

# The Coalition for Transparency in Public Education

## The “Safe Schools” Transfer Option and Under-Reported Sexual Molestation of Disabled Students in NYS

August 29, 2006

**The Coalition for Transparency in Public Education** believes that parents cannot secure their children’s right to be educated in safe schools if authorities withhold crucial information regarding crimes and violence in those schools or provide illegal waivers so that the most persistently dangerous schools do not even have to report their data. The Coalition also believes it is unacceptable for the State to trivialize or discount the sexual molestation of disabled children. It is particularly distasteful in that the regulatory scheme seems designed to deny parents their federally-mandated right to the option of a transfer to a safer school; so that the State can portray persistently dangerous schools as safe – or both.

### **Persistently Dangerous Schools**

A key feature of the No Child Left Behind (NCLB) law is the development by state education departments of a school violence index, under the NCLB's persistently dangerous schools requirement:

Section 7912. Unsafe school choice option

#### **(a) Unsafe school choice policy**

Each State receiving funds under this chapter shall establish and implement a statewide policy requiring that a student attending a persistently dangerous public elementary school or secondary school, as determined by the State in consultation with a representative sample of local educational agencies, or who becomes a victim of a violent criminal offense, as determined by State law, while in or on the grounds of a public elementary school or secondary school that the student attends, be allowed to attend a safe public elementary school or secondary school within the local educational agency, including a public charter school.

The New York State Department of Education's (NYSED) lack of transparency with respect to persistently violent schools was highlighted in a recent 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>1</sup>

This information also remains unavailable to the public in general, as well as to parents of students who do, or may, attend schools which actually have high violence and crime numbers.

## **NYSED's Scheme for Assessing Persistently Dangerous Schools Punishes the Victims**

NYSED's materials regarding its "persistently dangerous schools" crime/violent incident classifications and designation criteria state that while school administrators at all levels and law enforcement officials were consulted when determining what crimes would be counted, and the weight each would be given, parents of 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, this leads to the appearance of behind-the-scenes decision-making -- an impression is 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*. Parents, and the public, could not have provided meaningful input the very same day this agenda item was made public.

One starkly inappropriate feature of the new regulations (which the Coalition believes to have been 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 sex offense," not countable as a forcible offense, despite the fact that the conduct perpetrated may be *the same conduct that qualifies as a forcible sex offense if the victim is not severely disabled*. Pragmatically speaking, lowering the classification of forcible molestation when the victim is severely disabled simply serves to decrease pressure on school administrators to take all possible steps to insure that severely disabled children are not molested in their schools.

Under the current scoring system -- and even in the new "glossary" revised as of August 1, 2006 -- any sex act on a disabled student may be considered by a school's reporters to be an "other sex offense" if there was no forcible compulsion; *if the student was too disabled to legally give consent or too disabled to be able "prove" that actual assent was not given*. However, the NYS Education Department does not provide guidance as to the steps that should be taken by school personnel so they can credibly ensure that no "forcible compulsion" was involved in cases where the victim was too disabled to report or explain. Certainly NYSED cannot expect a perpetrator to voluntarily confess that s/he made a threat of force to compel agreement to a sex act. Nor can the public expect school staff to voluntarily assign such incidents to the forcible sex offense category, in the absence of regulatory mandates, when to do so would put their schools in danger of a "persistently dangerous" designation.

In the system approved for the 2006-2007 school year "[s]chools are identified either based on their index or based upon their index and the number of weighted incidents that occur at the school."<sup>2</sup>

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	

... 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). Id.

Despite the apparent precision of this scoring table, in fact, nothing forthrightly states that school sexual molestation of a student too disabled to legally give consent *will* be given the same weight as a "forcible sex offense" committed against a non-disabled student. No criteria are given for NYSED determinations as to the weight to be assigned to any given crime within the 30-to-100 point range. Essentially, the same situation exists within the context of these new regulations as was exposed in Comptroller Hevesi's prior audit. To repeat:

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.

What we do know is that NYSED's administration feels that:

" ... [I]t is important, therefore, to continue to employ a two-step process of identification that includes subsequent steps that acknowledge unique situations that may result in "false-positive" findings. This is accomplished through a system that provides school districts with the opportunity to:

... submit additional appropriate data to explain why the designation is not appropriate (see, 8 NYCRR §120.5[a] [2]). School districts may wish the Department to consider such factors as:

...The school serves primarily or exclusively students with severe emotional disabilities or histories of violent and/or aggressive behavior and has well-developed behavior management systems in place. ...

Id. In this system, the fact that the perpetrator is severely emotionally disturbed acts as a mitigating factor, although *the fact that the victim may be severely disabled is not taken into*

*account at all and clearly should be.* The Coalition does not maintain that it is inappropriate to consider the offender's status when determining consequences for the offender. We do maintain, however, that offender status may not be used to mitigate, and downgrade, the seriousness of the molestation the victim experiences. Severely disabled victims who are too impaired to give consent to any sexual acts require the highest level of protection: sexual molestation of such students *always* belongs in the most serious category of sex offenses.

The purpose of the persistently dangerous schools section of No Child Left Behind is to protect victims: NYSED's scheme stands this goal on its head. The Coalition notes that if the school and NYSED consider the fact that the school has "well-developed behavior management systems in place" as a legitimate defense against a 'persistently dangerous' designation, then the school and NYSED must implicitly be claiming that everything which could have been done actually was done to reduce violence - **and yet the school still has a high level of persistent violence.** In other words, the implication is that the best possible behavior management program, thoroughly and professionally implemented, cannot legitimately be expected to maintain a crime- and violence-free school building, including in all-special education schools which have extremely high staff-to-student ratios. Under those conditions, there is even *more* reason to require the legally-mandated proffer of a transfer for a disabled victim to a safe school, not less.

New York State's schools which primarily or exclusively enroll severely emotionally disturbed students: (a) have extremely high ratios of staff-to-students precisely because such students may act out; and, (b) are supposed to be staffed by behavioral experts who, through the rigorous implementation of research-validated methodologies or programs of behavior management and modification, with appropriately intense supportive and related services, should be able to ensure that their students do not act out. If BOCES, District 75 and the two State-operated schools are to be excused for failing to effectively (and humanely) manage the behavior of their severely emotionally disturbed students, and for not aggressively and effectively protecting those students who cannot meaningfully protect themselves, then the rationale for having such schools is very much open to question. Surely, NYSED does not intend to communicate that only non-disabled students in regular schools are deserving of protection from emotionally disturbed students who are violent and/or predatory, abandoning the more severely disabled - but nonviolent - students in special education schools and state-operated schools to their fates. Surely, NYSED does not intend to communicate a belief that severely disabled students suffer less trauma when sexually molested than do their non-disabled peers. School sexual molestation negates every child's ability to be effectively educated in the building where she or he was molested.

Put simply, both hostile, aggressive, sexually predatory teenage boys and severely depressed, withdrawn teenage girls can be, and often are, classified as "emotionally disturbed." Because NYSED cannot guarantee that a severely depressed withdrawn female student will not be placed in the same school building as an aggressive predatory male student, it is especially important that the offender's disability status not be used to minimize the severity of the offense when it comes to providing a safe school or proffer of transfer and counseling services to the victim.

The rationale behind the federal law holding that sex with a person too disabled to legally consent to a sex act is a serious felony is both clear and coherent: a severely disabled person may be unable to communicate what actually happened. It would be too easy for a perpetrator (or anyone desiring to mislead the public, regulatory and prosecutorial authorities) to invent a non-criminal, pretextual excuse for a forcible molestation's bruising and injuries (e.g., "She always bangs into furniture; she falls down a lot; other students bully and hit her all the time; she engages in self-injurious behavior.").

## **NYSED Responses Thus Far Do Not Address the Issue**

On June 8, Jean C. Stevens sent a summary and memo to the EMSC-VESID Committee, "Proposed Amendment to the Regulations of the Commissioner Relating to the Uniform Violent and Disruptive Incident Reporting System"<sup>3</sup> that includes the following response to public commentary to the 2005 notice of proposed rulemaking:

COMMENT: There is a federal law making it a serious crime to have sex or sexually molest or abuse a person with a severe disability, irrespective of that persons age, irrespective of the status of the person doing the abuse or molestation, etc. I suggest that you change these regulations to reflect the federal law unless you wish to continue countenancing sexual abuse and molestation of severely disabled persons of any age under your jurisdiction. I find it incredible that a SEA to not count consensual sexual abuse or molestation of a severely disabled person as a serious reportable crime pursuant to NCLBs Unsafe School Choice provisions. (underscore added)

DEPARTMENT RESPONSE: This commenter has misinterpreted the language of the proposed regulations. The regulations do not countenance sexual abuse and molestation of severely disabled persons. If a person is unable to consent to sexual contact due to a disability, the regulations require that the incident be reported, based on the nature of the incident, in either the forcible sex offenses category or the other sex offenses category. The affirmative defense for a consensual sexual act based on the age of the offender would not apply to such an incident where the victim is incapable of consent by reason of disability. In fact, the reference to an individual who cannot consent by reason of disability was included to accomplish precisely the opposite of what this commenter suggests--to ensure that sexual offenses against severely disabled individuals must be reported. The Department will further address this issue in guidance. The language that makes age an affirmative defense in the other sex offense category when the offender is less than 4 years older than the victim at the time of the offense was added to address concerns that the regulations should include such an affirmative defense in order to better align the regulations with the Penal Law. Pursuant to Penal Law 130.30 and 130.45, it is an affirmative defense to the crimes of rape in the 2nd degree and criminal sexual act in the 2nd degree that the defendant is less than 4 years older than the victim at the time of the act. The language was also added so that consensual sexual contact between minors would not be a reportable offense. This affirmative defense does not apply to the forcible sex offenses category.

The Department's response evades the point that *sexual molestation of disabled students too disabled to give consent should be counted as the most serious type of sex offense if the system is to be consistent both with state and federal laws and moral decency. Period.* Moreover, adding language to a "guidance" memo does not change the language of the regulation which clearly fails to adhere to state and federal laws by downgrading the significance of sexual molestation of seriously disabled students who cannot consent to sexual acts (NYSED's experience of widespread noncompliance with its time out room "guidelines" is instructive in this regard). Nor has the Department offered the clarification that it said it would in its most recent memorandum regarding the use of this scoring system, as discussed below. The Coalition also notes that Department's response with respect to an "affirmative defense" on the age difference between offender and victim is highly misleading, at best, because the Penal code does not permit this "affirmative defense" when the victim is too impaired to give consent.

## **NYSED Regulations Provide Too Much Discretion to Too Many**

The above concerns are consistent with the overwhelming contemporary trend in law enforcement to treat the status of the victim - in this case, the most vulnerable disabled students - as an aggravating factor, and accordingly, require 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>4</sup> and yet NYSED's scoring system minimizes this crime by calling it an "other sex offense." Within the New York context, the State Sex Offender Registration Act 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>5</sup> yet NYSED's scoring system minimizes this crime by calling it an "other sex offense. NYSED's scoring system does just the opposite of what state and federal law do by providing less protection to those who need it most. *We can only conclude that NYSED wrongly treats the victims' vulnerability as a mitigating factor in order to reduce the public perception of dangerousness in the schools, so as to evade the persistently dangerous schools law's more severe consequences.* The regulatory language set out below makes this clear:

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

Pursuant to sections 207 and 2802 of the Education Law and Chapter 402 of the Laws of 2005

Subdivision (gg) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective July 13, 2006, as follows:

(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. (Underscore added.)

Under this formula, given for the first time in a NYSED memo to the Regents (dated June 8, 2006, but not posted to NYSED public web site until 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) might appear to count equally, but the language of the regulation and the NYSED FAQ provided for school administrators make it clear that: (a) reporters are free to use discretion in how individual offenses within the category are scored, and (b) "other sex offenses" does not count toward a school being named persistently dangerous. The implications of this are, simply, reprehensible.<sup>6</sup>

"Other sex offenses," i.e., molestation of severely disabled students, are not included in "the most serious violent incidents." The Coalition's reading of what it believes is clear and unambiguous language above, intended for school and district administrators, contradicts the implications in NYSED's memoranda to the Regents regarding crime definitions and classifications. The Coalition's interpretation is further 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?

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.)

Nowhere in the document do the NYSED author(s) offer clarification harmonizing this language with their June 8 response to the public comment about disabled students who cannot give consent. Equally problematic is this portion of the memo:

**4. When a student with a disability engages in conduct that violates the school district's code of conduct and the conduct has been determined to be a manifestation of the student's disability, is the incident reportable?**

It depends on the particular facts. The purpose of the UVIR system is to collect data on all violent and disruptive incidents; there is no automatic exclusion for students with disabilities based on manifestation or otherwise. If, hypothetically, a student with a disability were to bring a weapon to school and cause the death of another, the incident would be reportable in the homicide category, even if it were determined to be a manifestation of the student's disability because the mental state of the perpetrator is irrelevant to that offense as defined for purposes of the UVIR. If, on the other hand, a student with a disability strikes another person and that conduct is determined to be a manifestation of the student's disability, the incident may or may not be reportable. To meet the definition of an assault, the student would have to engage in intentional or reckless behavior. A determination that the conduct was a manifestation of the student's disability indicates that the conduct was not intentional and should not be considered reckless behavior. The conduct would fit the definition of minor altercations, if it is determined that the student had an intent to harass, annoy or alarm another person, otherwise the incident would fit into Category 20, Other Disruptive Incidents. In either case-- whether or not it involves criminal harassment or other disruptive incidents-- the incident would be reportable, if it results in a disciplinary or referral action. If, for example, such an incident is sufficiently serious that it results in a suspension from school or an in-school suspension or a change in placement such as placement, in an interim alternative educational setting (IAES), it is a reportable incident, regardless of any manifestation determination. On the other hand, if all that occurs is the conduct of a functional behavioral assessment or the review or modification of a behavioral intervention plan, as required by law, without a change in placement, the incident would not be reportable.

According to the answer above, if a disabled student who cannot give consent is sexually molested by another disabled student who is of the same age or within a 4-year age difference, then the molestation may not even be reportable. It would depend entirely on how the CSE decided to describe the disabled offender's conduct, i.e., as a symptom or criminal "bad act." Because disabled students do sexually molest other disabled students - especially when IEP-mandated adult supervision is absent - the failure to mandate reporting sexual molestations committed – whatever the motivation; whatever the reason – simply guarantees a significant underestimate of the extent of sexual molestations and serious violent acts in a school.

### **Persistently Dangerous Schools May Be More Prevalent Than Has Been Reported**

In addition to the serious issues raised by minimizing the gravity of a sex offense against a disabled student too impaired to consent, NYSED's memorandum to the Regents of June 8, 2006 also omitted the fact that *NYSED has previously illegally 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 of the State-operated residential schools (the NYS School for the Blind and the NYS School for the Deaf).

**In fact, while NYSED has published some markedly incomplete crime information for Dist. 75 schools, it has never published any such information at all for any BOCES, nor for either of the two residential schools for severely disabled children which it directly operates.**

**Indeed, NYSED has never published full and complete No Child Left Behind report cards for any of the BOCES and Dist. 75 schools, nor any report cards of any kind for its own residential schools.**

While we know that there were 893 "other sex offenses" (without weapons) *reported* by New York public schools for the 2004-2005 school year,<sup>7</sup> we are provided *no information whatsoever* regarding sexual molestation of any students in the many BOCES programs; in the 60+ Dist. 75 schools, nor at the NYS Schools for the Blind and Deaf. An outside consultant's report on the School for the Blind indicates that this was a very significant problem. Without full, accurate reports, the public cannot be assured that it is still not a significant problem.

The "other sex offense" category for Dist. 75 is reported as "N/A" by NYSED.<sup>8</sup> Nevertheless, even the scant data available nationally shows that students with behavior disorders, autism and mental retardation are sexually molested in school far more often than students with other diagnoses. These are the students, of course, who are more likely to be placed in BOCES and Dist. 75 schools. The available research also shows that all students with disabilities are molested in schools at a rate multiple times higher than their non-disabled peers.<sup>9</sup>

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) by NYSED. Its 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.*<sup>10</sup> Specifically, students who are victims of "other sex offenses," which is the category in which NYSED has placed sex molestation of severely disabled students, are not entitled to such NCLB-mandatory transfers, although this law (NCLB) does so require.

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 has categorized as "serious" or "violent," and they are specifically excluded when they have been the victim of a non-consensual school sex molestation. Although their special education schools may be extremely violent or dangerous, these students do not, apparently, merit transfers to other, safer schools, despite the fact that all non-disabled students do.

In fact, in June 2006, NYSED presented the Regents with not one, but two separate sets of regulations of critical importance to disabled children and their parents - those regarding persistently dangerous schools, and those authorizing the use of aversives, restraints and seclusionary time out rooms solely on children with disabilities - both without meaningful prior public notice; both without the opportunity for substantive public input, and both in effect applying different, and lower, standards to disabled students than are applied to nondisabled students.

The Coalition believes that NYSED's actions are in violation of NCLB's persistently dangerous schools requirements. A 2005 USDOE Inspector General's audit, dealing with a similar waiver in

New Jersey,<sup>11</sup> 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.

Because NYSED nevertheless illegally waived the requirement:

parents of disabled students in NYS have no way to assess the safety of their child's school or a school to which a CSE proposes to send their child;  
parents of disabled students are not offered transfers for their children to safer schools - even when the schools are highly and persistently dangerous; and  
the incidence of sex molestation of New York's disabled students is 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. They then require that the institution or facility 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, or implement such obligations, which is why the Intermediate Care Facility at the School for the Blind had to be taken over by OMRDD last year. Hence, parents have no statutory right to demand, and/or receive reports from full investigations of the causes of the bruises and injuries their severely disabled children routinely come home with. Insidiously, they have no actual right to insist that changes be made so that the same thing(s) do not happen again. Unless parents sue or formally retain counsel to commence IDEA impartial due process hearings, the information they desperately need is unavailable: the protections their children need often exist only as administrative fictions.

In essence, these new regulations repeal many of the hard-won federal protections against rape and sex molestation of severely disabled persons - specifically for all the times they are students in New York's publicly-operated schools. Inasmuch as identifying perpetrators in such schools is often difficult, or impossible, because the victims may be unable to communicate, or may not be believed. A persistently dangerous schools crime classification system which "counts" sex with a severely disabled student as a forcible sex offense is, pragmatically, 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 sex abuse. USDOE selected Professor Charol Shakeshaft of Hofstra University in Hempstead, NY, a well known expert on this topic, for its literature review.<sup>12</sup> Prof. Shakeshaft secured research data, much of which was unpublished, on school sex molestation of students with disabilities and conducted a re-analysis. Some of the significant findings in her USDOE-published report were:

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

Professor Shakeshaft is a nationally recognized expert in the field of school sex abuse, which is why US DOE commissioned her to do this study. Nevertheless, her input was not solicited by NYSED prior to the adoption of its persistently dangerous schools crime definitions and crime classification system. Securing meaningful public, and expert, input prior to creation of these

regulations and greater transparency in the subsequent NYSED decisional process might have prevented some of the inequalities and injustices with the new system.

## **Summary**

NYS has authorized some of its most dangerous and/or violent schools to not report their crime and violence data, although they are all required to do so by NCLB, and does not subject them to mandatory safety transfer requirements. For those schools which do report, the sex molestation of seriously disabled students too impaired to legally give consent is not counted as a "serious sex offense," resulting both in victimized students not being offered the mandatory transfer option to a safe school, and in underestimating problems with significant persistent crimes and violence in these schools.

The Coalition recommends some simple solutions:

1. Merge "other sex offenses" into the "sex offenses" category, and treat the molestation of a student too disabled to give consent as at least equal to, if not greater than, any other sex offense involving forcible compulsion, with no mitigating factors.
2. Count sex molestations involving a nondisabled student offender and a student victim as the highest category of sex offense, irrespective of the ages of the victim and perpetrator.
3. Insure that all schools and educational programs in NYS report their data, as required by NCLB, including all BOCES, District 75 schools and State-operated schools and include their numbers in all such NYSED reports. Discipline administrators who fail to report full and complete data for their school or facility.
4. Insure that all data are made publicly available in a timely fashion.
5. Schedule public hearings regarding persistently dangerous schools criteria to solicit input from parents and other concerned stakeholders.
6. Require the State to upload the violence/crime data to its web site in a timely fashion and at least 60 days before any decisions regarding persistently dangerous schools issues are to be made by the Board of Regents.

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Coalition for Transparency in Public Education

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*Governing Board in Formation*

<sup>1</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>2</sup> <http://www.regents.nysed.gov/2006Meetings/June2006/0606emscvesidd3.htm>

<sup>3</sup> <http://www.regents.nysed.gov/2006Meetings/June2006/0606emscvesida5.htm>

<sup>4</sup> The relevant federal criminal statute reads as follows:

18 U.S.C. § 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>5</sup> NY Corrections Law § 168-l.

<sup>6</sup> <http://www.regents.nysed.gov/2006Meetings/June2006/0606emscvesida5.htm>

<sup>7</sup> <http://www.emsc.nysed.gov/irts/violence-data/2006/reports/04-05-summary.pdf>

<sup>8</sup> See <http://www.emsc.nysed.gov/irts/violence-data/2006/reports/2003-04-Incidents-New-York-City.htm>

<sup>9</sup> U.S. Department of Education, Office of the Under Secretary, *Educator Sexual Misconduct: A Synthesis of Existing Literature*, Washington, D.C., 2004, Table 14, <http://www.ed.gov/rschstat/research/pubs/misconductreview/report.pdf>

<sup>10</sup> This appears to be the reason that NY 1 television, when reporting on NYSED's new persistently dangerous schools list - which was predominately populated by NYC DOE District 75 special ed. schools - "Eleven of them are schools for special education students and city sources say those schools are usually exempt from list." NY 1 Television, August 23, 2006, <http://www.ny1.com/ny1/NY1ToGo/Story/index.jsp?stid=4&aid=62005>.

- <sup>11</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>12</sup> Shakeshaft, Charol, Ph.D., 2004, Educator Sex 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>