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October 24, 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 legal organizations greatly appreciate the opportunity to submit comments to the Ohio Department of Education (Department) regarding the above-referenced proposed policy and rule.

The Ohio Poverty Law Center (OPLC) is a non-profit law office that pursues statewide policy and systemic advocacy to expand, protect, and enforce the legal rights of low-income Ohioans. Among other things, OPLC seeks to ensure that low-income Ohio children have access to a high quality education and the right to attend school free of discrimination and criminalization and to fight the stigmatization and exploitation of, and discrimination against, low-income people and other vulnerable Ohioans.

Legal Aid of Western Ohio, Inc. (LAWO) is a non-profit regional law firm which provides high quality legal assistance in civil matters to help eligible low-income individuals and groups in western Ohio achieve self reliance, and equal justice and economic opportunity.

The Department's efforts to develop a policy and proposed rule around the implementation and adoption of positive behavior interventions and supports (PBIS) and the use of restraint and seclusion (RS) are a great step forward, and we are thrilled that the Department has taken the steps it has to bring these important issues to the table and develop policies to protect children from physical and psychological harm in our schools. We have some concerns, however, about some of the details set forth in the proposed policy and rule. We are concerned that the proposed pairing of RS with PBIS unnecessarily and somewhat illogically links the two subjects and suggests that they go together or are complementary policy changes. We feel that limitations on the use of restraint and

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seclusion, which are responses to extreme conduct, should be separated from policies governing the implementation of school-wide PBIS, which is a preventive and positive discipline and behavior system that is designed to create and foster safe, supportive, positive school climates and respond to misbehavior with interventions and consequences aimed at understanding and addressing the cause of misbehavior, resolving conflicts, meeting students' needs, and keeping students in school and learning. To be fair to both subjects, we feel that policies governing both should be introduced and evaluated separately.

Additionally, we feel that the proposed language must prohibit both seclusion and "transitional holds," as these are dangerous to the health and safety of children, counter to best practices, and unsupported by any evidence as effective interventions or responses. We strongly recommend that the Department adopt and implement a policy and a rule on RS that are transparent, enforceable, consistent with best practices, and encourage a spirit and environment of positive culture and learning for both students and staff.

Below please find our specific comments and recommendations.

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

I. Purpose

We support the Department's language here focusing on prevention as a primary means for addressing both PBIS and RS, but we reiterate our strong recommendation that the Department develop separate policies for RS and PBIS. RS are emergency procedures of last resort and are not part of a "behavioral system. . . used to create a learning environment that promotes the use of evidence based behavioral interventions".

Moreover, RS are procedures used by adults based on decisions made by adults – not the child. The child does not determine 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-factored decision making process which is not driven by the child. Thus, we recommend that the Department eliminate the phrase "need for" from the sentence *"Every effort should be made to prevent the need for the use of restraint and for the use of seclusion."*

We also strongly recommend that the department change the phrase in paragraph 3 "immediate threat of physical harm" to something more specific – we recommend "immediate threat of serious bodily injury." We have seen far too many cases where the subjectivity of the phrase "bodily harm" is used against students to cause them harm. For example, we've seen a case where the adult in the room characterized the throwing of an eraser as an "immediate threat of physical harm." We must ensure that the use of RS is limited *only* to those situations where there is no other possible means for protecting the bodily safety of those involved.

Finally, we recommend adding a statement in the Purpose section clarifying that schools must not replace RS with other aversive interventions that harm students, such as calling the police and

requesting arrest in situations when, prior to the policy, they might have used RS procedures to subdue the student.

II. Applicability

We recommend that the proposed policy language clarify that not only does the policy apply to all Ohio school districts, but also to all community schools, scholarship providers, and private schools.

III. Requirements

We recommend that the phrase “of last resort” be added following “interventions” in the first sentence in this section to convey to staff these procedures are similar to cardiopulmonary resuscitation (CPR), which is used only to save a life and not for routine management of student behavior.

We also recommend that the Department add to the list of requirements for schools that employ RS, a requirement that schools have in place a method of debriefing with the student, parents, staff, and student witnesses after every incident of RS, including the requirement for immediate notification to the parent as soon as the incident occurs.

IV. Definitions (these comments also apply to the definitions included in the proposed rule, 3301-35-15(A))

We believe that the definition of **Functional Behavior Assessment (FBA)** could lead to confusion. The definition of an FBA as a “collaborative problem-solving process” could lead to an understanding that an FBA is not an actual evaluative tool for students with disabilities requiring extensive data review, observations, a deep analysis by qualified individuals of the antecedents and functions of behavior, followed by the development of hypothesis related to these functions. The definition could also lead to confusion about whether a parent’s consent will be required for an FBA and whether a right to an Independent Educational Evaluation is triggered. See OSEP Guidance; Questions and Answers on Discipline Procedures revised June 2009:

Question E-4: Is consent required to do an FBA for a child?

Answer: Yes. An FBA is generally understood to be an individualized evaluation of a child in accordance with 34 CFR §§300.301 through 300.311 to assist in determining whether the child is, or continues to be, a child with a disability. The FBA process is frequently used to determine the nature and extent of the special education and related services that the child needs, including the need for a BIP. As with other individualized evaluation procedures, and consistent with 34 CFR §300.300(a) and (c), parental consent is required for an FBA to be conducted as part of the initial evaluation or a reevaluation.

Question E-5: If a parent disagrees with the results of an FBA, may the parent obtain an independent educational evaluation (IEE) at public expense?

Answer: Yes. The parent of a child with a disability has the right to request an IEE of the child, under 34 CFR §300.502, if the parent disagrees with an evaluation obtained by the public agency. However, the parent's right to an IEE at public expense is subject to certain conditions, including the LEA's option to request a due process hearing to show that its evaluation is appropriate. *See* 34 CFR §300.502(b)(2) through (b)(5). The Department has clarified previously that an FBA that was not identified as an initial evaluation, was not included as part of the required triennial reevaluation, or was not done in response to a disciplinary removal, would nonetheless be considered a reevaluation or part of a reevaluation under Part B because it was an individualized evaluation conducted in order to develop an appropriate IEP for the child. Therefore, a parent who disagrees with an FBA that is conducted in order to develop an appropriate IEP also is entitled to request an IEE. Subject to the conditions in 34 CFR §300.502(b)(2) through (b)(5), the IEE of the child will be at public expense.

Because FBAs are part of a special education evaluative process triggering parental consent and the right to an independent education evaluation, we feel that this definition needs to be clarified and expanded upon. We would like to see the definition clearly convey, as well, that FBAs are a tool that must be employed not just for special education-identified children who have disability-related behaviors, but for all children who display negative or problematic behaviors in school.

The definition of **Parent** does not appear to adequately clarify that foster parents for children who are not identified as eligible for special education services are parents for the purposes of the policy. Without that clarification (perhaps adding the term foster parents to subsection C), foster children who do not have a surrogate parent pursuant to OAC 3301-51-05(E) might be left without a parent authorized to act on their behalf.

The term **Physical escort** should either be removed from the rule and policy entirely or included as a physical restraint and prohibited. 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 definition also fails to clarify the number of adults that might be involved in this physical escort and the extent of physical contact which would be permitted under this classification. This could lead to subjective interpretation which may result in actual restraint.

The definition of the term **Physical Restraint** 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 phrase “for an extended period of time” should be removed from the definition of **Prone Restraint**. The length of time for such an intervention is irrelevant since it is prohibited 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 believe that the term **Transitional Hold** should be included as part of the definition of Prone Restraint and must be absolutely prohibited in the policy and the rule. If it must be included, we recommend that the Department clarify an upper time limit for its use. Without a specific time limit, the “brief physical positioning” language is ambiguous and could easily create a lethal situation, as positional asphyxia in the prone position can happen very quickly.

V. Positive Behavior Intervention and Supports

As an initial matter, we suggest that the Department change the singular word “Intervention” in the title of the proposed policy section to the plural “Interventions,” as it is used elsewhere in the document.

We recommend that the word “should” in the second sentence of section A be replaced with the word “shall,” to better reflect and conform with the mandatory language used elsewhere in the policy. Alternatively, we recommend clarifying that, if school districts do not implement PBIS, they *must* implement another school-wide, evidence-based preventive and positive approach to discipline, such as restorative practices.

In section D, subsection 2, we recommend that the Department add language clarifying that all students displaying behaviors which affect their learning or the learning of others, not just students who have been identified as needing special education services, should have a functional behavior assessment. Additionally, we recommend that this section include a review for medical and trauma contraindications as a requirement for any preventative assessment in subsection 1b.

In section D, subsection 3, we recommend adding language that clarifies that the PBIS system implemented not only support students’ efforts to self-manage behavior, but also proactively teaches replacement behaviors. We cannot assume that students receive appropriate input from parents, teachers, and other adults about appropriate, positive behaviors they should be engaging in. For this reason, one of the central tenets of PBIS is that schools must be proactive in teaching such behavior to students. The onus must not be solely on the student to recognize and self-manage his or her behavior. It is not enough to teach a student to self-manage – schools must also teach students what to do in place of the undesirable behavior.

VI. Prohibited Practices

We believe, as mentioned above, the definition of prone restraint should include transitional holds; thus, this prohibition should include a prohibition on the use of transitional holds.

It is not clear to use why corporal punishment is included here, since it is already prohibited by RC 3319.41. If it is to be included, however, we recommend including a definition.

We recommend explicitly prohibiting the use of RS of preschool students in any situation, rather than limiting the prohibition to the standards set forth in OAC 3301-37-10(D).

In section F, subsection 2, we recommend that the language be changed to simply say “Pinning down.” We recommend deleting the qualifier “with knees to torso, head, and/or neck.” We have seen situations in which adults have, for example, sat on small children or used other methods to “pin them down.” This type of unnecessarily aggressive intervention should be prohibited.

In section F, subsection 4 of this section, we recommend something similar: delete the language “by hair or ear.” We have seen situations where children were dragged or lifted by, for example, their wrists and ankles or elbows and legs; such dragging or lifting should also be prohibited because it poses a danger of injury and trauma to the child.

Finally, we strongly recommend that seclusion be added to the list of prohibited practices. No evidence exists to support its use on children of any age. The Ohio Department of Developmental Disabilities prohibits the use of seclusion and defines it as evidence of a system failure.

VII. Restraint

We recommend deleting section B, because we recommend prohibiting transitional holds as another form of prone restraint.

In section C, we again recommend removing the phrase “risk of physical harm” and replacing it with “risk of serious bodily injury.” The phrase “physical harm” is too vague and open to a wide range of subjective interpretations. Also in this section, we recommend deleting the phrase “in a manner that is age and developmentally appropriate” and replacing it with language that takes into account the wide range of factors that should be considered in determining whether restraint is appropriate: medical history, size, trauma history, location of episode, presence of trained staff, parental consent and /or parental procedure preference.

In section D, subsection 1, there is no definition of “appropriately trained.” The Department must set clear standards for the type and duration of training necessary. In subsection 4 of this section, we again recommend deleting the phrase “physical harm to self or

others” and replacing it with “serious bodily injury to self or others.” Also, we recommend adding to section D notice to the student’s parent, guardian, or legally-authorized representative:

- before a crisis emerges to try to help quell the episode, or,
- if restraint is used, or
- to provide the opportunity to participate in the debriefing and be part of a future plan of intervention to prevent recurrence.

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, if seclusion is used, to ensure that the student’s parent, guardian, or legally-authorized representative is contacted:

- before a crisis emerges to try to help quell the episode, or,
- if seclusion is used, or
- to provide the opportunity to participate in the debriefing and be part of a future plan of intervention to prevent recurrence.

IX. Training and Professional Development

The training recommendations for the implementation of PBIS should include:

The training, resources, and monitoring capabilities necessary to ensure implementation of positive discipline practices and policies, including:

- Ensuring that staff at the district level responsible for overseeing design and implementation of the positive discipline policies are trained in positive discipline models, culturally responsive approaches to education and discipline, youth development and other relevant methods.
- Requiring that school staff be trained in classroom management and positive approaches to discipline.
- Creating a Code of Conduct or Code of Ethics for teachers and other staff to promote positive interactions between teachers, students, parents, staff and administrators.
- Providing technical assistance for schools to implement and monitor positive approaches.
- Working to provide families and youth training on integrating positive approaches to discipline in school with positive discipline approaches at home and in community institutions.

Additionally, we recommend that training requirements for implementation of PBIS include a minimum number of required hours of training per adult staff person needed to achieve competency in the area.

We also recommend specifying the type and duration of training necessary for staff involved in RS implementation. Training in “crisis management and de-escalation techniques” makes sense, but is not synonymous with the appropriate use of RS. Training in these areas may

not adequately prepare a professional to safely and appropriately restrain or seclude a child. Specific annual or more frequent training and certification requirements should be spelled out here.

The term “adequate number of personnel” in section B also strikes us as too vague. While there may be variation in the actual number that is accurate, we recommend setting a minimum number, 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

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, we recommend that data be reviewed monthly.

We also recommend that this section spell out what information must be kept and reported, to avoid significant variation in the usefulness of the data collected and to ensure appropriate accountability. For example, school districts must report, at a minimum:

- The time, date, and place of the RS incident.
- A detailed description of what happened before the RS incident.
- A description of de-escalation and intervention techniques utilized by whom prior to the use of RS.
- What RS techniques were used and how long they were used.
- Who was involved and/or witnessed the event – adults and students (not names, but number of each, age, title, relationship to the incident).
- Explanation regarding why RS was used.
- A description of what happened after the technique was used.
- When notification was sent to the parent.
- Description of any police involvement before, during or after the RS event.

XI. Monitoring

The term “periodic review” in paragraph 1 is vague and should be changed to specify a minimum time standard for review of the policy. We recommend review no less than annually, which is the standard review period for RS procedures in other settings, such as health care organizations.

We recommend that this policy specifically reference the administrative complaint process available to parents through the consent order in *Doe v. State of Ohio*.

Comments on Proposed Rule: 3301-35-15 Standards concerning the implementation of positive behavior interventions and supports and the use of restraint and seclusion

- (A) See our comments on the definitions proposed in section IV of the policy, above.

- (B) We recommend that the implementation of PBIS be mandatory, or that the Department allow for alternative systems of school-wide preventive and positive discipline policies, such as restorative practices. We also recommend that the Department be charged with monitoring districts' implementation and training efforts.
- (C) Seclusion should be prohibited in this section, and we incorporate all of our suggestions regarding section VI, above.
- (D) 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 the understanding that restraint interventions are not used as punishment. Moreover, the Department must prohibit transitional holds, as they are another form of prone restraint.
- (E) As stated throughout these comments, we strongly urge that the Department revise the proposed policy and rule to prohibit the use of seclusion.
- (F) 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 failure to provide timely notice of interventions to parents, guardians, and legal representatives.

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.

- (G) Training on positive behavior intervention and supports must be mandatory, not merely "encouraged" as currently drafted, if the Department is truly committed to changing school cultures to be positive and preventive.

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.

- (H) The proposed rule should be revised to include a time deadline by which each school-district must adopt such written policies and procedures. We recommend the Department include a time period of 90 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 identified by the school and parent.

- (I) 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 recommended that the Department amend the proposed rule to identify an oversight body or advisory council to review and approve local RS policies.

In addition, the Department should develop a system for reviewing trends and patterns by school district, school building, and student demographics, and establish criteria for requesting corrective action, training, and, if appropriate, redirection of resources to prevent the use of restraint and to increase the safety of students and school personnel.

- (J) This paragraph requires school districts to report their RS use/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 change. 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 the Department adopt a reporting and oversight process that ensures a monthly review of reported data. Additionally, 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.

We greatly appreciate the opportunity to provide these comments to the Department. We are pleased that the Department is taking the initiative to provide some standards for the implementation of PBIS and the use of RS, and we hope that you will strongly consider the above comments. We look forward to working with the Department as it continues through the rulemaking and policymaking process. Of course, if you have questions or need clarification on any point made in these comments, please do not hesitate to contact Sarah Biehl at sbiehl@ohiopovertylaw.org or (614) 824-2504 or Kate Mitchell at lkmitchell@lawolaw.org or (419) 930-2383.

Best Regards,

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