

DISABILITY RIGHTS OHIO

Ohio Disability Rights Law and Policy Center, Inc.

October 22, 2012

Michael Sawyers
Acting Superintendent of Public Instruction
Ohio Department of Education
25 South Front Street
Columbus, Ohio 43215-4183

**RE: Ohio Department of Education's Proposed Policy and Rule (OAC 3301-35-15)
on the Standards Concerning the Implementation of Positive Behavior Intervention
Supports and the Use of Restraint and Seclusion**

Dear Acting Superintendent Sawyers:

The undersigned organizations appreciate the opportunity to submit comments to the Ohio Department of Education (Department) regarding the above-referenced proposed policy and rule. As you may know, the Ohio Disability Rights Law & Policy Center, Inc., or "**Disability Rights Ohio**" (formerly known as Ohio Legal Rights Service) is the federally and state designated Protection and Advocacy system for people with disabilities in the state of Ohio. Disability Rights Ohio's mission is to advocate for the human, civil, and legal rights of people with disabilities in Ohio, including the rights of students with disabilities to be free from abuse, neglect and rights violations and to receive a free and appropriate public education. **People First of Ohio** is a statewide self-advocacy organization run by and for people with developmental and intellectual disabilities. People First of Ohio believes that all people with disabilities should be treated equally and be able to speak up for what they want. **TASH Ohio** is a state chapter of TASH, an international leader in disability advocacy. Founded in 1975, TASH advocates for human rights and inclusion for people with significant disabilities and support needs – those most vulnerable to segregation, abuse, neglect and institutionalization. **NAMI Ohio** (National Alliance on Mental Illness of Ohio) was created in 1982 by a small, dedicated group of family members to provide mutual support, education, and advocacy for individuals and families affected by serious brain disorders. NAMI Ohio's mission is to improve the quality of life and ensure dignity and respect for persons with serious mental illness, and offer support to their families and close friends. **The Arc of Ohio** is a statewide membership association made up of people with intellectual and developmental disabilities, their families, friends, interested citizens and professionals in the disability field. The mission of The Arc of Ohio is to advocate for human rights, personal dignity and community participation of individuals with intellectual and developmental disabilities, through legislative and social action, information and education, local chapter support and family involvement.

We appreciate and acknowledge as a good first-step the Department's recent efforts to develop a policy and rule governing the implementation of positive behavior intervention supports (PBIS)

and the use of seclusion and restraint. However, we find both the policy and rule lacking in substantive areas that should be addressed. The Department's allowance of the use of "seclusion" and "transitional holds" of school children, presents a serious risk of physical and emotional harm, is counter to best practices, and is not supported by any evidence as effective interventions.

Through investigations conducted by Disability Rights Ohio, the *Columbus Dispatch*, and *State Impact Ohio*, we have learned that these potentially lethal interventions are often misused as a device to control and punish students for minor behavioral issues – with many instances appearing to be abusive and traumatizing. Indeed, the use of seclusion and other aversive interventions occurs far more often than the public and the parents of students with disabilities ever realized. The use of seclusion and transitional holds must be prohibited, and school-districts held accountable.

Accordingly, due to the importance of keeping students safe in the school setting, and our great sense of urgency that the state of Ohio develop and implement a comprehensive policy and rule that is consistent with best practices in the field, Disability Rights Ohio consulted with Dr. Janice LeBel, EdD, ABPP, a national expert on these matters. Dr. LeBel is a licensed psychologist, and well known author of many scholarly works on the use of restraint and seclusion in U.S. school settings and positive alternatives. Disability Rights Ohio engaged Dr. LeBel to review the Department's proposed policy and rule, and her feedback informed these comments.ⁱ

The undersigned organizations strongly recommend that the Department adopt and implement a policy and rule that are transparent, enforceable, consistent with best practices, and encourage a spirit and environment of positive culture and learning for both students and staff. Specifically, the policy and rule should include the following provisions:

- Clear definitions of terms and process;
- Prohibition of seclusion, transitional holds, and other dangerous interventions (mechanical and chemical restraint, aversive behavioral interventions, and physical restraint that is life-threatening or when medically or emotionally contraindicated);
- Requirement of training in positive behavior approaches and de-escalation;
- Establishment of notice, reporting, and complaint process requirements;
- Recognition and promotion of positive culture and safe education settings; and
- Accountability and performance standards that enables the Department, school districts, and the public to measure success over time, view unintended outcomes, and request further changes.

In addition to the general comments and recommendations stated above, we have also included more specific comments that reflect our section-by-section analysis of the proposed policy and rule.

Comments on the Ohio Department of Education’s Proposed Policy on Positive Behavior Interventions and Support, and Restraint and Seclusion.

I. Purpose

We appreciate the intent of this section – the critical concept of prevention is important and a necessary way to begin the statement of purpose. However, we do have concerns related to the following language in this section. Section I, Purpose (paragraph 2): *“Every effort should be made to prevent the need for the use of restraint and for the use of seclusion.”* The *“need for”* language is subjective, and imputes restraint and seclusion (RS)-worthy behavior onto the child, and relieves staff of the burden of responsibility for RS use. RS are procedures used by adults based on decisions made by adults – not the child. The child is not the determinant of who will experience RS, when RS will be used, for how long it will be used, and what method of intervention will be implemented. This is complex, multi-factorial decision making that is not driven by the child. We recommend that *“the need for”* language be deleted from the sentence.

The policy should not associate RS uses and RS prevention with the principle of Positive Behavioral Interventions and Support (PBIS). Restraint and seclusion procedures are emergency procedures of last resort and are not part of any “behavioral system to enhance academic and social behavioral outcomes for students.” It is not clear why these concepts and methods are linked in this policy. Moreover, PBIS was established as a school-focused intervention to maximize the academic climate and learning environment. PBIS was not developed as an alternative to RS use, and there is very limited data about the use of PBIS and its impact on RS. These methods have different intents altogether. It is recommended that these constructs be presented separately and not be conceptually linked or commingled. Otherwise, it conveys an incorrect message to staff that RS could be a legitimate component of PBIS, which is not the case.

II. Applicability

In addition to applying to all Ohio school districts, the proposed policy should make it clear that it also applies to all other public school settings in Ohio, including community schools, scholarship providers, and private schools.

III. Requirements

Section III, Requirements (paragraph 1): *“Each school district must develop, publish and implement written policies to govern the use of emergency safety interventions.”* We recommend the phrase *“of last resort”* be added following “interventions” to convey to staff that these procedures are similar to cardiopulmonary resuscitation (CPR), which is used only to save a life and not for routine management of student behavior.

Section III, Requirements (paragraph 3): *“Any school that employs physical restraint or seclusion shall have:”* This list of requirements does not include a method of debriefing with the student, parents, staff and student-witnesses. If this is not functionally included in the A-D requirements, it is strongly recommended that a debriefing or post-event review process be added into these requirements.

IV. Definitions

We object to the use of seclusion and transitional holds as authorized interventions and strongly urge the Department to declare them a prohibited intervention.

It is important to note that youth who have directly experienced such RS interventions have defined these practices as aversive. RS procedures meet the definition of “punishment” and the United Nations and leading advocacy organizations have found that harmful RS practices are consistent with aversive techniques and corporal punishment (LeBel et al., 2012).

V. Positive Behavior Intervention and Supports

Paragraph D, concerning the components of PBIS, should also include a review for medical and trauma contraindications as a requirement for any “preventative assessment.”

VI. Prohibited Practices

Similar to the other prohibited practices, seclusion should also be prohibited. It is already banned for preschool students, and no evidence exists to support its use on other school-age children. The Ohio Department of Developmental Disabilities also prohibits the use of seclusion and defines it as evidence of a system failure.

VII. Restraint

Section VII, Restraint (C): *“Physical restraint may be used only when and in a manner that is age and developmentally appropriate.”* It is not clear who or what authority is the arbiter of “age and developmentally appropriate.” This statement implies that some techniques are age and developmentally reasonable and some are not. This proposition is not supported by evidence nor has it been established in the literature. Moreover, the statement incorrectly implies that age and development are the only two indices of procedure ‘appropriateness.’ There are many other dimensions of consideration for RS use such as: medical history, size, trauma history, location of episode, presence of trained staff, parental consent and /or parental procedure preference. Please note: this statement applies to Section VIII (Seclusion) as well.

Section VII, Restraint (D): There is no reference in the list of tasks for school districts to follow if physical restraint is used to ensure that the student’s parent, guardian, or legally-authorized representative is contacted: a) before a crisis emerges to try to help quell the episode, or b) if restraint is used, or c) to be given the opportunity to participate in the debriefing and be part of a future plan of intervention to prevent recurrence. All of these elements should be included in this section. Please note: this statement applies to Section VIII (Seclusion) as well.

VIII. Seclusion

Seclusion should never be used. However, if such an intervention is used there should be a notice provision included in the list of tasks a school district must follow in order to ensure that that the student's parent, guardian, or legally-authorized representative is contacted: a) before a crisis emerges to try to help quell the episode, or b) if seclusion is used, or c) to be given the opportunity to participate in the debriefing and be part of a future plan of intervention to prevent recurrence.

IX. Training and Professional Development

Section IX, Training and Professional Development: The training requirements are fairly vague and do not appear to be competency-based. There is no reference to the number of hours of training in PBIS, nor is there explicit reference to RS implementation. While training in "*crisis management and de-escalation techniques*" is identified, it is not synonymous with RS use. There is no reference to training in RS prevention and how to avoid the use of these procedures, which is unusual given the stated purpose of the policy is to prevent the use of RS.

This section also references "*The school district shall ensure that an adequate number of personnel in each building are trained in crisis management and de-escalation techniques.*" The term "*adequate number*" is too vague, interpretable, and risks creating an unsafe situation by having too few trained personnel on site. A clear statement should be included such as: "Under no circumstances will there be fewer than four trained staff on-site at any time during school hours."

X. Required Data and Reporting

Section X, Required Data and Reporting: As previously recommended, annual reporting is insufficient for any serious RS reduction and prevention effort. It is impossible for the Department to reasonably monitor or affect any kind of necessary change by reviewing old data. Instead, data should be reviewed monthly.

XI. Monitoring

Section XI, Monitoring: "*Periodic review of this policy shall be the responsibility of the Ohio Department of Education.*" This statement is vague – we recommend that it be amended to include a reasonable time standard, such as "no less than annually," which is typically required in other settings that use RS, such as health care organizations.

Complaints about the use of RS with students with a disability are identified, presumably consistent with the consent order, *Doe v. State of Ohio*. It is not clear why complaints about the use of RS with students without a disability is not outlined or discussed in this policy. We recommend that the policy be amended to include such a provision in this section.

Comments on the Ohio Department of Education’s Proposed Rule: 3301-35-15 Standards Concerning the Implementation of Positive Behavior Intervention Supports and the Use of Restraint and Seclusion.

The following comments are related to paragraph (A) Definitions

The term “physical escort” should be removed from the rule. Unless the definition and process allows for a student to refuse the touch by staff and movement induced by staff, this phrase is euphemistic and actually the beginning of a physical restraint. The Centers for Medicare and Medicaid Services (CMS) and several states define a physical escort as a physical restraint. Imbedding the word “temporary” in the definition further obscures the action and makes it impossible to define or measure. It is then very easy for untrained staff to re-label a violent movement-inducing altercation as simply a physical escort.

The definition for the term “physical restraints” is too vague and uses language that minimizes the intent of the procedure. This term is more accurately described as a “means of physical control that immobilizes or reduces the ability of an individual to move”

The term “prone restraint” should not be defined with “an extended period of time” allowance. The length of time of such an intervention is irrelevant since it is prohibited in Ohio and conveys a message that the technique and position are different than the transitional hold – they are not different.

We object to the use of seclusion as an authorized intervention and strongly urge the Department to declare it a prohibited intervention.

We object to the use of transitional holds and encourage the Department to declare such interventions prohibited. The term “transitional hold” is euphemistically defined and should be understood and described as what it is – a prone physical restraint intended to move to a supine position. If the Department includes this term in the proposed rule, the definition should be anchored with an upper time limit to keep the intent clear. Without a specific time limit, the “minimum amount of time necessary” standard is ambiguous, interpretable, and could easily create a lethal situation. The literature indicates positional asphyxia in the prone position can happen very quickly, often in less than six minutes (Tracy, Donnelly & Stultz, 2002).

The following comments are related to paragraph (B) Implementation of PBIS

The implementation of PBIS must be mandatory and the Department should monitor school districts’ implementation and training efforts.

The following comments are related to paragraph (C) Prohibition on Certain Practices

Similar to corporal punishment and the other prohibited practices described in this paragraph, seclusion should also be prohibited. No compelling evidence exists to support its use on school-age children. Moreover, the Ohio Department of Developmental Disabilities (DoDD) already prohibits the use of seclusion and defines it as evidence of a system failure.

The following comments are related to paragraph (D) Physical restraint

The proposed language in this paragraph presumes that: 1) there is training on how to “safely” implement these lethal procedures, when in fact, no RS procedure follows textbook teaching and no RS episode can be considered “safe”; 2) staff can recognize “minimum amount of time necessary” – this is very subjective language. Staff does not have consistent training or knowledge about what this means or looks like in practice; and 3) that one can safely bring a student under control. This implies that the process can be implemented safely and without harming the student or the staff. It obviates the reality that harm is multi-dimensional – physical and emotional – and nothing can ensure that neither will happen to any participant during the RS process. The Department must make every effort to ensure that school districts and school personnel understand that restraint interventions must not be used as punishment.

The following comments are related to paragraph (E) Seclusion

As stated throughout these comments, we strongly recommend that the Department revise the proposed policy and rule to prohibit the use of seclusion and transitional holds.

The following comments are related to paragraph (F) Reporting and Notification

The Department must vigorously enforce the implementation of the reporting and notification requirements of the proposed rule. This should include holding school personnel and school districts accountable for not providing timely notice of such interventions to parents, guardians, and legal representatives.

We recommend that in a case in which bodily injury or death of a student occurs in conjunction with the use of physical restraint or any other intervention used to control behavior, the school district must notify in writing, within twenty four (24) hours after such injury or death, the following entities: 1) the Ohio Department of Education; 2) local law enforcement; and 3) the local children services board.

The following comments are related to paragraph (G) Training and Professional Development

Training on PBIS must be mandatory, not merely “encouraged” as currently drafted, if the Department is truly committed to changing the culture to one of a positive learning environment.

School districts should not use law enforcement officers to control behavior as a substitute for implementation and training of staff on PBIS and other prevention measures.

The following comments are related to paragraph (H) Policies and Procedures

The proposed rule should be revised to include a deadline by which each school district must adopt such written policies and procedures. We recommend that the Department include a time period of thirty (30) days from the effective date of the policy.

In addition to the written report that is provided after an intervention, the proposed rule should require that each school district establish a policy requiring that after any use of intervention upon a student, a debriefing session must occur. Such debriefing session should occur within five (5) days of the incident, and include any school personnel in the proximity of the student immediately before and after the time of the incident, the student's parent, guardian or legal representative, appropriate administrative staff, and appropriate IEP team members.

The following comments are related to paragraph (I) Monitoring

This paragraph does not identify a review process or method to ensure that every school district develops and implements a policy consistent with the proposed rule. We strongly recommend that the Department amend the proposed rule to identify an oversight body or advisory council to review, suggest changes, approve, and monitor local RS policies.

In addition, the Department should develop a system to 1) review trends and patterns by school district, school building, and student demographics; 2) establish criteria for requesting corrective action and training; and 3) if appropriate, recommend redirection of resources, in order to prevent the use of restraint and increase the safety of students and school personnel.

The following comments are related to paragraph (J) Reporting

This paragraph requires school districts to report their RS use and data to the Department annually and possibly upon request but that is not clear based on the current wording of the proposed rule. More importantly, annual RS reporting is insufficient and does not convey the importance of oversight and regular monitoring of the use of these potentially lethal interventions. It is impossible to ensure quality, safety, or reasonable practice when no regular data is being submitted to a governing body with authority to make changes. This requirement, as written, is hollow and provides no opportunity for course correction for school districts with significant challenges, and functionally renders this policy ineffective. Data oversight is critical to practice change and moving toward RS prevention. Without active, timely data review, no one is paying attention to or accountable for the RS activity in the schools.

We strongly recommend that the Department adopt a reporting and oversight process, which ensures a monthly review of reported data. We also recommend the Department review the reporting and review system administered by DoDD. It is known as the "major and unusual incidence" (MUI) system, and has been recognized as effective by stakeholders and state officials.

In addition, the Department should annually prepare and submit to the State Board of Education and make available to the public, in compliance with the Family Educational Rights and Privacy Act of 1974, a report that includes the total number of incidents of physical restraint imposed on students in the prior academic year. This information should be disaggregated by the total number of incidents in which physical restraint resulted in an injury, resulted in death, and in which the school personnel imposing the restraint were not trained in PBIS. The demographic characteristics of the students upon whom such restraints were imposed should also be included

in the report, such as age, race, ethnicity, gender, disability status, migrant status, English proficiency, and status as economically disadvantaged.

In conclusion, while much work remains on the proposed policy and rule, we are encouraged by the steps taken by the Department on this subject. We strongly encourage the Department to consider the above comments on both the proposed policy and rule. We look forward to working with the Department as it continues with the policy and rule development process. If you have any questions or would like to discuss this matter further, please contact Geoffrey Collver at (614) 466-7264 extension 102 or at gcollver@disabilityrightsohio.org.

Sincerely,

Disability Rights Ohio

<http://www.disabilityrightsohio.org/>

People First of Ohio

<http://www.peoplefirstohio.org/>

TASH Ohio

<http://tash.org/>

NAMI Ohio The Arc of Ohio

<http://www.namiohio.org/>

The Arc of Ohio

<http://www.thearcofohio.org/>

Consultant References:

- LeBel, J., Nunno, M., Mohr, W.K., & O'Halloran, R. (2012). Restraint and seclusion use in U.S. school settings: Recommendations from allied treatment disciplines. *American Journal of Orthopsychiatry*, 82(1), 75–86.
- National Association of State Mental Health Program Directors (NASMHPD) (2012). *National executive training institution: A training curriculum for the reduction of seclusion and restraint*, 10th Edition. Alexandria, VA. National Association of State Mental Health Program Directors, Office of Technical Assistance.
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