

**BRIEFING MEMORANDUM**

**Coalition for Transparency in  
Public Education**

**July 2006**

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**The Coalition for Transparency in Public Education** ("the Coalition") is a nascent organization of professionals, parents and parent groups, and members of the public advocating for educational integrity, effectiveness, and safety for all children in New York State. As such, it believes that sunlight is the best disinfectant: informed decision-making a mutual goal best serving all parties involved.

### THE PROBLEM:

The New York State Education Department (NYSED) is a large, complex state agency with a reputation for creating overly-complicated - and often incomprehensible - rules, regulations and operating procedures, while operating a decision-making process which is obscure, at best, and often completely lacking in transparency. This lack of transparency, combined with a bureaucratic resistance to receiving legitimate parental and public input on various aspects of NYSED's functioning have had a devastating impact on students with disabilities within the last six months alone.

It is axiomatic that one can tell a great deal about a society by the way it treats its most powerless members. Children with disabilities are, by and large, the most powerless, and vulnerable, citizens of the NYS public education system. Insofar as NYSED's actions have severely curtailed, if not silenced, the public voice of those organizations and groups (including parents) which traditionally have spoken for them. Recent decisions made by NYSED about the education of such children, without full and open public discourse, have been to their detriment.

### PROPOSED SHORT-TERM SOLUTIONS:

Transparency should be the guiding rule at NYSED. Because it deals in so many important ways with the lives of the children of the State of New York, the Regents should strongly consider establishing policies which rigorously implement both the letter and spirit of relevant laws such as the State Administrative Practices Law (e.g., public hearings and comment on proposed regulations; the NYS Freedom of Information Law) and other open government requirements. While some solutions to the overall problem of lack of transparency in NYSED's decision-making and monitoring/enforcement may seem complicated, others are simple, easily implemented in the short-term and hold the promise of ameliorating the most egregious symptoms of the underlying problem(s). The Coalition proposes the following:

1. Full versions of all materials provided to the Regents should be published on the Regents' web site at least 14 calendar days before the Regents are first scheduled to discuss them, and at least 21 days before the Regents are scheduled to vote on them.
2. All reports of audits - fiscal, programmatic or otherwise - performed by, for, or about New York's public elementary, secondary and special education institutions should be posted to the NYSED web site, or at a minimum, links to other sites containing these audits should be posted and be easily located on the NYSED site within 30 days of their completion. Other states do this routinely.<sup>1</sup>
3. The new regulations regarding persistently dangerous schools should be withdrawn and not reissued until full public hearings have been held, so that parents and the public will

have an opportunity to share their perspectives, and expertise with the Board of Regents. In the interim:

- NYSED should be *immediately* directed to follow federal law - which deems sex with any person of any age who is too legally disabled to consent to a sex act as a forcible sex offense, classifiable and "countable" in exactly the same way, and with the same weight, as a forcible sex act against any non-disabled student.
  - NYSED should be directed to recalculate and publish the pertinent data according to federal law: it should be directed to include data from all Board of Cooperative Educational Services (BOCES), NYC DOE District 75 facilities, schools, and districts, and the two State-operated schools - for which it has declined to make this information public.
4. The new regulations regarding the use of aversive behavioral interventions, restraints and time out/seclusion rooms in all in-State schools should be withdrawn and not reissued until such time as public hearings have been completed, to give professional organizations with relevant expertise and all other stakeholders the opportunity to provide sound, reasoned input. In formulating the new "emergency" regulations on aversive behavioral interventions, for example, NYSED never consulted with either the New York State Psychological Association or the NYS Psychiatric Association, two organizations with professional expertise in behavior modification, the use of aversives with emotionally disturbed youth, and health and safety issues related to same.

The Board of Regents should direct NYSED to draft new regulations which are comparable to federal laws and regulations regarding the use of aversives, restraints and time out/seclusion rooms in institutions and residential placements for persons with mental illness and/or developmental disabilities. In other words, a "transfer" of federal protections for persons with mental illness and/or developmental disabilities who are in institutions or residential placements should be made so that the same persons, when in NYS day and residential schools, have the same protections as they would have had if they not been de-institutionalized or initially placed in a less restrictive environment. Any deviation from the federal legal and regulatory requirements should be required to be justified by substantial relevant professional research.

## **TWO COMPELLING ISSUES DEMAND IMMEDIATE ATTENTION:**

**I. Persistently Dangerous Schools** - The lack of transparency was highlighted in a recent NYS Comptroller's audit in which Comptroller Hevesi found that NYS public schools were significantly under-reporting crimes and violent incidents, and that:

Schools on the [NYSED] preliminary list of persistently dangerous schools are also given a detailed description of the procedures followed by SED in calculating the Violence Index (i.e., the exact number of points that are assigned to each type of incident included in the calculation and the formula for performing the calculation). This description is not provided to schools that are not on the preliminary list and is not included in SED's explanatory materials for the incident reporting process.<sup>2</sup>

*This information was, and is, also not made available to the public in general, nor to parents of students who do, or may, attend such schools.*

Indeed, NYSED's materials regarding its "persistently dangerous schools" crime/incident classifications and designation criteria indicate that while school administrators at all levels and law enforcement officials were consulted when determining what crimes would be counted, and the weight they would be given, parents of public school students -- arguably the most important stakeholders -- were not consulted at all. NYSED's failure to hold public hearings on this new system of data collection and categorization meant that the public was also shut out of the decision-making process, again leading to the appearance of behind-the-scenes decision-making.

This impression was furthered by the fact that NYSED's explanatory memorandum to the Board of Regents was uploaded to the Regents' web site for public inspection *on the day* the Regents were slated to vote on these proposed regulations. No formal public testimony was sought on this critically important issue.

One feature of the new regulations (which was substantially mischaracterized in the staff memorandum accompanying the regulatory language) is that sex with a student too legally disabled to give consent to a sex act is deemed an "other sexual offense," not countable as a forcible offense, despite the fact that the conduct perpetrated is the *same conduct that qualifies as a forcible sexual offense if the victim is not severely disabled*.

The overwhelming trend is to treat offenses against society's most vulnerable members as aggravating factors, and accordingly, apply more severe consequences. It is a federal felony, punishable by up to 20 years in jail, to have sex with a person too legally disabled to give consent to a sex act, whether "consensual" or not<sup>3</sup> and yet NYSED's scoring system minimizes this crime by calling it an "other sexual offense." The NYS Sex Offender Registration Act also assigns greater punitive weight to sex offenders who abuse a victim who suffers from a "mental disability, or incapacity or from physical helplessness" than to one who merely uses forcible compulsion<sup>4</sup>, but NYSED's scoring system does the opposite. *NYSED wrongly treats the victims' vulnerability as a mitigating factor to reduce the perception of dangerousness in the schools, evading the law's more severe consequences.*

#### AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

(b) Sex offenses. (1) **Forcible sex offenses.** Forcible sex offenses involving forcible compulsion. Incidents involving forcible compulsion and completed or attempted sexual intercourse, oral sexual conduct, anal sexual conduct or aggravated sexual contact with or without a weapon, including, but not limited to, rape and sodomy.

(2) **Other sex offenses.** Other sex offenses involving inappropriate sexual contact but no forcible compulsion, including, but not limited to, conduct that may be consensual or involve a child who is incapable of consent by reason of disability or because he or she is under 17 years of age, ...

(8) **School violence index.** Each school year, commencing with the 2005-2006 school year, the department shall establish a school violence index as a comparative measure of the level of school violence in a school. The school violence index will be computed in accordance with a formula established by the commissioner that takes into account the enrollment of the school and is weighted to reflect the most serious violent incidents, which shall include but need not be limited to the following categories of incidents: homicide, forcible

sexual offense, robbery, assault resulting in serious physical injury, arson, kidnapping, and incidents involving the possession, use or threatened use of a weapon.<sup>5</sup> [Underscore added].

The clear and unambiguous language above, which contradicts implications in NYSED's memoranda to the Regents regarding crime definitions and classifications, is confirmed by the FAQ which NYSED published on June 21 for school administrators.

**Uniform Violent Incident Reporting System Questions & Answers  
For Reporting 2004-05 School Year Data - Most Recent Revision June 21, 2006**

...

8. Who is considered Victims of a Violent Criminal Offenses for Reporting Purposes?<sup>6</sup>

Education Law §2802(7) and 8 NYCRR §120.5 implement the NCLB's unsafe school choice provisions. Among other things, each local educational agency must provide unsafe school choice to students who are victims of violent criminal offenses.

Pursuant to Education Law §2802(7)(b) and 8 NYCRR §120.5(b), a violent criminal offense is a crime that involves the infliction of serious physical injury as defined in the Penal Law, a sex offense that involved forcible compulsion or any other offense defined in the Penal Law that involved the use or threatened use of a deadly weapon. [Underscore added.]

... Based on the foregoing, students who are victims of the following crimes must be provided with unsafe school choice and should be reported in Item 6 on the Summary of Violent and Disruptive Incident Form:

.... Sexual offenses involving forcible compulsion and sexual intercourse, oral sexual contact, anal sexual contact or aggravated sexual contact with or without weapons (Underscore added.)

Equally troubling, the NYSED memoranda to the Regents also omitted the fact that *NYSED has waived its "persistently dangerous schools" criteria* for:

1. all BOCES schools and programs;
2. all of the NYC Department of Education's (NYC DOE) 60+ District 75 schools (District 75 is the centrally-operated, all-special ed district for approximately 23,000 severely disabled students); and
3. both State-operated residential schools (the NYS School for the Blind and the NYS School for the Deaf).

A little known NYSED idiosyncrasy warrants notice: BOCES schools, District 75 schools and the State-operated schools are not formally designated as "public schools;" "school districts" or "local educational authorities" (LEA's). NYSED's FAQ on persistently dangerous schools reporting and transfer procedures highlights that it has also determined that individual students who attend any of the above-entities' schools are not to be offered "mandatory" transfers to other schools if they are personally victims of school violent crimes. Specifically, students who are vic-

tims of "other sexual offenses," which is the category in which NYSED has placed sexual molestation of severely disabled students, are not entitled to such NCLB-mandatory transfers.

In other words, disabled students in *all* of these schools are excluded from the "mandatory" transfer protection when they are the victim of any school crime which NYSED does include as a serious and violent school crime, and they are specifically excluded when they have been the victim of a non-consensual school sexual molestation. And although their special ed. schools may be extremely violent, these students do not, apparently, merit transfers to other, safer schools although all non-disabled students do.

The Coalition believes that NYSED's actions are in violation of NCLB's persistently dangerous schools requirements, a belief that is supported by a USDOE Inspector General's audit published in 2005, dealing with a similar waiver in New Jersey. That audit specifically stated that *no* state education department could waive or exempt regionally-operated special education schools, such as BOCES and District 75, from these NCLB mandates.<sup>7</sup>

Because NYSED nevertheless illegally waived the requirement:

- parents of disabled students in NYS have no way to even assess the safety of their child's school
- parents of disabled students are not offered transfers for their children to safer schools when the schools are highly dangerous, and
- the incidence and rate of sexual molestation of disabled students are significantly underestimated in reports to the Board of Regents and the public.

Federal laws and regulations mandate that whenever a severely disabled person in an institution or residential placement sustains unexplained bruises or injuries, a thorough and full investigation must be made to determine the cause of the bruises or injuries, and then requires that the institution or residence change something - procedures, staffing, staff training, placement of furniture and fixtures, etc. - so that such injuries or bruises will not recur. Currently, no publicly-operated schools within New York State have such obligations. Hence, severely disabled children coming home from school with unexplained bruises and injuries is extremely common. Parents have no statutory right to demand, and receive reports from, full investigations of the causes of these bruises and injuries, nor do they have any actual right to insist that changes be made so the same thing(s) will not happen again. Unless they sue, the information they need is unavailable.

In essence, these new regulations repeal most of the hard-won federal protections against rape and sexual molestation of severely disabled persons - very specifically for all the times when they are students in New York's publicly-operated schools. Identifying perpetrators in such schools is often difficult, or impossible, because the victims are unable to communicate. Maintaining a persistently dangerous schools crime classification system which "counts" sex with a severely disabled student as a serious sexual offense may be the only way in which schools can be held accountable for allowing molestations to occur in the first place.

The No Child Left Behind Act required that the U.S. DOE commission a study of school sexual abuse. USDOE contracted with Professor Charol Shakeshaft of Hofstra University, a well known national expert on this topic, who conducted a literature review.<sup>8</sup> At Coalition founding member Dee Alpert's request, Prof. Shakeshaft secured research data, much of which was unpublished, on school sexual molestation of students with disabilities and re-analyzed it. Some of the significant findings were:

- 8.8% of students with disabilities were sexually abused, compared to 2.8% of non-disabled students:
- 10.1% of students with mental retardation had been sexually abused
- 15.1% of students with behavior disorders or autism had been sexually abused

Given the disproportionately higher rates of sexual abuse among disabled students and in particular, those students whose impairment makes them more likely to be placed out of regular education public schools, the Coalition believes that it is misleading and dangerous for NYSED to permit BOCES, District 75, and State-operated schools to not report their data.

Although Professor Shakeshaft is a nationally renowned expert in the field of school sexual abuse, based locally, and although Professor Shakeshaft is well known to the NYSED staff who deal with educator misconduct, neither her information nor her input was solicited by NYSED prior to the adoption of its persistently dangerous schools crime definitions and crime classification system. Nor was the input of any member of the public sought. Having greater transparency in the process might have prevented the Board of Regents from approving regulations that seriously underestimate school sexual abuse and deprive disabled students and their parents from the federally mandated offers of transfer to safer schools.

**II. The Aversives, Restraints and Time Out/Seclusion Room Regulations** - In March 2006 the Regents were presented with a short, simple proposed regulation which would have, in essence, prohibited placement of NYS disabled students at the Judge Rotenberg Center (JRC).<sup>9</sup> JRC uses electric skin shock as an "aversive behavioral intervention" (a/k/a "punishment" for unwanted behavior). On May 19, 2006, NYSED posted its first major "revision" of this proposal which, instead of prohibiting sending NYS students to schools which used aversives such as electric shock, actually made it possible for aversives, restraints and time out/seclusion rooms to be used on any NYS student with a disability in any public school, pre-school, State-approved private school, and State-operated school in the entire State of New York. The May revision, which represented a complete *volte face* from the original version, was made public via the NYSED Regents' web site on the Friday before the Regents were scheduled to first fully discuss it, i.e., at their meeting on Monday, May 22. Many more changes, some *extremely* negative, were made afterwards - again, without public input or announcement - prior to the Regents' final vote in June.

Adding to confusion, NYSED gave all versions of the regulation the same name: a proposal to "prohibit or limit the use of certain behavioral approaches, including the use of certain aversive or noxious stimuli to reduce or eliminate maladaptive behaviors of students." In fact, *the regulation does just the opposite.*

By declaring the proposal to be an "emergency" regulation, *ergo*, not subject to State Administrative Procedures Act (SAPA) requirements for public hearings or input prior to approval, the public was deprived of an opportunity to review and provide input to NYSED and the Board of Regents. No public explanation has been given as to why the proposed regulations had to be handled as an emergency, circumventing the SAPA-mandated public hearing/public comment process. Since NYSED had already decreased the number of new out-of-state placements by 20% merely by removing many out-of-state schools from its "approved" list, and via its new on-line system which allows Committees on Special Education (CSEs) to determine which schools and programs have current vacancies, the need for any urgency in passing such regulations prior to the end of the 2005-2006 school year was already substantially vitiated.

Much of the language of the regulation is curious, if not bizarre, and many of the provisions are problematic in many, many respects:

1. Specific interventions named in the regulations, such as "strangling" and "hurling" students with disabilities, are prohibited unless permitted via a child-specific waiver, but strangling and hurling children violate numerous federal and state criminal laws. No regulation was needed to make these acts illegal and prohibited, and no Commissioner of Education can make these acts legal if performed by school personnel on a disabled child.
2. NYSED's child-specific waiver process, already used when districts and BOCES wish to exceed maximum class size regulations, operates as a virtual "Yes" rubber stamp. Regional associates have testified, under oath, that they have never denied a waiver application, and even with a newly constituted panel, there is no reason to believe that NYSED will actually enforce a genuine child-specific waiver in this situation. Of even greater concern is that careful reading of the new regulations suggests that NYSED emergency regulations allow the student's CSE or CPSE to make the final determination as to whether to grant itself a waiver after receiving "a recommendation" from the Commissioner's "expert panel." Thus, the very same CSE or CPSE that may have failed to obtain a comprehensive assessment of the child, and that may have failed to provide needed and appropriate related services, may now, in its own judgment, grant itself a waiver to use aversive behavioral interventions on a disabled student.
3. Many of the aversives, the use of restraints, and the use of time out rooms as "consequences" (i.e., punishments) - *all of which are specifically made permissible by this regulation* - are flatly prohibited in programs operated by the NYS Office of Mental Retardation and Developmental Disabilities (OMRDD), the NYS Office of Mental Health (OMH), and the NYS Office of Children's and Family Services (OCFS) because they are funded in major part by Medicaid. Federal laws and Medicaid rules are stringent and allow the use of aversives, restraints and time out/seclusion rooms, if at all, only under the most highly regulated circumstances, and with detailed procedural protections afforded to clients/patients. Neither OMRDD, OMH, nor OCFS can place children at the Judge Rotenberg Center. NYSED was - and is still - the *only* NYS governmental agency which sends children there.

The regulation, as passed, now allows every public school, every state-approved private day and residential school, every special act school, and the two NYSED-operated residential schools to use behavioral treatments and techniques which are banned in all OMRDD, OMH and OCFS programs, although children in these agencies' facilities have behavioral problems and diagnoses at least as severe as those in NYS public schools, state-approved private day and residential schools, special act schools and the NYS Schools for the Blind and the Deaf.

No reason has been made public as to why it is necessary for NYSED-regulated schools, programs and placements to use aversives, restraints and time out/seclusion rooms (as punishments) when they are essentially barred in these other agencies' placements. And no reason has been made public as to why NYSED has enacted regulations that are flatly contradicted by relevant federal regulations, policies, and the positions of major mental health organizations in the state and this country:

In its "A Roadmap to Seclusion and Restraint Free Mental Health Services for Persons of All Ages" training manual, the US Department of Health & Human Services' Substance Abuse and Mental Health Services Administration (SAMSHA, 2006) wrote:

In 2003, the Substance Abuse and Mental Health Services Administration (SAMHSA) set forth a bold vision to reduce and ultimately eliminate the use of seclusion and restraint in behavioral healthcare settings.

These practices are detrimental to the recovery of persons with mental illnesses. *Too often, the use of seclusion and restraint results in trauma, injury, and even death. We can and must do better to protect the lives and well-being of those whom we serve. SAMHSA has established seclusion and restraint as a priority area and has developed a National Action Plan to reach our vision of seclusion and restraint free mental health services.*<sup>10</sup> (italics added)

Similarly, the Alliance to Prevent Restraint, Aversive Interventions, and Seclusion (APRAIS) wrote:

Every day in this country, children with disabilities are needlessly being subjected to harmful practices in the name of treating "challenging behaviors." They are brought down to the ground and straddled, strapped or tied in chairs and beds, blindfolded, slapped and pinched, startled by cold water sprays in the face, deprived of food, secluded in locked rooms, and more, despite the fact that research and practice show that these techniques exacerbate challenging behavior and do nothing to teach the child appropriate behaviors.

The Alliance to Prevent Restraint, Aversive Interventions and Seclusion is a joint effort of the nation's major disability advocacy organizations, formed in response to this alarming problem.

APRAIS's partners in this effort include the National Down Syndrome Society, the National Disability Rights Network, the National Down Syndrome Congress, The Arc of the United States, the National Association of Councils on Developmental Disabilities, The Family Alliance to Stop Abuse and Neglect, TASH, the Federation of Families For Children's Mental Health, the RespectABILITY Law Center, the Bazelon Center for Mental Health Law, and the Autism National Committee.

The President's New Freedom Commission on Mental Health issued its final report in July 2003.<sup>11</sup> Among their conclusions, they state:

Seclusion and restraint will be used only as safety interventions of last resort, not as treatment interventions. Only licensed practitioners who are specially trained and qualified to assess and monitor consumers' safety and the significant medical and behavioral risks inherent in using seclusion and restraint will be able to order these interventions. (p. 9)

... An emerging consensus asserts that the use of seclusion and restraint in mental health treatment settings creates significant risks for adults and children with psychiatric disabilities. These risks include serious injury or death, re-traumatizing people who have a history of trauma, loss of dignity, and other psychological harm. Consequently, it is in-

appropriate to use seclusion and restraint for the purposes of discipline, coercion, or staff convenience. (Underscore added)

Seclusion and restraint are safety interventions of last resort; they are not treatment interventions. In light of the potentially serious consequences, seclusion and restraint should be used only when an imminent risk of danger to the individual or others exists and no other safe, effective intervention is possible. It is also inappropriate to use these methods instead of providing adequate levels of staff or active treatment. (p. 34)

... The Commission recognizes that to decrease the use of seclusion and restraint, policies and facility guidelines must be developed collaboratively with input from consumers, families, treatment professionals, facility staff, and advocacy groups. Supporting technical assistance, staff training, and consumer/peer-delivered training and involvement should be implemented to effectively improve and implement policies and guidelines based on research about seclusion and restraint. To improve the quality of care and ensure positive outcomes, model programs and best practices must be identified and information must be shared. (p. 47)

It is clear from reading the above statements that NYSED's regulations do exactly the *opposite* of what is being asserted as necessary and appropriate, as discussed below.

**NYSED's provisions on corporal punishment** – defined as the use of physical force against a child for the purposes of punishment -- is allegedly prohibited. However, use of restraint/corporal punishment is made permissible if it is not considered by personnel to be "punishment" and if it is used for any - or all - of the following purposes when the purposes can't be achieved without physical force:

- (i) to protect oneself from physical injury;
- (ii) to protect another pupil or teacher or any person from physical injury;
- (iii) *to protect the property of the school, school district or others; and*
- (iv) *to restrain or remove a pupil from class whose behavior is disruptive when that pupil has refused to comply with a request to refrain from further disruptive acts.* (italics added)

Thus, the last two exceptions to the bar on corporal punishment allow the use of restraint on a child for purposes that are not restricted to imminent health/safety emergencies. Because there are no qualifiers in the regulations, the property being "protected" could be a crayon. The "disruption" could be an autistic child's handflapping or a mild verbal tic of a child with Tourette's Syndrome. The "physical harm" could involve bumping into another student while walking through a hallway. It is a true "zero tolerance" provision. Both general and special education teachers may order a child restrained and removed from a class. The lack of qualifiers raises the possibility for overuse and misuse of physical force and restraint, risks that are increased by the fact that, due to inadequate training, teachers often unintentionally provoke children past their neurological limits, thus then necessitating the use of physical force "to protect themselves from physical injury" after the teachers have actually provoked and/or escalated a situation in the first place.

In 2006, the American Psychological Association Zero Tolerance Task Force issued a report, "Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations."<sup>12</sup> That report noted:

To the extent that zero tolerance policies are related to student shame, alienation, rejection, and breaking of healthy adult bonds, there are a number of reasons to be concerned that such policies may create, enhance, or accelerate negative mental health outcomes for youth. Some have suggested that the psychological effects of the coercion and shaming of students are linked to the increase in delinquent behavior. Further, the potential effects of alienation, rejection, and isolation associated with punitive and exclusionary school discipline are well documented, and may distance youth from healthy peer communities, accelerate contact with delinquent peers, reduce the amount of adult supervision they receive, and enhance the likelihood of marginalization.

These statements and issues are relevant when considering the use of seclusionary time out rooms, forcible restraint or removal of students from the classroom, and other aversive punitive measures incorporated in the new education regulations, because they suggest that the practices now permitted by the regulations *may impair disabled students instead of helping them*.

**NYSED's regulations allow for the use of aversives** as planned consequences for behavior or symptoms, instead of reserving the use of restraint and seclusion (time out rooms) for genuine safety emergencies, in direct contrast to all of the federal regulations and policies cited above.

**NYSED's regulations permit unlicensed individuals to design, implement, monitor, and supervise aversive behavioral treatments and interventions**, in direct contrast to all federal regulations and policies that require high levels of clinical training and skills to protect the health and safety of children. NYSED's regulations incorporate almost none of the health and safety precautions mandated by federal policies and regulations if the very same children were exposed to the very same interventions in a federally regulated facility.

As one example, Medicaid requires that licensed psychologists, at the Ph.D. level, be intimately involved in behavior analysis, behavior charting, behavior management and modification regimen planning, and analyses to determine whether behavioral interventions have been effective in eliminating unwanted behaviors. NYSED requires only CSE involvement, which normally entails participation by school psychologists at the master's degree level. While the new regulation appears to require behavioral analysis, charting, or management/modification regimens, NYSED has neither mandated nor required additional professional-level training for CSE members in this area. Reading the amended regulations carefully, it appears that CSEs can essentially grant themselves waivers to use aversives even after considering the advice of the Commissioner's expert panel. Thus, CSEs are by regulation, permitted to override licensed doctoral level psychologists, or physicians, or both, in reliance on master's level special education personnel.

Coalition founding member Leslie E. Packer, Ph.D., a licensed psychologist who provides behavior consultation services to school districts and who is well-versed in research issues and the available published research, has compared the new regulations to the federal protections required for using restraints and seclusion on youth in patient facilities. Her comparison is in the appendix to this memo.

As another example of why NYSED regulations need to be seriously revised to incorporate more safety precautions, in its 1999 report based on a review of restraint and seclusion in Medicaid and Medicare-funded facilities, the GAO<sup>13</sup> reported:

..... restraining individuals who are on certain medications can be risky. For example, a commonly prescribed antidepressant may result in metabolic problems when a patient's movement is restricted, which may lead to life-threatening hyperthermia. Clinicians have postulated that potentially fatal cardiac arrhythmia can result from the combination of certain drugs and the adrenaline produced by an individual's agitation and physical struggle while being restrained.

A recent caution from the NYS Commission on Quality of Care and Advocacy for Persons with Disabilities also noted the increased risks of heat-related illness experienced by children on certain medications. Despite these well-known medical risks, NYSED's regulations do not require an examination by a physician to determine if the child would be at any risk from being placed in restraints or in a hot time out room.

Again, a modicum of transparency would have provided access to NYSED's logic and the basis for their proposed regulations and NYSED might have refined the regulations to incorporate appropriate health and safety protections prior to the passage of the regulations.

**NYSED issues “empty” advice on research-validated methods.** Another troubling aspect to the new regulations is that although NYSED states that school districts should employ research-validated methods:

- NYSED acknowledged that it found *no research validation* for allowing schools to use aversive behavioral interventions in public school settings (and indeed, there is no replicated and controlled research that validates the use of these methods in public school settings);
- NYSED does not disseminate information on research-validated methods to schools on either academic or behavior issues; and
- NYSED has routinely taken a “hands off” policy when it comes to monitoring or insuring that schools use research-validated methods for academics or behavior.

**Time Out Rooms (Seclusion) are being misused and abused.** Despite NYSED having policies on the use of time out rooms since 1994, schools in NYS routinely misuse and abuse time out rooms as places to throw children who are getting on teacher's nerves or who are inconvenient to teach. The harm that has occurred to children while in time out rooms has been documented nationally and in NYS by the NYS Commission on the Quality of Care. As examples of recent time out room abuses, the Commission on Quality of Care in one of its quarterly reports to the NYS Legislature reported:

- Helping a Special Education Student Kept in Time-Out The WNYADD advocate came to the aid of a special education student who had been punished on twenty-two occasions by being placed in a small locked room with no supervision. On one occasion, *the student was found on the floor of the room after having suffered an apparent seizure*. On its face, it appears the school violated the State Education Department's policy on the use of time-out rooms, and litigation is under consideration. In the interim, the WNYADD advocate is assisting the family in securing a different school placement for the child.
- Challenging the Use of Time-Out Rooms The Commission's Protection and Advocacy for Persons with Developmental Disabilities (PADD) program in Syracuse, Legal Services of Central New York (LSCNY), intervened on behalf of a five-year-old child with autism who repeatedly was put in a school based time-out room. The student, who engaged in self-injurious behavior, received no supervision while in the room. LSCNY requested an Im-

partial Hearing that led to a settlement of the issue. Later, the LSCNY attorney filed a New York State Education Department (NYSED) complaint on the use of the time-out room. The NYSED findings verified the violations and citations were issued to the school district to bring an end to the misuse of the time-out room as a behavior modification tool.

NYSED's logs of time out room complaints received from parents document that violations of the guidelines are common. NYSED has never disciplined school personnel for such violations, no matter how flagrant.

The regulations require that a child in a time out room must be monitored by "staff." There is no provision in the regulations that requires that the "staff" be trained in crisis intervention skills or emergency medical skills. The regulations are simply inadequate to protect the health and safety of students.

In 1988, NYS' OMRDD developed a crisis defusing/safe methods of physical restraint protocol and training program called "Strategies for Crisis Intervention and Prevention;" the revised manual was published in 1998 and is known as SCIP-R. It is research-validated as effective and is used in all OMRDD facilities in New York State. When OMRDD took over the Intermediate Care Facility at the NYS School for the Blind in 2005 from NYSED, after NYSED was found to have allowed profound abuse and neglect of that unit's severely disabled students, OMRDD immediately had all ICF staff fully trained in SCIP-R. It is unfortunate that NYSED did not see the importance, or the need, to have its own staff who worked with these students trained in this validated protocol - or in any other such research-validated protocol for emergencies. Even more unfortunately, the new emergency aversives, restraints and time out/seclusion room regulations carry this past failure forward into the future - not just for the State-operated schools, but rather, for all schools in NYS which enroll severely disabled students.

Nevertheless, NYSED leaves the issue of what training will be provided to the staff who will decide upon the use of aversives, restraints and time out/seclusion rooms to the sole discretion of the very same CSEs, districts, BOCES, and NYC BOE District 75 administrators who have failed this discrete group of disabled students in the past, in many cases leading to students having been placed at the Judge Rotenberg Center.

**Failure followed by punishment** -- NYSED's own data shows that students classified as "Emotionally Disturbed" are given long term suspensions and expulsions at a rate 2.5 times higher than the rate of long term suspensions and expulsions for all NY students classified as having disabilities as a group. The NYS rate of graduation for students classified as "Emotionally Disturbed" is a full 10% lower than the national graduation rate for such students. These statistics suggest that students classified as Emotionally Disturbed are at greatest risk for aversive behavioral interventions, time out room seclusion, and restraints or corporal punishment.

Although clinical research suggests that restraint and seclusion may be of value in carefully selected cases of violent/assaultive or seriously self-injurious behavior<sup>14</sup>, the literature also identifies significant risks and pitfalls, including the possibility that punitive and isolating behaviors from staff may actually increase negative behaviors in adolescents.<sup>15</sup>

Published literature and government reviews also provide useful information which would alarm any reasonable person reading NYSED's regulations. David M. Day, Ph.D., C.Psych., in his review of the literature on the use of restraint and seclusion in children wrote:

... restraints and seclusion should never be used with children who present with certain psychological or medical characteristics or under certain circumstances... Contraindications for the use of seclusion and restraints with children include a history of sexual abuse, physical abuse, or neglect and abandonment... risk of psychosis... risk of excited delirium, usually as a result of drug intoxication, or if the intrusive measure is positively reinforcing the behaviour.... (references omitted)<sup>16</sup>

Nowhere do NYSED's regulations bar the use of restraint or time out rooms for children with these types of histories or contraindications, however. In its most recent monitoring report on the Judge Rotenberg Center, NYSED site monitors reported that:

Many of the students from NYS have diagnoses of posttraumatic stress disorder (PTSD), schizophrenia, ... A number of students also have histories of abuse and abandonment. JRC has a 'near zero' rejection policy and accepts students with psychiatric, developmental, and dually diagnosed disorders.<sup>17</sup>

Not only does JRC accept all students, it does not consider the causes of behavior in determining whether to apply for court approval to use Level 3 aversives – despite research findings that some children are more likely to be harmed if these techniques are used on them.

Based on NYSED's history of failing to provide useful information to schools, we can only conclude that most school personnel considering restraint or seclusion for a particular child are not, and will not be, even aware of the literature on contraindications.

**Potential for Discrimination** - the published literature also raises serious issues about whether restraint, time out rooms, and aversive behavioral interventions will be applied in a discriminatory way. Not only are restraints and time out/seclusion techniques used on children more frequently than on adults and with a higher risk of injury or death than in adults; they are used more frequently on blacks than on whites; they are used more frequently on younger children than older children, they are used more frequently on children with a diagnosis of Attention Deficit Hyperactivity Disorder, Conduct Disorder, or Impulse Control disorder, they are used more frequently on children with deficient coping skills, and they are used more frequently on children with lower intelligence or neurological impairments (Day, 2000). NYSED's data shows that students with disabilities who are black are given long term suspensions and expulsions at double the rate of all disabled students.

In their recent monitoring report on JRC, NYSED site visitors reported:

Eighty-two percent of NYS students were placed at JRC by the New York City Department of Education. The additional NYS students represent school district placements from 22 other NYS school districts. Most of these students have the disability classification "Emotional Disturbance" with IQ scores that fall in the low average to average range of intelligence. There are also a number of students with the classification of Autism with cognitive abilities falling in the range of mild to profound mental retardation. Many of the students from NYS have diagnoses of post-traumatic stress disorder (PTSD), schizophrenia, attention deficit hyperactivity disorder (ADHD), obsessive-compulsive disorder (OCD), and bipolar disorder. A number of students also have histories of abuse and abandonment.

In light of the over-representation of NYC students at the Judge Rotenberg Center, the Board of Regents should insist that there be a review to determine if there are any racial or economic fac-

tors that are leading to higher rates of placement of NYC students at JRC, and if referral to JRC is being made as a substitute for providing appropriate supports and services in less restrictive environments.

### **III. FISCAL AND PROGRAMMATIC EFFECTIVENESS AND EFFICIENCY:**

It can fairly be said that NYSED is a poor shepherd of New York State's educational fiscal resources.

- It has evaded its responsibilities to act as a resource for districts and BOCES who lack staff with high-level professional training and expertise in identifying and evaluating valid, relevant research which should be used to inform district and BOCES decision-making at all levels.
- It does not publish any lists of research-validated methodologies in any areas of educational endeavor at all, much less require that districts use them.
- It does not publish lists of research-validated methodologies or programs of initial reading instruction for any group of students - poor, minority, "at risk," English language learners, students with disabilities – even though methodologies such as these exist.
- It does not publish lists of research-validated methodologies or programs of reading or math remediation for failing students, struggling readers or students with disabilities - although these exist.
- It does not publish lists of research-validated school-wide behavior management or modification methodologies or programs - although these exist.
- It does not publish lists of research-validated classroom behavior modification or management methodologies or programs - although these exist.
- It does not publish lists of research-validated behavior modification or management methodologies or programs for individual students with or without disabilities - although these exist.

In July 2005, Syracuse University published its outside evaluation of NYSED's 5-year, multi-million dollar OSEP State Improvement Grant (SIG).<sup>18</sup> The goals of this large-scale, federally-funded project were:

1. decrease the gap in scores between students with disabilities and students who were not classified as having disabilities; and
2. decrease the over-representation of minorities in special education in NYS.

NYSED funded over 30 districts' grant applications as part of this project. Each district was allowed to select the graduate school of education of its choice to "partner" with and each district was allowed to select the reading instruction and remediation methodology or program of its choice.

Result: According to this evaluation, *no significant decrease in the score gap between students with disabilities and students without disabilities was found. Further, no significant decrease in*

*the over-representation of minorities in special education was identified.* It would appear that districts chose graduate schools of education and reading instruction/remediation methodologies or programs with which they were previously familiar, or which made them comfortable, rather than searching out those methodologies and programs which research had shown were effective. Despite this expensive and large-scale project failure, NYSED has *still* not responded by issuing a list of research-validated reading methodologies and programs for districts and BOCES to consider using.

Despite the fact that NY's outcomes for students with disabilities - and particularly those classified as emotionally disturbed - are so poor, and that such students are disproportionately over-represented in the group of disabled students who are given long term suspensions and expulsions, NYSED has not published a list of research-validated methodologies or programs of behavior management or modification for such students. NYSED implemented one OSEP-funded pilot project training staff in the use of Positive Behavioral Incentives and Supports in one NYS mainstream high school. NYSED did not make the outside evaluation of this project public. A one-line mention of the evaluation indicates that the project failed. NYSED has not published an analysis of this failure so as to allow districts and BOCES to avoid whatever mistakes were made in its sole Positive Behavioral Intervention Strategies project.

When the Legislature flatly ordered NYSED provide districts with a list of ways to save money, NYSED instead responded by doing a survey of how districts said they had already saved money, and published those results. NYSED omitted - and thus the NYS Comptroller was forced to publish - a comprehensive list of ways in which districts *could* save money - many of which few or none had actually implemented. NYSED's list omitted - and the Comptroller's list included - using the RFP process to secure outside auditing services at the lowest cost. This requirement is now embodied in legislation passed to remedy some of the widespread abuses first disclosed in the Roslyn district fiscal scandals.

NYSED receives, but does not make public, copies of all audits performed on NY public school districts, BOCES, State-approved private schools and recipients of federal funds which it passes through. NYSED does not routinely publish copies of outside evaluations of its own programs and projects and does not require that districts do so for the mandated evaluations of their federally-funded programs. If parents, the public, and taxpayers, are to be asked to support public education at a fiscally-appropriate level, they must be provided with documentation showing that children are being effectively educated, and that taxpayers' funds are being wisely and properly spent. Outside audits and evaluations are the best demonstration of this process.

Roslyn's outside auditors first documented some financial misconduct one year before the scandal hit the national media. Then the Roslyn whistleblower sent a detailed complaint to NYSED. Only when that was not acted upon by NYSED did the whistleblower send the same material to the media and relevant prosecutors. The rest is history.

Public confidence in the fiscal and functional soundness of the NYS public education system needs be restored and supported. Full public disclosure of audits and outside evaluations is a needed, and easily-effectuated, first step.

## **CONCLUSION & RECOMMENDATIONS**

In sum, NYSED's decision-making processes and general methods of administration have been shrouded both in secrecy and overly-complex regulatory gobbledygook and memoranda. Disabled students in public day and residential schools have been denied the protections man-

dated by the persistently dangerous schools provision of No Child Left Behind: most importantly, severely disabled students have been denied important protections against sexual molestation in school. The new regulations regularizing the use of aversives, restraints and time out/seclusion rooms may well seriously endanger these students' physical and emotional welfare. No research has been made public justifying this decision in terms of any objective educational cost-benefit analysis. New York's outcomes for those students most likely to be subjected to aversives, restraints and time out/seclusion rooms - students classified as emotionally disturbed - are extremely poor and significantly below the national average.

At the same time, NYSED has not effectively insured that public education is both effective and efficient, nor acted as a resource for districts and BOCES which wish to do so.

The Board of Regents is in a position to take short- and longer term steps to ameliorate these situations. In the short term, the Board should require that:

1. All materials provided to the Regents be published on the Regents' web site at least 14 calendar days before the Regents are scheduled to discuss them, and then at least 21 days before the Regents are scheduled to vote on them, or 21 days prior to a scheduled vote if no prior discussion has been scheduled;
2. Withdrawal of the regulations regarding persistently dangerous schools until such time as public hearings have been held. In the interim, NYSED should be required to follow federal laws regarding such sex offenses and school crimes and violent incidents, and publish data from all those locations which it has granted waivers from these requirements; and
3. Withdrawal of the regulations regarding the use of aversive behavioral interventions until such time as public hearings have been held, with federal laws and regulations to serve as a model for same.

These easily-accomplished steps would make significant progress in informing the public and the Regents about the state of education in New York State, enabling better, more educationally valid and fiscally responsible decision-making. In the process, we will have significantly increased the protection of students with disabilities from physical and emotional harm and educational disadvantage.

Coalition for Transparency in Public Education:

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Governing Board in Formation  
July 2006

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## Endnotes

<sup>1</sup> For example, Arizona, [http://www.auditorgen.state.az.us/Reports/School\\_Districts/School\\_Districts.htm](http://www.auditorgen.state.az.us/Reports/School_Districts/School_Districts.htm); Arkansas, <http://www.legaudit.state.ar.us/>, Florida, <http://www.state.fl.us/audgen/pages/subjects/dsb.htm>, New Jersey, [http://www.njleg.state.nj.us/legislativepub/auditreports\\_department.asp#EDU](http://www.njleg.state.nj.us/legislativepub/auditreports_department.asp#EDU), and Georgia [http://www.audits.state.ga.us/internet/ead/lea\\_schools\\_2004](http://www.audits.state.ga.us/internet/ead/lea_schools_2004), routinely post such audits to state government web sites.

<sup>2</sup> Reporting Of Violent And Disruptive Incidents By Public Schools, Report 2005-S-38, Office of the NYS Comptroller, May 22, 2006.  
<http://www.osc.state.ny.us/audits/allaudits/093006/05s38.pdf>

<sup>3</sup> The relevant federal criminal statute reads as follows:

TITLE 18. PART I. CHAPTER 109A. § 2242

§ 2242. Sexual abuse -

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly—

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or

(2) engages in a sexual act with another person if that other person is—

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act; or attempts to do so, shall be fined under this title, imprisoned not more than 20 years, or both.

<sup>4</sup> NY Corrections Law § 168-I.

<sup>5</sup> Under this formula, given for the first time in a NYSED memo to the Regents (dated June 8, 2006, but posted to NYSED web site on or about June 20, 2006), both "forcible sex offenses" and "other sex offenses" (e.g.: sex with an individual too disabled to give consent) count for 100 points. The language of the regulation, however, and the NYSED FAQ provided for school administrators, does not count "other sex offenses" toward a school being named persistently dangerous. The implications of this are, simply, reprehensible.  
<http://www.regents.nysed.gov/2006Meetings/June2006/0606emscvesida5.htm>

<sup>6</sup> [http://www.emsc.nysed.gov/ssss/SAVE/vadir/Q&A\\_VADIR\\_June23REVISEDhtml.htm](http://www.emsc.nysed.gov/ssss/SAVE/vadir/Q&A_VADIR_June23REVISEDhtml.htm)

<sup>7</sup> The State of New Jersey's Compliance With The Unsafe School Choice Option Provision, ED-OIG/A03-E0008, <http://www.ed.gov/about/offices/list/oig/auditreports/a03e0008.pdf>

<sup>8</sup> Shakeshaft, Charol, Ph.D., 2004, Educator Sexual Misconduct: A Synthesis of Existing Literature, US Dept. of Education, Washington, DC, 2004, Chapter 5.3 - "Targets," <http://www.ed.gov/rschstat/research/pubs/misconductreview/report.pdf>.

<sup>9</sup> Memo - Policy on the use of aversive or noxious stimuli in public and private schools serving students with disabilities, Rebecca Cort, March 20, 2006,  
<http://www.regents.nysed.gov/2006Meetings/March2006/0306emscvesidd6.htm>

- <sup>10</sup> “A Roadmap to Seclusion and Restraint Free Mental Health Services for Persons of All Ages” training manual. United States Department of Health and Human Services – Substance Abuse and Mental Health Services Administration, 2006.  
[http://www.mentalhealth.samhsa.gov/media/ken/pdf/SMA06-4055/Manual\\_front.pdf](http://www.mentalhealth.samhsa.gov/media/ken/pdf/SMA06-4055/Manual_front.pdf)
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[http://www.educationnews.org/PR/Zero\\_Tolerance\\_Task\\_Force.htm](http://www.educationnews.org/PR/Zero_Tolerance_Task_Force.htm)
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<http://www.gao.gov/archive/1999/he99176.pdf>
- <sup>14</sup> Busch, A.B. & Shore, M.F. (2000). Seclusion and restraint: A review of recent literature. *Harvard Review of Psychiatry*, 8, 261-270.
- <sup>15</sup> Natta, M.B., Holmbeck, G.N., Kupst, M.J., Pines, R.J. & Schulman, J.L. (1990). Sequences of staff-child interactions on a psychiatric inpatient unit. *Journal of Abnormal Child Psychiatry*, 18, 1-14.
- <sup>16</sup> Day, D. M. A review of the literature on restraints and seclusion with children and youth: Toward the development of a perspective in practice. <http://rccp.cornell.edu/pdfs/Day.pdf>
- <sup>17</sup> Observations and Findings of Out-of-State Program Visitation: Judge Rotenberg Educational Center. NYSED, June 9, 2006. [http://boston.com/news/daily/15/school\\_report.pdf](http://boston.com/news/daily/15/school_report.pdf)
- <sup>18</sup> <http://www.systemschange.syr.edu/uploaded/2004-2005SIGevaluationReport.pdf>.

## Appendix:

### Comparison of Federal Regulations to NYSED's Regulations on Restraint and Seclusion

Prepared by Leslie E. Packer, PhD

It is the position of the US Dept. of Health & Human Services' Substance Abuse and Mental Health Services Administration (SAMSHA) that the national goal should be to eliminate the use of restraints and seclusion in facilities treating persons with mental illness. SAMSHA's training manual on this topic notes that use of restraints and seclusion/time out rooms often leads to "trauma, injury and death," a finding consistent with the final report of the President's New Freedom Commission on Mental, which also noted: that seclusion and restraint should be used only as safety interventions of last resort; that only licensed practitioners who are specially trained and qualified to assess and monitor consumers' safety and the significant medical and behavioral risks inherent in using seclusion and restraint be authorized to order these interventions. At the same time, NYSED's new regulations specifically permit the use of restraints and seclusion/time out rooms in virtually every school building in the State of New York at the hands of unlicensed practitioners.

The federal regulations cited below are for youth aged 21 or younger who are inpatient psychiatric facilities or psychiatric residential treatment facilities that are not hospitals, providing inpatient psychiatric services to individuals under age 21. Source: 42 CFR Ch. IV Subpart G.

Note that the federal regulations state, "Each resident has the right to be free from restraint or seclusion, of any form, used as a means of coercion, discipline, convenience, or retaliation." *This directly contradicts NYSED's new regulatory permission of restraints and seclusion/time out rooms as a means of discipline or coercion.*

Federal Regulations	New NYSED Regulations
<p>Definition of Restraint: Drugs that are not a standard treatment for the resident child or youth's medical or psychiatric condition, that temporarily restrict freedom of movement or that are given to control behavior in a way that reduces the safety risk to the resident or others are considered restraints. Restraints also involve mechanical devices and physical force that is applied to restrict freedom of movement. Briefly holding a resident without undue force for the purpose of comforting him or her, or holding a resident's hand or arm to safely escort him or her from one area to another is not considered a restraint.</p>	<p>No definition of "restraint" provided.</p>
<p>Definition of Seclusion: Seclusion is when the resident child or youth is involuntarily confined to an area or room and physically prevented from</p>	<p>No reference to "seclusion" but the involuntary confinement and physical prevention from leaving is similar to NYSED's use</p>

leaving.	of "time out."
<p>Definition of Time Out: Time out involves restricting an individual in a designated area for a period of time to give him or her an opportunity to regain self-control. Under the rules, children and youth in time out must be monitored by staff and may not be physically prevented from leaving the area.</p>	<p>No definition of "time out," and students may be physically prevented from leaving the time out room.</p> <p>Amendments provide some standards for time out rooms. "Staff shall be assigned to continuously monitor the student in a time out room. The staff must be able to see and hear the student at all times."</p> <p>Notes: (1) Could "staff" be the janitor? (2) Some provisions do not apply if another agency has its own time out provisions and rules: BOCES facilities often use time out rooms for violations of building codes without individualizing; regulations do not address this.</p>
An order for restraint or seclusion must not be written as a standing order or on an as-needed basis.	The order for restraint or seclusion is written into a plan as a standing order.
An order for restraint or seclusion is given <i>only</i> to ensure the safety of the resident or others during an emergency safety situation, where "emergency safety situation" is defined as "unanticipated resident behavior that places the resident or others at serious threat of violence or injury if no intervention occurs and that calls for an emergency safety intervention."	The order for restraint or seclusion is permitted for non-emergency situations; no order is needed for "emergency" situations. The state allows restraint and/or seclusion/time out for behaviors that damage district property and that interfere with orderly functioning of school or district function.
Restraint or seclusion must stop as soon as the emergency safety situation ends.	Restraint or seclusion may continue based on time specified in the child's plan.
Restraint and seclusion may not be used simultaneously.	No prohibition on restraint and time out rooms used simultaneously; prohibition on electric skin shock and restraint used simultaneously.
The facility must obtain an acknowledgment, in writing, from the resident, or in the case of a minor, from the parent(s) or legal guardian(s) that he or she has been informed of the facility's pol-	Schools not required to provide written policies on use of emergency restraints and time out rooms to parents. Contradictory provisions in regulations about

<p>icy on the use of restraint or seclusion during an emergency safety situation. Staff must file this acknowledgment in the resident's record; and (4) Provide a copy of the facility policy to the resident and in the case of a minor, to the resident's parent(s) or legal guardian(s).</p>	<p>whether informed consent statement by parent is necessary for use of time out rooms as part of planned behavior interventions.</p>
<p>The use of restraint or seclusion may only be ordered by a physician or other licensed practitioner permitted by the state and the facility to order restraint or seclusion and trained in the use of emergency safety interventions.</p>	<p>The use of restraint and seclusion time out rooms ordered by the CSE without any requirement for physician or licensed practitioner orders. No requirement that CSE or any staff be trained in the use of emergency safety interventions.</p>
<p>If the child's or youth's treating physician is available, only he or she can order restraint or seclusion. If the physician or other licensed practitioner permitted by the state and the facility to order restraint or seclusion orders the restraint or seclusion, the resident's treatment team physician must be contacted (unless the ordering physician is the resident's treatment team physician).</p>	<p>No requirement that the school contact their own physician or the child's physician at any time during the use of restraint or seclusion/time out rooms.</p>
<p>If the physician, or other licensed practitioner permitted by the state and the facility to order restraint or seclusion and trained in the use of emergency safety interventions, is not available to order the restraint or seclusion, and a verbal order is obtained, a registered nurse or other licensed staff, such as a licensed practical nurse, must receive (at the time the emergency safety intervention is initiated) the verbal order. This verbal order should be verified by the physician's or licensed practitioner's signature. The physician or licensed practitioner must be available for consultation with staff, in person or by phone, throughout the emergency.</p>	<p>No requirement to notify school nurse or that a school nurse be on the premises.</p> <p>No requirement that any building employing aversives, restraints, or time out rooms have a full-time school nurse on the premises.</p>
<p>An order for restraint or seclusion must:</p> <ul style="list-style-type: none"> <li>• not exceed the duration of the emergency safety situation;</li> <li>• be limited to four hours for youth ages 18-21, two hours for 9-17 year-olds and one hour for children under age 9;</li> <li>• include the ordering physician's or licensed practitioner's (permitted by the</li> </ul>	<p>Documentation concerning emergency restraints required.</p> <p>No time limits on emergency restraints.</p> <p>Time out rooms can be used for emergency interventions (seclusion).</p>

<p>state and the facility to order restraint or seclusion) name, the date and time the order was obtained, the time limit, and what emergency safety intervention was used.</p> <p>If the emergency safety situation (restraint or seclusion) extends beyond the time limit for the use of restraint or seclusion, a registered nurse or other licensed staff, such as a licensed practical nurse must immediately contact the ordering physician or other licensed practitioner permitted by the state and the facility to order restraint or seclusion for instructions.</p>	<p>Regulations do not apply to other agencies which may have their own procedures re restraints or seclusion.</p> <p>No required timely notification of child's physician or child's parent that emergency restraints were used.</p> <p>Seclusion can be used as a routine punishment.</p>
<p>A physician or other licensed practitioner trained in the use of emergency safety interventions, and permitted by the state and the facility to assess the physical and psychological well being of residents' must perform a face-to-face evaluation of the patient, including a physical and psychological assessment, no more than one hour after the restraint or seclusion is initiated.</p>	<p>No medical or psychological assessment of the child is required following restraint or time out room seclusion.</p>
<p>Clinical staff trained in the use of emergency safety interventions must continually monitor (in person) and assess the physical and psychological status of the resident throughout the use of restraints.</p>	<p>No requirement that clinical staff monitor or even be present during restraint of child.</p>
<p>After the restraint is removed, a physician or other licensed practitioner permitted by the state and the facility to evaluate the resident's well-being and trained in the use of emergency safety interventions must evaluate the resident.</p>	<p>No post-restraint evaluation by medical or clinical staff required.</p>
<p>For emergency safety situations involving the use of seclusion, a clinical staff member (trained in the use of emergency safety interventions) must continually monitor and assess the resident's physical and psychological status by being either physically inside or immediately outside the seclusion room. Video monitoring does not meet this requirement. After the resident is removed from seclusion, a physician or other licensed practitioner permitted by the state and the facility to evaluate the resident's well-being and trained in the use of emergency safety interventions must assess the resident's well-being.</p>	<p>Monitoring while in time out room required by "staff" (janitor, perhaps?). No post-seclusion evaluation required.</p>

<p>Application of time out: (a) A resident in time out must never be physically prevented from leaving the time out area. (b) Time out may take place away from the area of activity or from other residents, such as in the resident's room (exclusionary), or in the area of activity or other residents (inclusionary). (c) Staff must monitor the resident while he or she is in time out.</p>	<p>Students are physically prevented from leaving the time out area.</p> <p>"Staff" must monitor the student while in time out, but no credential or training requirements specified for the staff who performs monitoring duties.</p>
<p>After each initiation of an emergency safety situation for a minor resident, the facility is required to notify the parent(s) or legal guardian(s) as soon as possible. A record of the facility's contact with the parent or legal guardian must be documented in the resident's record. The information must include the date and time of notification and the name of the staff member who provided the notification.</p>	<p>No notification required.</p>
<p>Two briefing sessions must occur within 24 hours after use of restraint or seclusion:</p> <ul style="list-style-type: none"> <li>• a face-to-face discussion between the resident and all staff involved (excluding any staff whose presence may jeopardize the well-being of the resident) about the circumstances that led to the use of restraint or seclusion and strategies that could be used to prevent future use. Parents or legal guardians may participate, when appropriate as determined by the facility.</li> <li>• a meeting among all staff involved in the emergency safety situation and appropriate supervisory and administrative staff. The session must, at the least, include a discussion of: the emergency safety situation that led to the use of restraint or seclusion; alternative techniques; any staff procedure that may be used to prevent the reoccurrence; and the outcomes.</li> </ul> <p>Both debriefing sessions must be documented in the resident's record, including any changes to the resident's treatment plan as a result of the session.</p>	<p>No debriefing requirements.</p>

Before participating in the use of restraint or seclusion, staff must have certification in the use of cardiopulmonary resuscitation (competency-demonstrated yearly) and demonstrate knowledge (every two years) of: techniques to identify staff and resident behaviors, events and environmental factors that trigger emergency safety situations; the use of nonphysical interventions (such as de-escalation, active listening, etc) that can be use to prevent emergency safety situations; and the safe use of restraint and seclusion, including ability to recognize signs of physical distress.

The facility is required to document in the resident's record successful completion of these demonstrated competencies. HCFA, the state Medicaid agency and the state survey agency must be able to review all training programs and materials used by the facility.

No CPR required training.

“Staff who may be called upon to implement emergency interventions shall be provided with appropriate training in safe and effective restraint interventions.”

“All personnel involved in the development, application, monitoring, data collection or review of a behavioral intervention plan that includes the use of aversive behavioral interventions shall be appropriately certified in accordance with the provisions of Part 80 of this Title and sections 200.6 and 200.7 of this Part”

*[Note that these are the sections of the regulations which deal with school staff qualifications: none specifically require professional-level training in behavior or validated methods of behavior management/modification.]*

“Any person who uses aversive behavioral interventions on students shall receive appropriate supervision, including direct observation. Appropriate training shall be provided on a regular, but at least annual basis, which shall include, but not be limited to, training on: (i) safe and therapeutic emergency physical restraint interventions; (ii) data collection of the frequency, duration and latency of behaviors; (iii) identification of antecedent behaviors and reinforcing consequences of the behavior; (iv) approaches to teach alternative skills or behaviors including functional communication training; (v) assessment of student preferences for reinforcement, assessing and responding to the collateral effects of the use of aversive behavioral interventions including, but not limited to, effects on a student’s health, increases in aggression, increases in escape behaviors and/or emotional reactions; (vii) privacy rights of students; and (viii) documentation and reporting of incidents, including emergency restraints and injuries.”

*"Appropriate training" is not defined in*

*terms of the depth or level of expertise imparted.*

The research-validated methodology/program of behavioral crisis defusing and safe methods of physical restraint utilized in NYS psychiatric hospitals is SCIP-R, which requires 25 hours of initial training and staff certification, with yearly update training and re-certification. NYS' OMRDD developed SCIP-R.