

## **Summary of Amendments to the Regulations of the Commissioner of Education**

Effective January 16, 2007

### **BEHAVIORAL INTERVENTIONS, INCLUDING THE USE OF AVERSIVE INTERVENTIONS**

#### **Program Standards for Behavioral Interventions**

Sections 200.1, 200.4 and 200.22 of the Regulations of the Commissioner of Education establish standards for assessments of student behaviors; behavioral intervention plans; the use of time out rooms; and use of emergency interventions.

#### **I. Assessment of Student Behaviors**

- Functional behavioral assessments (FBA) must be conducted as required in section 200.4 of the Regulations of the Commissioner of Education relating to procedures for referral, evaluation, individualized education program (IEP) development, placement and review, and section 201.3 of the Regulations of the Commissioner of Education relating to discipline procedures for students with disabilities.
- Section 200.1(r) of the Regulations of the Commissioner of Education defines FBA to mean the process of determining why the student engages in behaviors that impede learning and how the student's behavior relates to the environment. The FBA must be developed consistent with the requirements in section 200.22(a) of the Regulations of the Commissioner of Education relating to assessment of student behaviors and includes, but is not limited to:
  - identification of the problem behavior;
  - definition of the behavior in concrete terms;
  - identification of the contextual factors that contribute to the behavior (including cognitive and affective factors); and
  - formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it.
- The FBA must, 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); and
  - 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 cannot be based solely on the student's history of presenting problem behaviors.
- The FBA must 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) (definition of *functional behavioral assessment*) 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.

## **II. Behavioral Intervention Plans**

- Sections 200.1(mmm) and 201.2(a) of the Regulations of the Commissioner of Education define behavioral intervention plan as 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 that include positive behavioral supports and services to address the behavior.
- The Committee on Special Education (CSE) or Committee on Preschool Special Education (CPSE) must consider the development of a behavioral intervention plan for a student with a disability when:
  - 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;
  - the student's behavior places the student or others at risk of harm or injury;
  - the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or
  - as required pursuant to section 201.3 of the Regulations of the Commissioner of Education relating to discipline procedures for students with disabilities.
- In the case of a student whose behavior impedes his or her learning or that of others, the CSE or CPSE must consider strategies, including positive behavioral interventions and supports and other strategies to address that behavior.
- The IEP must indicate 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.

- A student's need for a behavioral intervention plan must be documented in the IEP, and the behavioral intervention plan must be reviewed at least annually by the CSE or CPSE. However, the behavioral intervention plan does not need to be a component of the student's IEP.
- Unless a child-specific exception for the use of aversive interventions has been provided by the CSE after review by the Panel's recommendation (see page 7), a behavioral intervention plan shall not include the use of aversive interventions.
- The behavioral intervention plan must identify:
  - the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors. Such baseline must, to the extent practicable, include data taken across activities, settings, people and times of the day. The baseline data will be used as a standard to establish performance criteria and against which to evaluate intervention effectiveness;
  - 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
  - a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals.
- The implementation of a student's behavioral intervention plan must 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 in the student's IEP.
- The results of the progress monitoring must be documented and reported to the student's parents and to the CSE or CPSE and must be considered in any determination to revise a student's behavioral intervention plan or IEP.

### **III. Use of Time Out Rooms**

- A time out room is an area for a student to safely deescalate, regain control and prepare to meet expectations to return to his or her education program. If a time out room is to be used, it must be used in conjunction with a behavioral intervention plan in which a student is removed to a supervised area in order to facilitate self-control or when it is necessary to remove a student from a potentially dangerous situation and unanticipated situations that pose an immediate concern for the physical safety of a student or others.

- Each school which uses a time out room as part of its behavior management approach must ensure that the school's policy and procedures on the use of the time out room are developed and implemented consistent with the regulations, including the physical and monitoring requirements, parental rights and IEP requirements for students with disabilities.
- The school's policy and procedures must minimally include:
  - prohibiting placing a student in a locked room or space or in a room where the student cannot be continuously observed and supervised;
  - factors which may precipitate the use of the time out room;
  - time limitations for the use of the time out room;
  - staff training on the policies and procedures related to the use of time out room;
  - data collection to monitor the effectiveness of the use of time out rooms; and
  - information to be provided to parents.
- A student's IEP must 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.
- Except for unanticipated situations that pose an immediate concern for the physical safety of a student or others, the use of a time out room can only be used in conjunction with a behavioral intervention plan that is designed to teach and reinforce alternative appropriate behaviors.
- The school district must inform the student's parents prior to the initiation of a behavioral intervention plan that will incorporate the use of a time out room for a student and must give the parent the opportunity to see the physical space that will be used as a time out room and provide the parent with a copy of the school's policy on the use of time out rooms.

The physical space used as a time out room must meet certain standards.

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

- The time out room must 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.
- Staff must 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.
- The school must 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.
- For an education program operated pursuant to section 112 of the Education Law and Part 116 of this Title (i.e., education programs operated by the Office of Mental Health (OMH), the Office of Mental Retardation and Developmental Disabilities (OMRDD), the Department of Correctional Services (DOCS), and the Office of Children and Family Services (OCFS)), if these regulations relating to use of time out rooms conflict with the rules of the respective State agency operating such program, the rules of such State agency prevail, and the conflicting regulatory standards would not apply.

#### **IV. Emergency Interventions**

- Emergency means a situation in which immediate intervention involving the use of reasonable physical force pursuant to section 19.5(a)(3) of the Rules of the Board of Regents, relating to the prohibition of corporal punishment, is necessary.
- Emergency interventions must be used only in situations in which alternative procedures and methods not involving the use of physical force cannot reasonably be employed.
- Emergency interventions must not be used as a punishment or as a substitute for systematic behavioral interventions that are designed to change, replace, modify or eliminate a targeted behavior.
- Staff who may be called upon to implement emergency interventions must be provided with appropriate training in safe and effective restraint procedures in accordance with sections 100.2(l)(1)(i)(g) (i.e., school conduct and discipline) and 200.15(f)(1) (i.e., procedures for prevention of abuse, maltreatment or neglect of students in residential placements) of the Regulations of the Commissioner of Education, as applicable.
- The school must maintain documentation on the use of emergency interventions for each student, which shall include:
  - the name and date of birth of the student;
  - the setting and the location of the incident;

- the name of the staff or other persons involved;
  - a description of the incident and the emergency intervention used, including duration;
  - a statement as to whether the student has a current behavioral intervention plan; and
  - details of any injuries sustained by the student or others, including staff, as a result of the incident.
- The parent of the student must be notified when an emergency intervention has been used with his/her child. The documentation of emergency interventions must be reviewed by school supervisory personnel and, as necessary, the school nurse or other medical personnel.
  - For an education program operated pursuant to section 112 of the Education Law and Part 116 of this Title (i.e., education programs operated by OMH, OMRDD, DOCS, and OCFS), if these regulations relating to emergency interventions conflict with the rules of the respective State agency operating such program, the rules of such State agency prevail, and the conflicting regulatory standards would not apply.

## **V. Corporal Punishment and Aversive Interventions**

Section 19.5 of the Rules of the Board of Regents was amended as follows:

- The prohibition of corporal punishment applies to a teacher, administrator, officer, employee or agent of a school district in this State, a board of cooperative educational service (BOCES), a charter school, a 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.
- The use of aversive interventions is prohibited for use in public schools, BOCES, charter schools, approved preschool programs, approved private schools, State-operated or State-supported schools, approved out-of-State day or residential schools or registered nonpublic nursery, kindergarten, elementary or secondary schools in this State (except as outlined in Section B below).
- Aversive interventions are defined to mean an intervention that is intended to induce pain or discomfort to a student for the purpose of eliminating or reducing maladaptive behaviors, including such interventions as:
  - contingent application of noxious, painful, intrusive stimuli or activities;
  - any form of noxious, painful or intrusive spray, inhalant or tastes;
  - contingent food programs that include the denial or delay of the provision of meals 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; or
  - other stimuli or actions similar to the interventions described above.

- Aversive interventions do 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 similar interventions.
- Section 19.5 of the Rules of the Board of Regents, relating to the prohibition of corporal punishment and aversive interventions, allows for a child-specific exception to the prohibition on the use of aversive interventions.

## **VI. Child-specific Exception to the Prohibition on the Use of Aversive Interventions**

- Section 200.22(e) of the Regulations of the Commissioner of Education establishes the procedures for a child-specific exception to use aversive interventions to reduce or modify student behaviors.
  - A child-specific exception to the prohibition of the use of aversive interventions may be granted for a school-age student, in accordance with the procedures outlined in section 200.22(e) of the Regulations of the Commissioner of Education, only during the 2006-07, 2007-08 and 2008-09 school years; provided that a student whose IEP includes the use of aversive interventions as of June 30, 2009 may be granted a child-specific exception in each subsequent school year, unless the IEP is revised to no longer include such exception.
  - No child-specific exception shall be granted for a preschool student.
  - Aversive interventions shall be considered only for students who are displaying self-injurious or aggressive behaviors that threaten the physical well being of the student or that of others.
  - No child-specific exception shall be granted for interventions used as a consequence for behavior intended to induce pain or discomfort that include ice applications, hitting, slapping, pinching, deep muscle squeezes, use of an automated aversive conditioning device, the combined simultaneous use of mechanical restraints and the application of an aversive intervention; withholding of sleep, shelter, bedding, bathroom facilities, denial or unreasonable delays in providing regular meals to the student or other stimuli or actions similar to these interventions at the discretion of the Commissioner.
  - Whenever a CSE is considering whether a child-specific exception to the prohibition of the use of aversive interventions is warranted, the school district must submit an application to the Commissioner in a form prescribed by the Commissioner requesting a review of student specific information by an independent panel of experts.
  - The Commissioner will refer the application to an independent panel of experts appointed by the Commissioner or Commissioner's designee for a recommendation to the CSE as to whether a child-specific exception is warranted. The Panel will be comprised of three professionals with appropriate clinical and behavioral expertise to make such determinations.

- o The Panel will review the written application, the student's IEP, the student's diagnosis(es), the student's functional behavioral assessment (FBA); 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.
- o The Panel will make a recommendation to the student's CSE as to whether a child-specific exception is warranted. The recommendation of the panel shall be based on the professional judgment of the panel that:
  - 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
  - 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 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.
- o The Panel will notify the school district and the Commissioner of its recommendation as to whether a child-specific exception is warranted and the reasons for that recommendation. For students whose current IEP does not include a child-specific exception, the Panel will provide notice within 15 business days of receipt of an application.
- o The CSE must determine, based on its consideration of the recommendation of the Panel, whether the student's IEP will include a child-specific exception allowing the use of aversive interventions.
- o The determination to provide a child-specific exception must be made by the CSE and not by a subcommittee.
- o The CSE must request the participation of the school physician member in such determination.
- o The school district must notify and provide a copy of the student's IEP to the Commissioner when a child-specific exception has been included in the student's IEP.
- o Any IEP providing for a child-specific exception allowing the use of aversive interventions must identify the specific:
  - self injurious and/or aggressive targeted behavior(s);
  - aversive intervention(s) to be used to address the behavior(s); and
  - aversive conditioning device(s) and/or mechanical restraints where the aversive intervention(s) includes the use of such device(s).
- o A parent must provide informed written consent for the use of the aversive interventions.
- o A child-specific exception will be in effect only during the time period the IEP providing such exception is in effect. If the continued use of an aversive intervention for a student is being considered for subsequent IEP(s), the CSE

- must submit an annual application to the Commissioner for each such IEP(s).
- If the student's IEP is amended or a subsequent IEP is adopted to no longer include a child-specific exception, the school district need not notify the Panel but must submit a revised copy of the student's IEP to the Commissioner.
  - For an education program operated by another State agency, if any of the above rules relating to the use of aversive interventions conflicts with the rules of the respective State agency operating the education program, the rules of that State agency shall prevail and the conflicting provision of section 200.22(e) of the Regulations of the Commissioner of Education shall not apply.
  - These rules do not authorize a school or agency to provide aversive interventions that are otherwise prohibited by the State agency licensing a program.
  - Any program providing aversive interventions must meet the standards established in section 200.22(f) of the Regulations of the Commissioner of Education relating to program standards for the use of aversive interventions.

## **VII. Standards for the Use of Aversive Interventions**

### **A. Policies and Procedures**

- Each school that proposes to use aversive interventions pursuant to a child-specific exception must submit its policies and procedures consistent with the above to the Department for approval prior to the use of such interventions.
- Only those schools with policies and procedures approved by the Department on or before June 30, 2007 shall be authorized to use such interventions.
- Any program that employs the use of aversive interventions to modify an individual student's behavior must comply with the following standards:
  - The program shall provide for the humane and dignified treatment of the student. 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.
  - Aversive intervention procedures may be used only if such interventions are recommended by the CSE consistent with the student's IEP and behavioral intervention plan as determined by the CSE.
  - Aversive 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, such as verbal or other counseling services, speech and language therapy and/or functional communication training.

- Aversive interventions shall be combined with reinforcement procedures, as individually determined based on an assessment of the student's reinforcement preferences.
- Aversive 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 interventions.
- The use of aversive interventions shall be limited to those self-injurious or aggressive behaviors identified for such interventions in the student's IEP.
- Whenever possible, the use of aversive 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 interventions.
- In the event the aversive 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 intervention.
- 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.
- No program may combine the simultaneous use on a student of a physical or mechanical restraint device with another aversive intervention.

## **B. Human Rights Committee**

Each school that uses aversive interventions with students with disabilities shall establish a Human Rights Committee to monitor the school's behavioral intervention program for any student being considered for or receiving aversive interventions to ensure the protection of legal and human rights of individuals.

- 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;
  - one parent or parent advocate; and
  - may include not more than two additional individuals selected by the school or agency.

- When the purpose of the Human Rights Committee meeting includes a review of an individual New York State (NYS) student's program, a representative of the school district or agency placing the student in the program and a representative of the NYS Education Department, Office of Vocational and Educational Services for Individuals with Disabilities (VESID) shall be invited to participate.
- The Human Rights Committee shall meet at least quarterly to review, monitor and investigate the implementation of students' behavioral intervention plans that include aversive interventions.
- A written report on the findings and recommendations of the Human Rights Committee regarding an individual student shall be provided to the CSE of the student and to the agency that placed the student in the program.

### **C. Supervision and Training Requirements**

Aversive interventions shall be administered by appropriately licensed professionals or certified special education teachers in accordance with Part 80 (Requirements for Teachers' Certificates and Teaching Practice) and sections 200.6(b) (Continuum of services) and 200.7(b)(6) (Program standards for education programs for students and preschool students with disabilities being educated in private schools and State-operated or State-supported schools) of the Regulations of the Commissioner of Education or under the direct supervision and direct observation of such staff. Training shall be provided on a regular, but at least annual basis, which shall include, but not be limited to, training on:

- safe and therapeutic emergency physical restraint interventions;
- data collection of the frequency, duration and latency of behaviors;
- identification of antecedent behaviors and reinforcing consequences of the behavior;
- approaches to teach alternative skills or behaviors including functional communication training;
- assessment of student preferences for reinforcement;
- assessing and responding to the collateral effects of the use of aversive interventions including, but not limited to, effects on a student's health, increases in aggression, increases in escape behaviors and/or emotional reactions;
- privacy rights of students; and
- documentation and reporting of incidents, including emergency restraints and injuries.

#### **D. Parent Consent**

- Aversive 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 intervention.
- A parent shall be given a copy of the school's policies and procedures on the use of aversive interventions.

#### **E. Quality Assurance Reviews**

The program providing aversive interventions must conduct periodic reviews of all incident reports relating to such interventions 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.

#### **F. Progress Monitoring**

The program using aversive interventions must:

- 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 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; and
- submit quarterly written progress reports on the implementation of the student's behavioral intervention program to the CSE and to the agency that placed the student in the program.

### **VIII. Public School District Responsibilities when Aversive Interventions are Recommended by the CSE**

- A school district that places a student in a program that uses aversive interventions with such student is responsible to ensure that the student's IEP and behavioral intervention plan are being implemented.
- The CSE must 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 has recommended the use of aversive interventions.
- Such review must 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 the concerns of the student's parent.

- A representative of the school district must observe the student at least every six months and, as appropriate, interview the student in the program and communicate regularly with the student's parent and must report the results thereof to the CSE.

**IX. Requirements Relating to Approved Private Schools, State-supported and State-operated Schools**

Section 200.7 of the Regulations of the Commissioner of Education relating to program standards for education programs for students and preschool students with disabilities being educated in private schools and State-operated or State-supported schools was amended as follows:

- A school applying for approval must include with its application a copy of the school's procedures regarding behavioral interventions, including, if applicable, procedures for the use of aversive interventions.
- An approved private school serving school-age students with disabilities, a State-operated school or a State-supported school is prohibited from using aversive interventions, unless provided through a child-specific exception, to reduce or eliminate maladaptive behaviors of students.
- An approved preschool program is prohibited from using aversive interventions with preschool students with disabilities without exception.
- Not later than August 15, 2006, a private school that proposes to use or to continue to use aversive interventions in its program must submit its written policies and procedures on behavioral interventions to the Department. Only those private schools with policies and procedures that are approved pursuant to section 200.22(f)(8) on or before June 30, 2007 shall be authorized to use such interventions with NYS students. Failure to comply with the provisions of this paragraph may result in revocation of approval to accept new admissions of NYS students or termination of private school approval pursuant to section 200.7(b) of the Regulations of the Commissioner of Education.
- 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 interventions to reduce or eliminate maladaptive behaviors of students without a child-specific exception or that an approved private school is using aversive interventions in a manner inconsistent with the standards as established in section 200.22(f) of the Regulations of the Commissioner of Education.