent organizations with relevant expertise are consulted. The new regulations should be drafted so as to be consistent with the protections embodied in current relevant federal laws and regulations.

No public reason has been given for adoption of "emergency" regulations when no emergency has been declared by the New York State Department of Education (NYSED). NYSED had already lowered the number of new out-of-state placements school: the need for urgency in passing these regulations before the end of the 2005-2006 school year appears to have been substantially vitiated. Had the proposed regulations been discussed publicly before any vote by the Board of Regents, their severe flaws might well have been avoided.

Ambiguous Language Creates Confusion and Permits Discrimination

The emergency regulations in effect legalize corporal punishment of disabled students by categorizing many corporal punishment techniques as "aversive behavioral interventions" and then not providing any clear distinction between the two. The result is that while there is a general prohibition against the use of corporal punishment with non-disabled students, schools may now obtain waivers to use corporal punishment on disabled students by mischaracterizing it as an "aversive behavioral intervention." NYSED has not explained how permitting such practices for disabled students, while prohibiting them for students who have no disabilities, does not constitute illegal discrimination on the basis of disability. Hitting is hitting. Slapping is slapping. Strangling is strangling.

The regulations also fail to incorporate clear definitions of "restraint." Do they refer to physical force applied to a student to make him or her do something, or stop doing something, such as when school personnel wrap their arms around a student to get the student to stop breaking an object? Do they refer to physically incapacitating a student via use of a straight jacket or "wrapping cloths" in a school, or do they refer to dosing a child with extremely strong sedatives to incapacitate? These terms have precise definitions in the behavioral and mental health literature. Precision in NYSED's definitions is required so that parents, their children's outside treating professionals, and special education staff know precisely to what they refer.

Similarly, the regulations address the use of “time out rooms” but do not acknowledge that the “time out rooms” in NYSED’s “aversive behavioral interventions” are what mental health professionals call “seclusion.” Nor do the regulations ever define “time out rooms” or make clear that using time out rooms as punishment or to decrease targeted behavior is an aversive behavioral intervention that is only permissible with a child-specific waiver. Thus, despite declaring a general prohibition on aversive behavioral interventions, the regulations seemingly ignore the prohibition - and in §200.22 (c) tell schools that if they use time out rooms, they have to have building policies regarding the use thereof, and they have to notify parents. This post-hoc notification is wholly inconsistent with the requirement for prior informed consent specified in the later sections on aversive behavioral interventions. It is also misleading to imply that schools may use time out rooms as punishment or consequences for disabled students without a child-specific waiver. And it violates the IDEA’s requirements for full prior informed parental consent to Behavior Intervention Plans.

Failure to Require Research-Validated Methodologies

NYSED acknowledges that it could find no peer-juried research to validate the use of what it calls “aversive behavioral interventions” in school settings. Under the circumstances, and in light of both IDEA 2004 and NCLB’s clear emphasis on utilization of scientifically validated methods of instruction and programs, NYSED’s message seems to be “Do as we say, but not as we do.” Disabled youth in NYS would be better served if NYSED reversed its long-standing “hands off” approach to issues of methodology and commenced the dissemination of information on research-validated methods for behavior and academic improvement. Instead, NYSED has started down the slippery slope of authorizing behavior management and behavior modification methods for which there is both inadequate scientific and clinical justification for use in school settings. The time to reverse course is now, before it is too late.

Failure to Comply with Federal Legal Prohibitions

Almost all of the “aversive behavioral interventions” authorized by these regulations are prohibited in programs run by, or funded by, the New York State Offices of Mental Retardation and Developmental Disabilities (OMRDD), Mental Health (OMH), and Children and Family Services (OCFS). Those agencies serve children who have identical behavioral symptoms and diagnoses as do those in New York State’s schools. NYSED has provided no rationale as to why NYS schools, programs, and placements should be permitted to use aversives, restraints, and time out/seclusion rooms as punishments when such use is prohibited in these other agencies’ New York State facilities serving similar populations. If these techniques are not permissible for clinical or ethical reasons in facilities staffed by highly trained clinical and medical personnel, they certainly should not be permitted in “school” facilities which are not staffed with highly trained clinical and medical personnel. Nor has NYSED provided an explanation as to why it is authorizing methods that are clearly prohibited by the plain language of 42 U.S.C. §15009 for educational programs receiving federal funds.

42 U.S.C. §15009 states, in pertinent part:

Rights of individuals with developmental disabilities

(a) In general

...

(3) The Federal Government and the States both have an obligation to ensure that public funds are provided only to institutional programs, residential programs, and other community programs, including educational programs in which individuals with developmental disabilities participate, that -

...

(B) meet minimum standards relating to -

(i) provision of care that is free of abuse, neglect, sexual and financial exploitation, and violations of legal and human rights and that subjects individuals with developmental disabilities to no greater risk of harm than others in the general population; ...

(iii) prohibition of the use of physical restraint and seclusion for such an individual unless absolutely necessary to ensure the immediate physical safety of the individual or others, and prohibition of the use of such restraint and seclusion as a punishment or as a substitute for a habilitation program; ...

(v) provision for close relatives or guardians of such individuals to visit the individuals without prior notice. [underscore added].

In June 2006, in State of CT Office of Protection & Advocacy v. Hartford Bd. of Ed., the United States Department of Justice filed an amicus brief on behalf of the US Departments of Health & Human Services and Education which took the position that 42 U.S.C.3 §15009 applied to public schools operated by school districts such as the Hartford Public Schools.¹ Seeking confirmation, Coalition co-founder Dee Alpert spoke with counsel at the United States Departments of Justice and Health & Human Services. All agree that 42 U.S.C. §15009 does apply to both day and residential publicly-operated schools.

The prohibitions in 42 U.S.C. 15009 require that NYSED revoke any and all regulations which would grant schools the authority to use restraint or seclusion in time out rooms for anything other than the protection of the child or others from risk of serious physical injury due to a legitimate emergency.

The prohibitions in 42 U.S.C. §15009 require that NYSED revoke any regulations that would grant schools the authority to use restraint or seclusion in time out rooms for both disciplinary purposes and as “aversive behavioral interventions.”

¹CT OPA v. Hartford Bd. of Ed., No. 05-1240-CV, Brief of *Amici Curiae* US Departments of Health & Human Services and Education, filed by the US Department of Justice, June 2006, http://www.ndrn.org/amicus/ct_ferpa_doj.pdf.

Corporal Punishment by Any Other Name or Waiver is Still Corporal Punishment

The emergency regulations contain exceptions to the use of physical force that significantly increase the risk of injury - or death - to students and school personnel. The exceptions do not adequately distinguish between "physical force" and "corporal punishment." They seemingly neglect to consider that if a student is exposed to "physical force" for a relatively minor transgression or for a behavior that is a symptom of the child's disability, he may experience it as punishment irrespective of the actor's motivation.

Additionally, NYSED's proposed regulations contain a potentially serious procedural loophole. School personnel must merely obtain a child-specific waiver before aversives or restraints and/or seclusion may be used. Historically, requests for NYSED's child-specific waivers have rarely, if ever, been denied. This procedural requirement will not prevent the use of aversives: in practice, it has functioned as nothing more than a rubber-stamp approval. Moreover, even with the advent of a new, specially formed panel on the use of aversive behavioral interventions, close examination of the new regulations shows that the student's Committee on Special Education or Committee or Preschool Special Education makes the final determination on whether to authorize aversives. The expert child specific waiver panel merely makes "recommendations." If those CSEs which have failed to provide needed, appropriate and competent related and behavior management services to a student, and who initially request the use of aversives, restraints, or time out/seclusion, are the same individuals with the ultimate power to approve such use, the process is seriously flawed. CSEs are simply not valid gatekeepers: CSE members are rarely, by training and experience, qualified to make these types of determinations. The vast majority of such determinations will be without integrity.

As stated above, CSEs are simply not the appropriate groups to make decisions about what are really "treatment" issues. NYSED's regulations blur the line between "behavior interventions" and "treatment" and assume that masters' level certified school personnel are qualified to make treatment recommendations for students who manifest behavioral symptoms of their disabilities. Students who have the kinds of severe behavioral manifestations of disabilities that the child-specific waiver might address require treatment. *Only licensed and qualified personnel with expertise in the treatment of disabilities should be making treatment decisions, consistent with professional research, treatment guidelines in the professional literature, and the ethical dictates of their respective professions - and the relevant State and federal laws.* Even if schools have full-time clinical personnel with the necessary licensure and expertise, however, safe treatment requires numerous safeguards which have not been incorporated into the "emergency" regulations. Fully certified school psychologists, counselors and special education teachers lack the high-level professional training and experience to safeguard the physical and psychiatric/psychological safety and well-being of disabled children upon whom these aversive behavioral interventions will be used.

The Coalition notes that the current regulations provided no qualifiers for the use of certain techniques. Apart from the fact that some techniques are flatly illegal and prohibited by federal law, as noted above, it is important for the Board of Regents to know that not only do the use of aversives, restraints, and/or time out/seclusion rooms create significant risks for children with disabilities, including trauma, serious injury, and sometimes death, but that these risks may be severely exacerbated by the presence of other medical conditions (i.e., cardiac problems of students with developmental disabilities); by the use of psychotropic medications that many mentally ill youth take by prescription, as well as by child-specific historical variables including a history of abuse or abandonment or the presence of other psychiatric disorders such as a thought

disorder (psychosis). The regulations regarding restraints and time out/seclusion must include - but currently lack - significant protections for the physical and mental health and well-being of students subject to these interventions. NYSED's regulations must parallel federal protections.

As suggested earlier, those authorized "interventions" which are deemed crimes under the NYS Penal Code, as well as those which are prohibited under federal laws, should be eliminated from these regulations. For example, the regulations state that aversive interventions such as "strangling" and "hurling" are prohibited unless permitted via a child-specific waiver. Strangling and hurling children violate numerous federal and state criminal laws; we are unaware of any authority of New York State Department of Education to legalize techniques which clearly constitute major felonies. Indeed, within the past few weeks a New Jersey school's tutor was sentenced to a year in prison for using some of these aversive behavioral techniques on an autistic boy. While the New Jersey tutor slapped and prodded and pushed, she hadn't - that we know of - engaged in some of the more onerous "methods" New York's regulations now fully authorize. Indeed, had this case arisen in New York, the tutor-defendant, now tutor-convict, might have claimed she was just using NYSED-sanctioned techniques, and may have been successfully defended on those grounds. New York cannot allow this situation to continue. Hitting is hitting. Hurling is hurling. Strangling is strangling.

Clinical research has consistently demonstrated that use of restraints and time out/seclusion rooms, if used at all, should be carried out as a last resort, and then only to protect the student's safety or the safety of others - *and should only be used by highly clinically trained personnel under the most regulated, controlled conditions with adequate medical and clinical supervision and monitoring*. That position is supported by the President's New Freedom Commission on Mental Health, the US Department of Health & Human Services' Substance Abuse and Mental Health Services Administration, and the position of countless mental health organizations, civil rights organizations, and disability support organizations. There is no adequately controlled and replicated research that validates the use of restraint and seclusion/time out rooms in school settings; another compelling reason to limit its use to emergency safety situations only. But the current New York regulations permit the use of physical force, indistinguishable from restraint, in a wide variety of circumstances where such interventions are not only unwarranted but can cause trauma, injury, or death. It is quite possible that untrained personnel will react to behaviors with the use of restraint and/or time out/seclusion because the regulations lack clear guidance on who should administer interventions and the regulations fail to sufficiently specify which behaviors might warrant the use of such interventions.

The regulations also fail to contain monitoring and reporting provisions consistent with federal regulations for restraint and seclusion of mentally ill youth under age 21 served in inpatient facilities and some community facilities. They also omit stringent prior informed consent provisions for any use of restraint or seclusion. The regulations state that parents must be "notified if..." time out rooms are to be used with their child. Under federal law, prior informed consent is required, and only after a full discussion including the possible risks associated with the use of seclusionary time out. Vague, generalized notice is simply inadequate. NYSED needs to promulgate regulations that at least comply with the federal protections.

Therefore, the Coalition urges the Board of Regents to adopt the current federal protections embodied in 42 U.S.C. §15009 and the policy statements in the US Department of Health and Human Services' Substance Abuse and Mental Health Services Administration training manual (SAMSHA). The current federal protections are based on substantial professional research and support certain basic principles that are missing from New York State's regulations. These basic principles are:

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- Aversives are *never* to be used as punishment;
- Restraints and time out/seclusion are only to be used as a last resort in response to behaviors that pose a risk of imminent and serious physical injury to the child or others;
- Only qualified and licensed personnel should administer restraint and time out/seclusion interventions, consistent with the federal protections in 42 CFR § 483.356 and other federal regulations which address the treatment and rights of mentally ill and/or developmentally disabled youth.

Because there is insufficient peer-reviewed research on the use of aversives in school settings to justify their use, let alone their use in mainstream public schools, aversives should be prohibited, *without exception* as planned behavior consequences. This does not rule out use of aversives as medically necessary treatment to be developed as part of a treatment plan by properly qualified treatment professionals and the child's parents, to be administered in a setting meeting intensive treatment needs while protecting the student's physical and emotional safety. It does, however, rule out their use in all schools as part of a behavior intervention plan under IDEA.

In the future, the Coalition hopes that emergency regulations are only enacted in true emergencies so that full public comment can be received before such regulations are enacted. The Coalition urges the Regents not to make these regulations permanent until they carefully consult recognized experts in the treatment field, and thoroughly review the relevant research materials. This is particularly important as there is very little peer-reviewed research demonstrating the efficacy of any of these "aversive behavioral interventions" in schools. In short, the best practices on aversives use are found in the federal statutory protections: New York State would be best served if it simply adopted these protections *in toto*.

Respectfully submitted,

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