

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JEANNETTE ALLEYNE; ALLEN DATOUSH; KIM
DATOUSH; LINDA DOHERTY; SUSAN HANDON;
LESLIE JOYNER; LASHARON JOYNER; MITCHELL
SHEAR; MARCIA SHEAR; THE JUDGE ROTENBERG
EDUCATIONAL CENTER, INC.,

DECLARATION

06-CV-994

Plaintiffs,

GLS/RFT

-against-

NYS EDUCATION DEPARTMENT; RICHARD P
MILLS; BOARD OF REGENTS,

Defendants..

James P. DeLorenzo, does hereby declare under penalty of perjury, that:

1. I am the Statewide Coordinator for Special Education Services in the Office of Vocational and Educational Services for Individuals with Disabilities (hereinafter "VESID"). VESID is an Office within the New York State Education Department (hereinafter "SED"). I make this declaration in opposition to the above-captioned plaintiffs' application for a preliminary injunction order and pursuant to this Court's leave to submit further documentation.

2. I understand that during oral argument on Tuesday, August 22, 2006, counsel for plaintiffs incorrectly asserted that school district Committees on Special Education were not advised of the new regulations. On June 22, 2006, a "field memorandum" was sent to various parties statewide, including District Superintendents, Superintendents of Schools, and Presidents of Boards of Education, in which the recipients were advised of the new regulations. Field memoranda, which are transmitted via e-mail, are VESID's primary method

of disseminating information to the multiple and various interested parties. In the June 22, 2006 field memorandum, which was issued under my name, the recipients were further provided a summary of the amended regulations, as well as an Internet link to obtain the full text of the amended regulations (see <http://www.vesid.nysed.gov/specialed/behavioral/amendment62306.htm>). The recipients were also directed to disseminate the field memorandum to the appropriate individuals within each school district, which includes Directors of Special Education and the chairperson of each school district's Committee on Special Education (hereinafter "CSE"). A copy of the June 22, 2006 field memorandum with attachments is annexed hereto as Exhibit A.

3. On August 21, 2006, recipients of the June 22, 2006 field memo were provided a further field memorandum, to which was attached the application form for the inclusion of aversive interventions in an individualized education program (hereinafter "IEP"). A copy of the field memo and attachment are annexed hereto as Exhibit B. The two field memoranda and the application form are also available on VESID's website, at <http://www.vesid.nysed.gov/specialed/behavioral/home.htm>.

4. The new regulations require CSEs to apply to the Commissioner before including aversive intervention in an IEP, and to consider the recommendation of a State level independent panel of three experts before including aversives in the IEP.

5. It is my understanding that, as one ground for seeking preliminary relief, plaintiffs assert that students currently receiving aversive interventions, including electric skin shock, will be denied those interventions because there is currently no independent panel in place. This is not true. Until the independent panel is in place on October 1, 2006, aversive interventions

included on a student's current IEP will continue, with the limited exception of specific types of aversive interventions prohibited by the regulations (use of aversives for behavior that is not self-injurious or aggressive [8 N.Y.C.R.R. §200.22(f)(2)(vi)], use of aversives while the student is in a physical or mechanical restraint [§200.22(f)(2)(ix)], and use of automated aversive conditioning devices [§200.22 (f)(2)(viii)]. Put another way, the status quo with respect to aversive intervention, with these limited exceptions, will be maintained until the CSE has had the opportunity to apply to the Commissioner and to review the panel's recommendation.

6. The CSE remains, as it must under the Individuals with Disabilities Education Act (hereinafter "IDEA"), the ultimate decision-maker with respect to each student's IEP. Under the regulations, the independent panel does not have the authority to override the CSEs.

7. The emergency regulations constitute a comprehensive regulatory package designed to protect the students who receive aversive behavioral interventions, and ensure a safe, humane framework for the use of aversives. In addition to the independent panel review of proposed aversive interventions, the regulations contain, inter alia, administrative provisions and substantive standards a) to ensure that schools have policies and procedures in place for the use of aversive interventions; b) to establish program standards for assessment of behaviors and the need for aversives vis-à-vis other available strategies such as positive behavioral interventions and supports; c) to ensure safe and appropriate use of time out rooms and physical restraints; d) to establish procedures to ensure periodic review of the efficacy and need for aversive interventions for each individual student; and e) to establish substantive standards to govern the application of aversive interventions to New York's disabled children.

8. As one example of this comprehensive framework, there are specific requirements for a school administering aversives to submit quarterly reports on students who have received aversive interventions (§200.22[f][3][iii]), and for each student's school district CSE to convene a meeting at least once every six months and annually observe the student in the school setting (§200.00[f][7][ii]). These provisions, and all of the administrative provisions and substantive standards in the regulations, establish important safeguards to ensure that aversive interventions are applied only to the extent necessary and appropriate, and under controlled conditions with appropriate progress monitoring, reporting to the CSE, and State oversight.

9. Indeed, the administrative requirements and the substantive standards outlined in the regulations provide protections to NYS students. The requirements are clear in this intent to ensure that CSEs make decisions based upon sufficient information, that CSEs monitor students subject to aversive interventions, and that schools using aversive interventions do so under appropriate and humane conditions. In light of the controversial nature of aversive intervention and the plain dangers associated with it, the reporting and standards requirements set forth in the new regulations benefit the students rather than harm them.

10. Injunctive relief as to the administrative requirements of the regulations would usurp the authority of SED, diminish its ability to comply with its obligations under federal law, and deprive the SED of its right to determine the appropriate policies and procedures that will be in place in New York to implement the IDEA. Similarly, injunctive relief as to the substantive standards usurps the SED's right to establish standards as required by the IDEA for the provision of special education services to children with disabilities. Without the standards provided by the amended regulations, schools administering aversive interventions will be

guided only by their own internal policies, not a consistent, comprehensive policy established by the State educational agency. Injunctive relief with respect to the administrative and standards requirements of the amended regulations would harm SED.

11. I am advised that plaintiffs seek relief to prevent SED from removing JRC from its approved list based upon any failure to comply with the new regulations. I respectfully submit that such relief is premature. On June 21, 2006, SED issued to JRC a standard notification pursuant to 8 N.Y.C.R.R. §200.7(a)(3) that failure to comply with the required corrective actions to address identified health and safety issues may result in JRC being ineligible for approval by the Commissioner to receive public funds for the education of students with disabilities. However, SED has taken no further action to remove JRC from the approved list. To the contrary, by letter dated June 16, 2006, SED advised JRC that it was still reviewing JRC's response to the June 12, 2006 notification letter, and would take no action regarding JRC's eligibility for approval to receive public funds until the review was completed and JRC was notified of the status of each issue at the conclusion of the review. That review has not yet been completed.

12. Contrary to plaintiffs' suggestions, the regulations were enacted after careful consideration of research regarding behavioral interventions, and health and safety aspects of aversive interventions. As noted in the Regulatory Impact Statement, which was prepared in the process of promulgating the rules, defendants considered various studies on behavioral interventions prior to drafting the regulations. True and correct copies of the Notice of Emergency Adoption and Proposed Rule Making, the Summary of Rule, the Regulatory Impact Statement and the Statement of Facts and Circumstances Which Necessitate Emergency Action

are annexed hereto as Exhibit C. See Exhibit C, Regulatory Impact Statement, pp.3-6. In particular, the Regulatory Impact Statement discusses various research studies and findings.

13. It is my understanding that, during oral argument on August 22, 2006, plaintiffs' counsel incorrectly asserted that they have had no opportunity to comment on the amended regulations. In fact, plaintiffs have had ample opportunity to comment, and have fully availed themselves of that opportunity. As part of the process under the State Administrative Procedure Act (hereinafter "SAPA"), SED received public comment on the new regulations. Copies of the written comments received by SED during the Public Comment Period (June 23 - August 28, 2006) are annexed hereto as Exhibit D. SED also received oral comments at three public meetings held in Albany on August 8, New York City on August 14 and Syracuse on August 15, 2006. The oral comments will be available in audio tape format.

14. The written comments received by SED are overwhelmingly opposed to aversive interventions. See Exhibit D. Indeed, the large majority of the organizations and individuals who submitted comments, including professionals, parents of children with disabilities and individuals with disabilities themselves, adamantly opposed and strongly criticized SED for including any child-specific exception to the ban on aversive intervention. See id. Opponents to the use of aversive intervention include New York State Mental Hygiene Legal Service (a division of the New York State Office of Court Administration), Advocates for Children of New York, Inc., New York State Assembly member Richard N. Gottfried, Disability Advocates, Inc., the New York State Psychological Association and Parent to Parent of NYS. See Exhibit D.

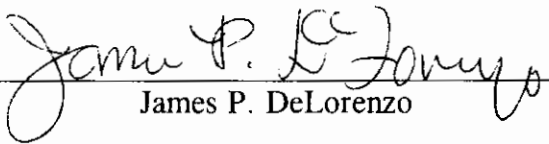
15. On or about August 24, 2006, my office was copied on a letter from counsel for the Student Plaintiffs with respect to plaintiff TD. In the letter, counsel concedes that TD "has

been faded from the GED” as of August 1, 2006. A copy of the letter, with TD’s name and date of birth redacted, is annexed hereto as Exhibit E.

16. Based upon the foregoing and the facts set forth in the August 21, 2006 Declaration of Rebecca H. Cort, I respectfully request that plaintiffs’ application for preliminary relief be denied.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Dated: September 1, 2006
Albany, New York


James P. DeLorenzo