

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 207, 210, 305, 4401, 4402, 4403, and 4410

1. Section 19.5 of the Rules of the Board of Regents is amended, effective June 23, 2006, as follows:

§ 19.5 Prohibition of corporal punishment and certain behavioral interventions.

(a) Prohibition of corporal punishment.

(1) No teacher, administrator, officer, employee or agent of a school district in this State, [or of] a board of cooperative educational services (BOCES), a charter school, State-operated or State-supported school, an approved preschool program, an approved private school, an approved out-of-State day or residential school, or a registered nonpublic nursery, kindergarten, elementary or secondary school in this State, shall use corporal punishment against a pupil.

[(b)] (2) As used in this section, corporal punishment means any act of physical force upon a pupil for the purpose of punishing that pupil, except as otherwise provided in [subdivision (c)] paragraph 3 of this [section] subdivision.

[(c)] (3) In situations in which alternative procedures and methods not involving the use of physical force cannot reasonably be employed, nothing contained in this section shall be construed to prohibit the use of reasonable physical force for the following purposes:

[(1)] (i) to protect oneself from physical injury;

[(2)] (ii) to protect another pupil or teacher or any person from physical injury;

[(3)] (iii) to protect the property of the school, school district or others; or

[(4)] (iv) to restrain or remove a pupil whose behavior is interfering with the orderly exercise and performance of school or school district functions, powers and duties, if that pupil has refused to comply with a request to refrain from further disruptive acts.

(b) Prohibition of the use of aversive behavioral interventions.

(1) No public school, BOCES, charter school, approved preschool program, approved private school, State-operated or State-supported school in this State, approved out-of-State day or residential school, or registered nonpublic nursery, kindergarten, elementary or secondary school in this State shall employ the use of

aversive behavioral interventions to reduce or eliminate maladaptive behaviors, except as provided pursuant to section 200.22(e) and (f) of this Title.

(2) As used in this section, aversive behavioral intervention means:

(i) application of noxious, painful, intrusive stimuli or activities intended to induce pain such as electric skin shock, ice applications, hitting, slapping, pinching, kicking, hurling, strangling, shoving, deep muscle squeezes or other similar stimuli;

(ii) any form of noxious, painful or intrusive spray, inhalant or tastes;

(iii) withholding sleep, shelter, bedding, bathroom facilities or clothing;

(iv) contingent food programs that include withholding meals or limiting essential nutrition or hydration or intentionally altering staple food or drink in order to make it distasteful;

(v) movement limitation used as a punishment, including but not limited to helmets and mechanical restraint devices;

(vi) the placement of a child unsupervised or unobserved in a room from which the student cannot exit without assistance; or

(vii) other stimuli or actions similar to the interventions described in subparagraphs (i) through (vi) of this paragraph.

The term does not include such interventions as voice control, limited to loud, firm commands; time-limited ignoring of a specific behavior; token fines as part of a token economy system; brief physical prompts to interrupt or prevent a specific behavior; interventions medically necessary for the treatment or protection of the student; or other similar interventions.

2. Paragraphs (lll) and (mmm) are added to section 200.1 of the Regulations of the Commissioner of Education, effective June 23, 2006, as follows:

(lll) Aversive behavioral intervention means application of noxious, painful, intrusive stimuli or activities intended to induce pain such as electric skin shock, ice applications, hitting, slapping, pinching, kicking, hurling, strangling, shoving, deep muscle squeezes or other similar stimuli; any form of noxious, painful or intrusive spray, inhalant or tastes; withholding sleep, shelter, bedding, bathroom facilities or clothing; contingent food programs that include withholding meals or limiting essential nutrition or hydration or intentionally altering staple food or drink in order to make it distasteful;

movement limitation used as a punishment, including but not limited to helmets and mechanical restraint devices; the placement of a child unsupervised or unobserved in a room from which the student cannot exit without assistance; or other similar stimuli or actions. The term does not include such interventions as voice control, limited to loud, firm commands; time-limited ignoring of a specific behavior; token fines as part of a token economy system; brief physical prompts to interrupt or prevent a specific behavior; interventions medically necessary for the treatment or protection of the student; or other similar interventions.

(mmm) Behavioral intervention plan means a plan that is based on the results of a functional behavioral assessment and, at a minimum, includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies to address the behavior.

3. Subparagraph (i) of paragraph (3) of subdivision (d) of section 200.4 of the Regulations of the Commissioner of Education is amended, effective June 23, 2006, as follows:

(i) in the case of a student whose behavior impedes his or her learning or that of others, consider strategies, including positive behavioral interventions, and supports and other strategies to address that behavior that are consistent with the requirements in section 200.22 of this Part;

4. Subparagraph (i) of paragraph (2) of subdivision (a) of section 200.7 of the Regulations of the Commissioner is amended, effective June 23, 2006, as follows:

(i) Conditional approval for private schools shall be limited to a period of one school year, or the period of time required to complete approval, and will be based on:

(a) . . .

(b) . . .

(c) . . .

(d) for schools operating as corporate entities, evidence of the following:

(1) . . .

(2) . . .

(3) for out-of-state schools, a license or charter from the state education agency of the state in which the school is located; [and]

(e) at least one onsite program review visit by program or fiscal staff of the Education Department; and

(f) submission for approval of the school's procedures regarding behavioral interventions, including, if applicable, procedures for the use of aversive behavioral interventions.

5. Subparagraph (iv) of paragraph (3) of subdivision (a) of section 200.7 of the Regulations of the Commissioner of Education is amended, effective June 23, 2006, as follows:

(iv) Schools may be removed from the approved list five business days after written notice by the commissioner indicating that there is a clear and present danger to the health or safety of students attending the school, and listing the dangerous conditions at the school, including, but not limited to, evidence that an approved private school is using aversive behavioral interventions to reduce or eliminate maladaptive behaviors of students without a child-specific exception provided pursuant to section 200.22(e) of this Part or that an approved private school is using aversive behavioral interventions in a manner inconsistent with the standards as established in section 200.22 (f) of this Part.

6. Paragraph (8) is added to subdivision (b) of section 200.7 of the Regulations of the Commissioner of Education, effective June 23, 2006, as follows:

(8) Except as provided in subdivision (e) of section 200.22 of this Part, an approved private school, a State-operated school, or a State-supported school is prohibited from using corporal punishment and aversive behavioral interventions to reduce or eliminate maladaptive behaviors of students.

7. Paragraph (6) is added to subdivision (c) of section 200.7 of the Regulations of the Commissioner of Education, effective June 23, 2006, as follows:

(6) Policies and procedures relating to the use of aversive behavioral interventions. Not later than August 15, 2006, a private school that proposes to use or to continue to use aversive behavioral interventions in its program shall submit its written policies and procedures on behavioral interventions to the Department with certification that the school's policies, procedures and practices are demonstrably in compliance with the standards established in section 200.22(f) of this Part. Any school

that fails to meet this requirement shall be immediately closed to new admissions of New York students and shall be prohibited from using aversive behavioral interventions with any New York State student placed in such program. Failure to comply with this requirement may result in termination of private school approval pursuant to paragraph (3) of subdivision (a) of this section.

8. A new section 200.22 is added to Part 200 of the Regulations of the Commissioner of Education, effective June 23, 2006, as follows:

§ 200.22 Program standards for behavioral interventions.

Behavioral intervention plans shall be provided in accordance with this section and those other applicable provisions of this Part and/or Part 201 that are not inconsistent with this section.

(a) Assessment of student behaviors. For purposes of this section, an assessment of student behaviors shall mean a functional behavioral assessment (FBA), as such term is defined in section 200.1(r) of this Part.

(1) A FBA shall be conducted as required in section 200.4 of this Part and section 201.3 of this Title.

(2) The FBA shall, as appropriate, be based on multiple sources of data including, but not limited to, information obtained from direct observation of the student, information from the student, the student's teacher(s) and/or related service provider(s), a review of available data and information from the student's record and other sources including any relevant information provided by the student's parent. The FBA shall not be based solely on the student's history of presenting problem behaviors.

(3) The FBA shall provide a baseline of the student's problem behaviors with regard to frequency, duration, intensity and/or latency across activities, settings, people and times of the day and include the information required in section 200.1(r) of this Part in sufficient detail to form the basis for a behavioral intervention plan for the student that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement.

(b) Behavioral intervention plan. The CSE or CPSE shall consider the development of a behavioral intervention plan for a student with a disability whenever

the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; when the student's behavior places the student or others at risk of harm or injury; when the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and as required pursuant to section 201.3 of this Title.

(1) In accordance with the requirements in section 200.4 of this Part, in the case of a student whose behavior impedes his or her learning or that of others, the CSE or CPSE shall consider strategies, including positive behavioral interventions and supports and other strategies to address that behavior. If a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate. A student's need for a behavioral intervention plan shall be documented on the IEP and such plan shall be reviewed at least annually by the CSE or CPSE.

(2) Except as provided in subdivision (f) of this section, a behavioral intervention plan shall not include the use of aversive behavioral interventions.

(3) The behavioral intervention plan shall identify:

(i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors. Such baseline shall, to the extent practicable, include data taken across activities, settings, people and times of the day. The baseline data shall be used as a standard to establish performance criteria and against which to evaluate intervention effectiveness;

(ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and

(iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals.

(4) Progress Monitoring. The implementation of a student's behavioral intervention plan shall include regular progress monitoring of the frequency, duration

and intensity of the behavioral interventions at scheduled intervals, as specified in the behavioral intervention plan and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's behavioral intervention plan or IEP.

(c) Use of time out rooms. (1) Each school which uses a time out room as part of its behavior management approach shall ensure that the school's policy and procedures on the use of the time out room are developed and implemented consistent with this subdivision, including the physical and monitoring requirements, parental rights and IEP requirements for students with disabilities.

(2) A student's IEP shall specify when a behavioral intervention plan includes the use of a time out room for a student with a disability, including the maximum amount of time a student will need to be in a time out room as a behavioral consequence as determined on an individual basis in consideration of the student's age and individual needs.

(3) Except for emergency interventions, the use of a time out room shall only be used in conjunction with a behavioral intervention plan that is designed to teach and reinforce alternative appropriate behaviors.

(4) Parents shall be informed prior to the initiation of a behavioral intervention plan which will incorporate the use of a time out room. Upon request, parents must be shown the physical space that will be used as a time out room.

(5) The physical space used as a time out room shall provide a means for continuous visual and auditory monitoring of the student. The room shall be of adequate width, length and height to allow the student to move about and recline comfortably. Wall and floor coverings should be designed to prevent injury to the student and there shall be adequate lighting and ventilation. The temperature of the room shall be within the normal comfort range and consistent with the rest of the building. The room shall be clean and free of objects and fixtures that could be potentially dangerous to a student and shall meet all local fire and safety codes.

(6) The time out room shall be unlocked and the door must be able to be opened from the inside. The use of locked rooms or spaces for purposes of time out or emergency interventions is prohibited.

(7) 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.

(8) The school shall establish and implement procedures to document the use of the time out room, including information to monitor the effectiveness of the use of the time out room to decrease specified behaviors.

(9) For an education program operated pursuant to section 112 of the Education Law and Part 116 of this Title, if a provision of this section relating to use of time out rooms conflicts with the rules of the respective State agency operating such program, the rules of such State agency shall prevail and the conflicting provisions of this section shall not apply.

(d) Emergency use of physical restraints.

(1) The use of physical force to restrain a student from engaging in behaviors shall not be used as a substitute for systematic behavioral interventions that are designed to change, replace, modify or eliminate a targeted behavior.

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

(3) Emergency use of physical restraints shall be used only when no other methods of controlling the student's behaviors would be effective.

(4) For an education program operated pursuant to section 112 of the Education Law and Part 116 of this Title, if a provision of this section relating to the emergency use of physical restraints conflicts with the rules of the respective State agency operating such program, the rules of such State agency shall prevail and the conflicting provision of this section shall not apply.

(e) Child-specific exception to use aversive behavioral interventions to reduce or modify student behaviors.

(1) (i) Effective on or after October 1, 2006, whenever a CSE or CPSE is considering whether a child-specific exception to the prohibition of the use of aversive

behavioral interventions set forth in section 19.5(b) of this Title is warranted, the school district shall submit an application to the commissioner.

(ii) For any student with an IEP in effect prior to October 1, 2006 that includes the use of aversive behavioral interventions, such application shall be submitted prior to the next scheduled review of the student's IEP, but not later than October 1, 2006.

(2) The application shall be in a form prescribed by the commissioner. The commissioner shall refer the application to an independent panel of experts appointed by the commissioner or commissioner's designee. The panel shall be comprised of three professionals with appropriate clinical and behavioral expertise to make such determinations.

(3) The panel shall review the written application; the student's IEP; the student's diagnosis(es); the student's functional behavioral assessment; any proposed, current and/or prior behavioral intervention plans for the student, including documentation of the implementation and progress monitoring of the effectiveness of such plans; and other relevant individual evaluations and medical information that allow for an assessment of the student's cognitive and adaptive abilities and general health status, including any information provided by the student's parent.

(4) The panel's recommendation to the CSE or CPSE as to whether a child-specific exception is warranted shall be based on the professional judgment of the panel that:

(i) the student is displaying self-injurious or aggressive behaviors that threaten the physical well being of the student or that of others and a full range of evidence-based positive behavioral interventions have been consistently employed over an appropriate period of time and have failed to result in sufficient improvement of a student's behavior; or

(ii) the student's self-injurious or aggressive behaviors are of such severity as to pose significant health and safety concerns that warrant the use of aversive behavioral interventions to effect rapid suppression of the behavior and a range of nonaversive prevention strategies have been employed and have failed to provide a sufficient level of safety.

(5) The panel shall notify the school district and the commissioner of its recommendation as to whether a child-specific exception is warranted and the reasons therefor. For applications received pursuant to subparagraph (i) of paragraph (1) of this subdivision, the panel shall provide such notice within 15 business days of receipt of an application.

(6) The CSE or CPSE shall, based on its consideration of the recommendation of the panel, determine whether the student's IEP shall include a child-specific exception allowing the use of aversive behavioral interventions. The school district shall notify the commissioner when a child-specific exception has been included in the student's IEP.

(7) Any IEP providing for a child-specific exception allowing the use of aversive behavioral interventions shall identify the specific:

(i) targeted behavior(s);

(ii) aversive behavioral intervention(s) to be used to address the behavior(s);

and

(iii) aversive conditioning device(s) where the aversive behavioral intervention(s) includes the use of such device(s).

(8) Nothing in this section shall authorize the use of aversive behavioral interventions without the informed written consent of the student's parent.

(9) Any such child-specific exception shall be in effect only during the school year for which such IEP applies. If the student's IEP is amended, or a subsequent IEP is adopted, that no longer permits the use of aversive behavioral interventions, the school district need not notify the panel or the commissioner.

(10) For an education program operated pursuant to section 112 of the Education Law and Part 116 of this Title, if a provision of this section relating to the use of aversive behavioral interventions conflicts with the rules of the respective State agency operating such program, the rules of such State agency shall prevail and the conflicting provision of this section shall not apply.

(11) Coordination with licensing agencies. Nothing in this section shall authorize a school or agency to provide aversive behavioral interventions that are otherwise prohibited by the State agency licensing such program.

(f) Program standards for the use of aversive behavioral interventions.

(1) Applicability. (i) The requirements in this subdivision shall apply to a public school, BOCES, charter school, approved preschool program, approved private school, State-operated or State-supported school in this State and an approved out-of-State day or residential school.

(ii) For an education program operated pursuant to section 112 of the Education Law and Part 116 of this Title, if a provision of this section relating to the use of aversive behavioral interventions conflicts with the rules of the respective State agency operating such program, the rules of such State agency shall prevail and the conflicting provision of this section shall not apply.

(2) General requirements. Any program that employs the use of aversive behavioral interventions to modify an individual student's behavior as authorized pursuant to subdivision (e) of this section shall comply with the following standards:

(i) The program shall provide for the humane and dignified treatment of the student and for the development of such student's full potential at all times. The program shall promote respect for the student's personal dignity and right to privacy and shall not employ the use of threats of harm, ridicule or humiliation, nor implement behavioral interventions in a manner that shows a lack of respect for basic human needs and rights.

(ii) Aversive behavioral intervention procedures may be used only if such interventions are recommended by the CSE or CPSE consistent with the student's IEP and behavioral intervention plan as determined by the CSE or CPSE.

(iii) Aversive behavioral intervention procedures shall not be the sole or primary intervention used with a student and shall be used in conjunction with other related services, as determined by the CSE or CPSE, such as verbal or other counseling services, speech and language therapy and/or functional communication training.

(iv) Aversive behavioral interventions shall be combined with reinforcement procedures, as individually determined based on an assessment of the student's reinforcement preferences.

(v) Aversive behavioral interventions shall be implemented consistent with peer-reviewed research based practices and shall include individualized procedures for generalization and maintenance of behaviors and for the fading of the use of such aversive behavioral interventions.

(vi) The use of aversive behavioral interventions shall be limited to those self-injurious or aggressive behaviors identified for such interventions on the student's IEP.

(vii) Whenever possible, the use of aversive behavioral interventions shall apply the lowest intensity for the shortest duration and period of time that is effective to treat the problem behavior and employ strategies that increase the effectiveness of mild levels of aversive behavioral interventions. In the event the aversive behavioral intervention fails to result in a suppression or reduction of the behavior over time, alternative procedures shall be considered that do not include increasing the magnitude of the aversive behavioral intervention.

(viii) The use of any aversive conditioning device used to administer an electrical shock or other noxious stimuli to a student to modify undesirable behavioral characteristics shall be limited to devices tested for safety and efficacy and approved for such use by the United States Food and Drug Administration where such approval is required by federal regulation. The magnitude, frequency and duration of any administration of aversive stimulus from such a device must have been shown to be safe and effective in clinical peer-reviewed studies. The use of automated aversive conditioning devices is prohibited.

(ix) No program may use an aversive behavioral intervention on a student while the student is in a physical or mechanical restraint.

(x) Behavioral intervention plans shall be designed and supervised by qualified professionals in accordance with their respective areas of professional competence. 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

(3) Human Rights Committee. (i) Each school that uses aversive behavioral interventions with students shall establish a Human Rights Committee to monitor the

school's behavior intervention program for any student being considered for or receiving aversive behavioral interventions to ensure the protection of legal and human rights of individuals.

(ii) The Human Rights Committee shall be comprised of individuals not employed by the school or agency, which shall include at least one licensed psychologist with appropriate credentials in applied behavior analysis; one licensed physician, physician's assistant or nurse practitioner; one registered dietician or nutritionist; one attorney, law student or paralegal; and one parent or parent advocate. In addition, when the purpose of the Human Rights Committee meeting includes a review of an individual New York State student's program, a representative of the school district or agency placing the student in the program and a representative of the Department shall be invited to participate.

(iii) The Human Rights Committee shall meet at least quarterly to review, monitor and investigate the implementation of students' behavioral intervention plans that include aversive behavioral interventions. A written report on the findings and recommendations of the Human Rights Committee regarding an individual student shall be provided to the CSE or CPSE of the student and to the agency that placed the student in the program.

(4) Supervision and training requirements. 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,

(vi) 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.

(5) Parent consent. Aversive behavioral interventions shall be provided only with the informed written consent of the parent and no parent shall be required by the program to remove the student from the program if he or she refuses consent for an aversive behavioral intervention.

(6) Quality assurance reviews. The program's use of aversive behavioral interventions, including a review of all incident reports relating to such interventions, shall be subject to quality assurance reviews to ensure that practices are clinically sound, supported by proper documentation and consistent with these program standards and the school's policies and procedures as approved by the Department.

(7) Progress monitoring. (i) The program shall provide for ongoing monitoring of student progress, including the collection and review of data and information. Such information shall include reports on the assessment of and strategies used to address any indirect or collateral effects the use of aversive behavioral interventions may be having on the student, including, but not limited to, increases in aggressive or escape behaviors, health-related effects and/or emotional reactions. The program shall submit quarterly written progress reports on the implementation of the student's behavioral intervention program to the CSE or CPSE and to the agency that placed the student in the program.

(ii) A school district that places a student in a program that uses aversive behavioral interventions with such student shall be responsible to ensure that the student's IEP and behavioral intervention plan are being implemented. The CSE or CPSE shall convene at least every six months, or more frequently as needed, to review the student's educational program and placement for any student for whom the CSE or CPSE has recommended the use of aversive behavioral interventions. Such review shall include the review of written progress monitoring and incident reports, at least

annual observations of and, as appropriate, interviews with the student in the program and regular communication with the student's parent.

(8) Policies and procedures. Each school that proposes to use aversive behavioral interventions pursuant to a child-specific exception shall submit its policies and procedures consistent with this subdivision to the Department for approval prior to the use of such interventions.