



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

THE ASSISTANT SECRETARY

October 19, 2006

Barbara Trader
Executive Director,
TASH
29 W Susquehanna Avenue Suite
210 Baltimore, MD 21204

Dear Director Trader:

Thank you for your August 23, 2006 electronic correspondence expressing concern regarding the New York State Department of Vocational and Educational Services for Individuals with Disabilities' preparation to implement State regulations on Aversive Behavioral Intervention (Regulations). It is our understanding that the other organizations listed in the electronic transmission (The Self-Advocacy Association of New York State, Inc; The RespectABILITY Law Center; The Family Alliance to Stop Abuse and Neglect; The Public Interest Law Center of Pennsylvania; and The Advocacy Institute) also object to implementation of these Regulations.

As you are aware, the Individuals with Disabilities Education Act (IDEA or Act) requires that in order for a State to be eligible to receive funds under Part B of the Act, the State must, among other conditions, ensure that a free appropriate public education (FAPE) is made available in the State to all children with specified disabilities in mandated age ranges. 20 U.S.C. 1412 (a)(1). The term "FAPE" includes, among other elements, special education and related services, provided at no cost to parents, in conformity with an individualized education program (IEP). 20 U.S.C. 1401(9). The Act provides a strong preference for educating children with disabilities in regular classes with appropriate aids and supports. Specifically, the Act provides that States must have in effect policies and procedures ensuring that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with nondisabled children, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C 1412 (a)(5)(A).

The final decision on the provision of special education and related services for any child with a disability rests with the IEP Team, including the child's parents. IDEA and the final Part B implementing regulations' require that the IEP Team consider, in the case of a child whose behavior impedes the child's learning or that of others, the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 20 U.S.C. 1414(d)(3)(B)(i) and (C), and 34 CFR §300.324(a)(2)(i).¹ Thus, while the Act

¹ Final regulations implementing the Individuals with Disabilities Education Improvement Act of 2004 will take effect on October 13, 2006. 71 Fed.Reg. 46,540 (August 14, 2006) (to be codified at 34 CFR Part 300).

requires that an IEP Team consider the use of positive behavioral interventions and supports, and as such, emphasizes and encourages the use of such supports, it does not contain a flat prohibition on the use of aversive behavioral interventions. Whether to allow IEP Teams to consider the use of aversive behavioral interventions is a decision left to each State.

Accordingly, based on the information we have reviewed, we do not believe the New York Regulations conflict with IDEA, so long as the requirements of the Act and its regulations are met. Consistent with Federal-State relations and authority, OSEP cannot provide an opinion on whether the State's regulations are consistent with New York civil and criminal laws and the New York Constitution.

This response regarding a policy, question, or interpretation under Part B of IDEA is provided as informal guidance, is not legally binding, is issued in compliance with the requirements of 5 U.S.C. 553, and represents the interpretation by the Department of Education of the applicable statutory or regulatory requirements in the context of the specific facts presented.

Sincerely,



John H. Hager

/s/

John H. Hager

CC: Dr. Rebecca Cort