

DISABILITY RIGHTS OHIO

Ohio Disability Rights Law and Policy Center, Inc.

March 12, 2013

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

President Debe Terhar and Board Members
Ohio State Board of Education
25 South Front Street
Columbus, Ohio 43215

RE: Public Hearing Comments on Proposed Rule 3301-35-15: Standards for the implementation of positive behavior intervention supports and the use of restraint and seclusion.

Dear Mr. Sawyers, President Terhar, and Members of the Ohio Board of Education:

Good morning and thank you for the opportunity to appear today and provide comments on proposed rule 3301-35-15: Standards for the implementation of positive behavior intervention supports (PBIS) and the use of restraint and seclusion.

My name is Susan Tobin, and I am the Chief Legal Counsel of Disability Rights Ohio (formerly known as Ohio Legal Rights Service). Disability Rights Ohio is the federally and state designated Protection and Advocacy system for people with disabilities in the state of Ohio. Our mission is to protect and advocate for the human, civil, and legal rights of people with disabilities, including the rights of students with disabilities to be free from abuse and to receive a free and appropriate public education as required by the Individuals with Disabilities Education Act (IDEA).

Disability Rights Ohio appreciates your leadership in directing the Ohio Department of Education (ODE) to develop this rule and related policy. Almost one year ago, Disability Rights Ohio accompanied a courageous young woman who is a survivor of abusive seclusion and restraint that occurred when she was a student. She eloquently described to you the trauma she endured at the hands of her local school officials and, with us, urged you to require ODE to establish a rule to abolish the use of seclusion and limit the use of restraint.

Long before that day, and the post-restraint tragic death of Faith Finley, a minor receiving residential treatment at Parmadale in N.E. Ohio, which led to the 2009 Executive Order banning prone restraint, Disability Rights Ohio repeatedly pressed ODE to promulgate rules regulating the use of restraint and seclusion. Ohio has remained one of a handful of states that lack an enforceable rule or law governing the use of restraint and seclusion in the public school systems. At last, these rules provide a critical and much needed step in the right direction.

While the rule as proposed does not fully protect against the potential for human and civil rights violations by, for example, not prohibiting seclusion and not applying to public community schools – we support its passage through the JCARR process and ultimate adoption by the State Board of Education.

As many of you know, 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, our investigations of numerous complaints throughout the State indicate that restraint and seclusion are overwhelmingly and often exclusively used with students with disabilities, particularly those who have emotional disturbances or have been diagnosed with autism. Many victims are also trauma survivors and experience additional trauma during R/S episodes. Significant human rights violations occur every day throughout Ohio's public schools, far more often than the public and the parents of students with disabilities ever realized.

The proposed rule provides important protections for parents and students and also, much needed direction to school officials but, make no mistake, the work is far from completed. Research shows that restraint and seclusion are not effective responses to undesirable behavior and in fact cause physical and emotional harm and increase negative behavior. Restraint can be lethal in as little as three minutes. In healthcare settings, restraint and seclusion are considered treatment failures. In educational settings they should be considered no less than an educational failure.

Moreover, the use of seclusion rooms (sometimes referred to as “scream rooms” or ‘closets’) has been eliminated in many other service delivery settings. To accomplish this achievable goal, ODE must provide leadership, which includes:

- sending a clear and consistent message of the need for a cultural shift away from punishment to an individualized strength-based approach that teaches appropriate behavior;
- requiring school-wide PBIS practices;
- providing training resources and support, and
- exercising critical oversight, monitoring and enforcement procedures.

The need for appropriate training, monitoring and enforcement after the rule is adopted cannot be overstated. Indeed, the January 18, 2012 issue of *Psychology Today* captures reality and illustrates the problem at hand: “At the heart of this issue, many schools lack understanding about autism, why behaviors happen, how behaviors can be communication or sensory related, how calming and verbal de-escalation techniques work and how to modify behavior using positive behavior support. Often, our children cannot speak or communicate well, so they use behaviors as a form of communication to get their needs and wants known. Because school staff does not understand these behaviors as a way for the child to try to communicate, the child is punished and the need goes unmet.”

While some school personnel have complained about the cost of training in alternatives to restraint and seclusion, research shows there are significant costs associated with the use of such dangerous practices. In fact, reduction in the use of R/S saves money in terms of time off, worker's compensation claims, and litigation expenses. In addition to training, support and oversight, ODE's monitoring and enforcement procedures need to provide consequences when children are physically and emotionally, sometimes irreparably, injured.

Disability Rights Ohio is deeply concerned that ODE lacks the capacity to respond to complaints in an appropriate manner. In November, 2012, Disability Rights Ohio filed with ODE's Office for Exceptional Children (OEC), a formal written systemic complaint about the Columbus City Schools' use of restraint and seclusion. We attached to the complaint our investigative report which detailed our review of over 200 incidents of seclusion:

<http://www.disabilityrightsohio.org/sites/default/files/ux/lrs-ccs-invest-report-sept-2012.pdf>.

We consulted with a national expert, Dr. Janice Lebel regarding our findings and the appropriate professional standards of care. We included photographs of the seclusion rooms, which often had a door with only a peephole for observation of the student. One room was a mere 19 square feet, some had padded walls with a drain in the middle of the floor, and some had a foot lock on the outside of the door. Many students were secluded for behaviors that presented no danger; instead, they were secluded for non-compliance with staff requests.

During the course of its investigation OEC reviewed over 1200 incidents of restraint and seclusion but declared in its Letter of Findings (LOF) no violation of any student's rights.

<http://disabilityrightsohio.org/sites/default/files/sites/default/files/u62/Redacted%20LOF%20%2000013628%29.pdf>

The LOF describes incidents lasting almost four hours. Descriptions of incidents that occurred at Columbus' separate facilities (Beatty Park Elementary School, Clearbrook Middle School and Alumcrest High School) are particularly alarming: "In all, approximately 1,140 behavior/incident reports were reviewed from the three separate facilities. Alumcrest High School provided approximately 151 behavior incident reports involving forty-two students. Clearbrook Middle School provided approximately 130 behavior/incident reports involving fifty-one students. Beatty Park Elementary School provided approximately 862 behavior/incident reports involving 113 students." It is simply incomprehensible that students could receive a FAPE in schools that are so out of control and disruptive.

OEC has been quoted as saying that its staff will not second guess school officials. There was no critical look at the quality of services or outcomes; OEC did not evaluate whether students were making progress or instead, were regressing. Moreover, OEC did not interview any parents or students about any of the incidents. OEC's conclusions that students were dangerous were taken at face value, with no assessment of the incidents leading up to the incident and whether R/S could have been prevented.

The failure of OEC to make an independent assessment of the school district's compliance with the Free Appropriate Public Education (FAPE) requirement violates its general supervisory oversight duty under the federal IDEA. We have expressed these concerns to OEC:

http://disabilityrightsohio.org/sites/default/files/sites/default/files/u62/Tobin_response_letter.pdf

OEC recently responded that its investigation was proper and that schools were using PBIS. However, our expert advises that if they are using PBIS, it is improperly implemented. If implemented properly, the high numbers of incidents simply would not exist.

Further, we requested a meeting last month with several OEC staff and we provided them with examples of appropriate training materials that would obviate the use of R/S.

We are deeply concerned that the rules will have no meaning if ODE fails to provide its monitoring staff and school districts with appropriate training and also, if the conclusions reached and precedent set in the Columbus LOF stand. We urge you to review our report, the LOF and our response. After reviewing these documents and the seclusion room pictures, ask yourself whether you would want your child, grandchild, niece or nephew to be subjected to or even witness these practices. School should not hurt. The Columbus LOF cannot stand.

In conclusion, we support the proposed rule but encourage your review and consideration of additional modifications to the rule, and if necessary additional statutory language to improve ODE's training, monitoring, and enforcement capabilities. While we are not opposed to the use of voluntary sensory or calming rooms that do not prevent a child from leaving, we once again request that the use of seclusion rooms be banned in public schools. In the alternative and at a minimum, seclusion should be limited to no more than five minutes. Schools should be required to develop plans to reduce and virtually eliminate R/S. Finally, we believe the authority for requiring community schools to comply with respect to students with disabilities exists now and should be incorporated into these rules.

Thank you for your time and consideration on this important matter. We look forward to working with you and ODE staff on the implementation of this rule, and advancing the rights of students with disabilities to make educational progress commensurate with their abilities and to be free from physical and emotional abuse.