

THE SPECIAL EDUCATION MUCKRAKER

Dee Alpert, Publisher
(Hey – Somebody’s got to do it!)

January 3, 2007
Formal Notice

To: THE MEMBERS OF THE BOARD OF REGENTS
Via e-mail and regular mail

NOTICE

**YOU’VE BEEN MISINFORMED, MANIPULATED AND MISLED:
ACTING ON THE BASIS OF THIS MISINFORMATION MAY COST
NEW YORK STATE A SUBSTANTIAL AMOUNT OF MONEY
- AND HARM A LOT OF VULNERABLE KIDS -**

Re: I. Proposed Amended Aversives Regulations -

In its just-released rebuttal to the public comment submitted about its proposed amended “aversive interventions” regulations (in its “Assessment of Public Comment”), NYSED’s “response” to one comment warrants particular discussion – since it’s highly inaccurate (and apparently intentionally so).

COMMENT:

Permitting aversive interventions at all for students with disabilities appears to violate 42 USC section 15009, which prohibits exposing developmentally disabled students to any greater risk of harm than that experienced by students in the general population. 42 USC section 15009 does not allow parents to waive their children’s protections under this statute. Given that NYSED has acknowledged that aversive interventions do pose a risk of harm, the Board of Regents cannot permit their use at all without violating 42 USC section 15009. Aversive interventions must be barred, without exception, effective immediately. If aversive treatments are needed, they should be handled in the same way that a school or district would handle a student who needed medication and accommodations in school, via collaboration between a physician, the student’s parent(s) and the district.

DEPARTMENT RESPONSE:

With respect to an alleged violation of 42 USC section 15009, the comment is speculative in that it raises issues of statutory interpretation that have not yet been determined by either the Congress, a Federal agency responsible for oversight, or the Federal judiciary. The comment provides no citation to any authority specifically determining that the use of aversives falls

within the prohibition in 42 USC section 15009, but merely presents the opinion of the person providing the comment.

Actually, comments from major organizations, including the NYS Psychological Association - not just one individual - noted that the proposed (and current “emergency”) aversives regulations, as well as the associated regulations authorizing use of time out rooms for punishment (a/k/a “consequences”) each violate the specific terms of 42 USC 15009. *And this isn’t just one person’s opinion.*

Tired of being misinformed, manipulated, misled?

The US Department of Justice filed an *amicus* brief this past summer setting forth the position of both the US Department of Education and US Department of Health & Human Services to the effect that 42 USC 15009 specifically applies to day publicly-operated schools. The Second Circuit upheld that position a short time later. *Both federal agencies “responsible for oversight” and the federal judiciary maintain that this statute – which specifically prohibits doing anything to any person with a developmental disability which puts them at greater risk of harm than that to which the general population is subjected, and also specifically prohibits the use of time out rooms for punishment – applies to day publicly-operated schools.* Both the *amicus* brief and the 2nd Circuit opinion were specifically cited in submitted public comments.

NYSED claims that this issue raises “issues of statutory interpretation that have not yet been determined by “... a Federal agency responsible for oversight” The US Dept. of Health & Human Services’ position is that use of restraints and seclusionary time out rooms (which are some of what these regulations specifically authorize) cause “trauma, injury and sometimes deaths” – and should be eliminated. This HHS position was cited in comments submitted regarding these regulations.

Let’s not quibble. The statute says:

Section 15009. Rights of individuals with developmental disabilities

...

(a)(3) (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;

What about “don’t do it” doesn’t NYSED understand? The legal prohibitions are crystal clear. Will disabled children, illegally abused under NYSED’s regulations, have to wait for federal enforcement of their right not to be subjected to “trauma, injury and sometimes deaths”? And will NYSED agree to provide, at no cost, the professional services they require due to being traumatized, injured or almost killed. Has NYSED asked the Regents to vote for that budget line - yet? You will.

If the Regents want to endanger NY's federal school Medicaid funds, federal adult vocational rehabilitation funds, Title IV E (foster care) payments, as well as a host of related federal grant program monies ... vote for the proposed amended aversives regulations, including the sections on restraints and time out rooms.

We strongly recommend that the Regents request opinions from the Civil Rights Division of the US Dept. of Justice, the Office of Counsel of the US Dept. of Health & Human Services, and the Office of Counsel of the US Dept. of Education as to the legality and propriety of these regulations, and as to the legitimacy or frivolousness of NYSED's position regarding any alleged ambiguity or question as to whether 42 USC 15009 applies to these regulations - before voting to make any portion of them permanent.

That statute ends with the following provision:

(b) Clarification

The rights of individuals with developmental disabilities described in findings made in this section shall be considered to be in addition to any constitutional or other rights otherwise afforded to all individuals.

That's a polite way of saying that any entity which violates, or authorizes violation, of this law can be sued. So, in one very fell swoop, you may both be endangering a significant amount of NYS' federal funds, as well as opening the State to serious federal civil rights litigation. To do so without securing independent legal counsel would be ... unwise. At best.

II. NYSED Will Carefully Monitor Use of Aversives, Restraints and Time Out Rooms to Protect Disabled Children's Health and Welfare -

NYSED hasn't done this in the past and it isn't doing it now (under the currently-in-effect "emergency" regulations). Those who ignore history are condemned to repeat it. *What on earth makes you think they'll do it in the future?*

A. The Shelter Island Time Out Room's Door – Chained & Padlocked:

When NYSED had time out room "guidelines," the head of a Long Island parent advocacy group sent Rebecca Cort an e-mail complaint, including a picture of the Shelter Island district's chained, padlocked door to the time out room in which an 8-year old boy was locked – on numerous occasions – without his parent's knowledge or consent. Oh, yes – he was the only biracial student in the district. The boy was not classified as having a disability, since the district had agreed to his mom's request for an evaluation; then reneged on it. Ultimately, the mom had him evaluated privately: he was professionally diagnosed as suffering from bipolar disorder. Since Cort ignored the complaint, the group's leader got the parent to send Cort the same complaint.

Then NYSED "investigated." *Ha!* NYSED's finding was that although it conceded that it had a picture of the chained and padlocked door to the time out room, since there was no chain and padlock present when its Regional Associate inspected the room – by prior appointment – the chain and padlock never happened. We have a copy: will furnish on request.

B. The Lorge School Time Out Room Violations: In early 2006, the UFT complained to NYSED about many serious violations of special ed regulations, including failure to have a certified administrator in charge of this very expensive State-approved private school; failure to provide severely emotionally disturbed or speech impaired students with their IEP-“mandated” counseling and speech services; having teachers not able/trained to teach the curricula needed for the students’ IEP’s-“mandated” diplomas; not providing staff with students’ IEP’s and not providing students with individualized instruction; having uniform, rather than individualized behavior rules - and “bad behavior management” which resulted in children being repetitively placed in the school’s two time out rooms, one of which was filthy, with frayed carpet and a hole in one wall ...

NYSED’s May ’06 compliance review report resulted in the school being given a September 2006 deadline to submit a plan to correct its time out room and “bad” behavior management violations. When the school did not submit an appropriate corrective action plan in September 2006, and was in violation of the June 2006 “emergency” regulations regarding time out rooms, NYSED’s response was to extend the school’s deadline to submit a corrective action plan for future implementation. Although severely emotionally disturbed students were being abused by being repetitively thrown into time out rooms as punishment for uniform behavior code violations, and although PBIS was not being used, NYSED did not order the school to stop abusing these students.

For that matter, the only violation of NYSED regulations which NYSED *did* require be fixed immediately involved ordering it to stop using the basement for classes and one time out room, since the building’s Certificate of Occupancy did not permit student uses in the basement at all. The school is still in violation of State regulations and federal law regarding having fully certified administrators, having fully certified teachers and related service providers, providing IEP-mandated related services, providing IEP-mandated curriculum ... In short, the kids are being abused by “bad” behavior management and recurrent internment in time out rooms from which they cannot freely exit; are not given the special and regular education curriculum to which they are entitled; are not provided the related services they so desperately need and ... NYSED could care less.

Oh ... we’re told that one emotionally disturbed student was sexually molested by a school employee, but couldn’t “open up” and tell anyone about the molestation for quite a while ... because she wasn’t getting her IEP-mandated counseling. The police took care of the molester – eventually. How has NYSED taken care of these very disabled kids? *They’re still being abused today.*

Rigorously enforce its aversives, restraints and time out rooms regulations to protect the safety and welfare of disabled children? We don’t think so.

For more on sexual molestation of severely disabled kids in schools, see Section III.

III. Discounting School Sexual Molestation of Severely Disabled Kids –

Yes, we know that in June, NYSED gave you information which carefully misled you into believing that school sexual molestation of a child too disabled to legally consent to a sex act would be weighted as heavily as a forcible sex act on a “regular” student. We didn’t believe them then. We were right. You were had.

This is what they told you:

...

Proposed Weightings for Identification of Persistently Dangerous Schools

LEVEL	INCIDENT	WGT Range
1	Violent Incidents	100-30
	Homicide, Forcible Sex Offenses, Other Sex Offenses, Robbery, Assault with Serious Physical Injury, Assault with Physical Injury, Arson, and Kidnapping	
2	Disruptive Incidents With Weapons	25-15
	Minor Altercations, Intimidation, Harassment, Menacing, Bullying, Burglary, Criminal Mischief, Larceny, Riot, Weapons Possession	

Note: Level 1 incidents are weighted the same regardless of whether they occur with or without a weapon (i.e., kidnapping with a weapon and kidnapping without a weapon will have the same weight). Level 2 incidents are weighted only if they occur with a weapon.

<http://www.regents.nysed.gov/2006Meetings/June2006/0606emscvesidd3.htm>.

GOTCHA! NYSED's current point system for school crimes and violent incidents was outed in December '06 and ...

School sexual molestation of a child too disabled to legally consent to a sex act – whether consensual or not – “counts” for 3/4ths of a forcible sex act perpetrated on a non-disabled child.

Criteria for Designating Persistently Dangerous Schools in 2006

Designation of persistently dangerous schools in 2006 is based on Violent and Disruptive Incident data from 2004-05 and 2005-06. The Department has established a School Violence Transitional Index (SVTI) to identify persistently dangerous schools.

...

Incident Category (All of these Types of Incidents are Considered to be Serious Incidents)	Weight
Homicide	100
Forcible Sex Offenses	60
Other Sex Offenses	45

<http://www.emsc.nysed.gov/irts/violence-data/2006/PD-criteria.pdf>.

Of course, sexual molestation of a child too disabled to legally consent to sex is an “other sex offense,” not a “forcible sex offense.”

2.2 Other Sex Offenses: involving inappropriate sexual contact but no forcible compulsion. Other sex offenses, includes, but is 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.

<http://www.emsc.nysed.gov/irts/violence-data/2006/glossary.pdf>

And while parents of “regular” kids who are victims of a forcible sex offense must, under NYSED’s system, be offered transfers to other schools, parents of severely disabled kids who are raped in school (“that may be consensual or involve a child who is incapable of consent by reason of disability ...”) are not entitled to such offers of transfers. *Perhaps you’d like to ask NYSED’s officials why this is: Are severely disabled kids thought to be incapable of suffering psychiatric trauma due to being raped in schools, or is it that it doesn’t matter if they are traumatized by being raped in schools because they can’t really learn anyway? Or is protecting BOCES, not disabled students, what these folk are really all about?*

And why is it that NYSED exempted all BOCES from all persistently dangerous schools requirements ... where a huge proportion of NY’s severely disabled kids are schooled? Or did you really think that NYSED made the BOCES give parents the BOCES summaries of crimes and violent incidents, as the federal law required they do? Raped in a BOCES: stay in a BOCES. Ask the US DOE’s Inspector General what he thinks of that!

Remember your US History courses ... when Negroes were counted as being worth 5/8ths of a white person? Is it progress to say that at least severely disabled kids are counted as 3/4ths of “regular” kids – when raped? And that 3/4ths is more than 5/8ths? We don’t think so.

The purpose of this notice is so that no Regent can say “we didn’t know.” Your NYSED handlers may think that you’re too _____ (fill in the blank) to wade through the nonsense they try to bury you with, and too _____ (fill in the blank) to remember in January ’07 what they wrote in June ’06, but ... we’re not. And we invite you to join us in our exercise in remembrance.

You can’t say “We didn’t know.” You’ve been put on notice. You know.

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