



DISABILITY RIGHTS NEW YORK

New York's Protection & Advocacy System and Client Assistance Program

INVESTIGATORY REPORT

COMPLAINTS OF ABUSE AND NEGLECT AT BLUE CREEK ELEMENTARY SCHOOL IN THE NORTH COLONIE CENTRAL SCHOOL DISTRICT: FINDINGS AND CORRECTIVE ACTION

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EXECUTIVE SUMMARY

Disability Rights New York (“DRNY”) is the designated federal Protection and Advocacy System (“P&A”)¹ for individuals with disabilities in New York State, as set forth in Executive Law §558(b). One of DRNY’s core functions is to investigate allegations of abuse and neglect of persons with disabilities. DRNY has authority under federal and state law to thoroughly investigate allegations of abuse or neglect occurring in any public or private entity that provides care, services, treatment or habilitation to individuals with disabilities. See 42 U.S.C. § 15043(a) (2) (B); 45 C.F.R. § 1386.27; N.Y. Exec. Law § 558(b) (ii)-(iii).²

Pursuant to its statutory authority, DRNY commenced an investigation of allegations of abuse and neglect at Blue Creek Elementary School (“Blue Creek School”) in the North Colonie Central School District (“District”). DRNY’s investigation was seriously delayed by ongoing federal litigation between the District and DRNY regarding access to Blue Creek School and the records of students with disabilities. This report enumerates DRNY’s investigatory findings and the efforts made by the District to address the concerns identified by DRNY.

Based on the records of five elementary students with disabilities and information obtained through the issuance of a Temporary Restraining Order against the District in 2014, DRNY has found that:

1. The District used physical restraints repeatedly on three students as a substitute for systematic behavioral interventions designed to change, replace, modify or eliminate a targeted behavior in violation of 8 N.Y.C.R.R. § 200.22 (d)(1)(ii).
2. The District failed to conduct timely Functional Behavior Assessments (FBAs) for students whose behavior placed them or other students at risk of harm or injury, as required by 8 N.Y.C.R.R. §§ 200.4(b)(1)(v), 200.22(a), and 200.22(b)(1)(ii).
3. The District failed to timely create and implement systematic Behavioral Intervention Plans (BIPs) designed to change, replace, modify or eliminate targeted behavior, as required by 8 N.Y.C.R.R. §§ 200.1(mmm), 200.22(b), and 200.22(d)(2)(ii).
4. The District consistently failed to identify and document “physical escorts” as “emergency interventions” in violation of 8 N.Y.C.R.R. § 200.22.

¹ DRNY receives funding from the U.S. Department of Health and Human Services (HHS), Administration on Intellectual and Developmental Disabilities (AIDD) to implement the Developmental Disabilities Assistance and Bill of Rights Act of 2000. This Report and its content and conclusions are those of DRNY and should not be construed as the official position or policy of, nor should any endorsements be inferred by, AIDD, HHS, or the U.S. Government.

² Appendix A details DRNY’s authority under the relevant P&A statutes and regulations.

5. The forms used by the District to report restraints at the time the complaints were received by DRNY did not include information required by regulation, including whether the student had a current behavioral intervention plan and the duration of the incident, in violation of 8 N.Y.C.R.R. § 200.22(d)(4).
6. A student was restrained in a non-emergency situation.
7. District staff who physically restrained students were not trained in accordance with the District's restraint training protocol.
8. The District failed to develop and implement policies, individualized plans and staff necessary to prevent and address student elopement from the school building and grounds.
9. The District failed to provide a safe and appropriate physical environment to address the behavioral and learning needs of students in the Academic Skills Class for students in grades four through six ("ASC 4-6 class").
10. An unsafe bathroom adjacent to the ASC classroom was used for behavioral intervention.
11. Blue Creek School and District administrators failed to respond to safety and other concerns from school staff related to the use of a bathroom as a "quiet room", "break room", or place of instruction for students in the ASC 4-6 class.
12. The District initially obstructed DRNY's investigation by denying DRNY access to Blue Creek School, students with disabilities and student records in violation of 42 U.S.C. § 10543(a)(2)(H) and (1), 42 U.S.C. § 10805(a)(3) and (4), 42 U.S.C. § 10806, 45 C.F.R. § 1386.25, 1386.27 and 42 C.F.R. § 51.42. After a temporary restraining order was issued requiring the District to allow DRNY access, the District complied.

Consequently, DRNY concludes that students with disabilities attending Blue Creek School were harmed and remained at continued risk of harm absent significant corrective actions by the District. As detailed in the Report, the District has taken substantial steps to address DRNY's findings. DRNY intends to monitor the rights and safety of the students to insure that corrective actions remain in place.

BACKGROUND

DRNY received multiple complaints alleging abuse and neglect of students with disabilities participating in the ASC 4-6 class and in the District's Academic Skills Class for students in

grades one through three (“ASC 1-3”) in the Blue Creek School.³ DRNY conducted this investigation pursuant to its statutory and regulatory authority and obligations as the P&A for persons with disabilities in New York State.

From April 22, 2014, through June 9, 2014, DRNY received several complaints of abuse and neglect relating to students with disabilities at the Blue Creek School. DRNY requested access to all areas and locations throughout the school available to students in the ASC 4-6 class. The District denied the request, alleging that DRNY did not have authority to access Blue Creek School. DRNY then sought and obtained a Temporary Restraining Order in federal court authorizing access to Blue Creek School to investigate the allegations received. DRNY staff visited Blue Creek School on June 23, 24 and 26, 2014. Students were present only on June 23 and 24 for half-days since it was the last week of the school year. Several District administrators were present and cooperated during DRNY’s visits. DRNY visited the ASC 4-6 and ASC 1-3 classrooms as well as other locations within the school building. DRNY also had unaccompanied access to school staff and students during these visits. In July 2014, DRNY requested records pursuant to federal law of four specific students in the ASC 4-6 class during the 2013-2014 school year.⁴ The District refused to provide any records pursuant to DRNY’s P&A authority. Instead, the District only provided DRNY with the records available pursuant to the Family Educational Records Protection Act. On March 21, 2016, the federal court upheld DRNY’s authority to access Blue Creek School and obtain student records. *Disability Rights New York v. N. Colonie Bd. of Educ.*, No. 1:14-CV-0744, 2016 WL 1122055 (N.D.N.Y. Mar. 21, 2016).

In August 2016, DRNY provided the District with a Draft Report of its findings and recommendations (hereinafter “Draft Report”). The District willingly accepted DRNY’s invitation to provide a written response to the Draft Report as well as documentation to supplement DRNY’s investigation, dispute DRNY’s findings, and demonstrate the corrective actions the District has implemented since June 2013. After diligent review of the District’s responses dated November 1, 2016 and December 2, 2016, DRNY amended the Draft Report in accordance with the evidence offered by the District, and now issues this Investigatory Report.

COMPLAINTS RECEIVED BY DRNY

From April 2014 through March 2015, DRNY received complaints of abuse and neglect of students with disabilities at the Blue Creek School from parents, legal guardians, former and then current Blue Creek School staff, and others. These complaints include but are not limited to the following allegations:

³ The definitions of abuse and neglect under the P&A system are set forth in Appendix B.

⁴ 42 U.S.C. § 15043(a) (2) (I) and 45 C.F.R. § 1386.27.

- The District repeatedly subjected students with disabilities to physical restraints without having conducted FBAs and developing BIPs. The restraints were imposed on students in the ASC 4-6 class, ASC 1-3 class, a regular education class in the Boght Hills Elementary School, and a summer special education class;
- The District failed to notify parents and complete required documentation when students were physically restrained in a “physical escort;”⁶
- The District permitted untrained staff to imposed physical restraints;
- The District failed to prevent student elopement from the school building and grounds into a busy traffic area;
- The District authorized the use of a bathroom with a non-windowed door and an internal locking system as an alternate instructional room, a quiet room, and a time out room for students in the ASC 4-6 class;
- The District failed to provide adequate training for ASC class staff; and
- The District failed to address complaints from school staff with direct knowledge of environment and staffing concerns that were alleged to cause or increase behavioral interventions, including the use of restraints and time out rooms.

SCOPE OF INVESTIGATION

DRNY’s investigation consisted of the following activities:

1. Interviews with complainants regarding students with disabilities in the ASC 4-6 program and the ASC 1-3 program at Blue Creek School;
2. Review of student records, correspondence and other documents provided by complainants;
3. Review of student records provided by the District;
4. Observations at Blue Creek School on June 23 and 24, 2014;

⁵ Physical Restraint is also referred to as an Emergency Intervention in State Education Law (8 N.Y.C.R.R. 200.22).

⁶ An escort was defined by complainants as one or more adults physically placing his or her hands on the student to forcibly move the student to another location.

5. Limited interviews with Blue Creek School staff on June 23, 24 and 26, 2014;⁷
6. Interviews on June 23, 2014 with the Director and Assistant Directors of Pupil Services, and the Principal of Blue Creek School in the presence of the District's counsel;
7. An interview with the Director of Pupil Services on June 26, 2014;
8. Phone interview on March 10, 2015, with staff of the District;
9. Review of monitoring review letter and compliance assurance plan dated March 13, 2015, issued by the New York State Education Department to the Superintendent of the North Colonie School District;
10. Review of Affidavit of the Principal of Blue Creek School , *Disability Rights New York v. N. Colonie Bd. of Educ.*, Case No. 1:14-cv-00744, Doc. No. 57;
11. Review of exhibits to Affidavit of the Principal of the Blue Creek School, *Disability Rights New York v. N. Colonie Bd. of Educ.*, Case No. 1:14-cv-00744, Doc. No. 57-1; and
12. Review of Affidavit of Director of Pupil Services, *Disability Rights New York v. N. Colonie Bd. of Educ.*, Case No. 1:14-cv-00744, Doc. No. 58.
13. Review of a District letter and exhibits dated November 1, 2016 responding to DRNY's Draft Report.
14. Review of a District letter and exhibits dated December 2, 2016 further responding to DRNY's Draft Report.
15. Review of a District letter and exhibits dated March 13, 2017 further responding to DRNY's Draft Report.

⁷ DRNY did not fully interview these individuals as they were engaged in their teaching and support obligations to students when DRNY staff were present.

INVESTIGATION FINDINGS

FAILURE TO COMPLY WITH FEDERAL AND STATE LAWS IN THE USE OF PHYSICAL RESTRAINTS

- **FINDING:** *THE DISTRICT USED PHYSICAL RESTRAINTS REPEATEDLY ON STUDENTS AS A SUBSTITUTE FOR SYSTEMATIC BEHAVIORAL INTERVENTIONS DESIGNED TO CHANGE, REPLACE, MODIFY OR ELIMINATE A TARGETED BEHAVIOR IN VIOLATION OF 8 N.Y.C.R.R. § 200.22 (D)(1)(II).*
- **FINDING:** *THE DISTRICT FAILED TO CONDUCT TIMELY FBAs FOR STUDENTS WHOSE BEHAVIOR PLACED THEM OR OTHER STUDENTS AT RISK OF HARM OR INJURY, AS REQUIRED BY 8 N.Y.C.R.R. §§ 200.4(B)(1)(V), 200.22(A), AND 200.22(B)(1)(II).*
- **FINDING:** *THE DISTRICT FAILED TO TIMELY CREATE AND IMPLEMENT SYSTEMATIC BIPs DESIGNED TO CHANGE, REPLACE, MODIFY OR ELIMINATE TARGETED BEHAVIOR, AS REQUIRED BY 8 N.Y.C.R.R. §§ 200.1(MMM), 200.22(B), AND 200.22(D)(2)(II).*

The District failed to timely conduct required FBAs and develop BIPs for students in the ASC classes at Blue Creek School who were repeatedly restrained. The development and implementation of a BIP based on a thorough FBA must be considered by the Committee on Special Education (CSE) when a student's behavior places the student or others at risk of harm or injury and when persistent behaviors impede the student's learning or that of others.⁸ The use of physical restraints cannot serve as a substitute for systematic behavioral interventions designed to change, replace, modify, or eliminate a targeted behavior.⁹ During the time period in question, the District's own policy on physical restraints also prohibits such conduct.¹⁰

The District's restraint and escort forms, health records and student records reveal two students who were restrained on multiple occasions but had no FBA-based BIP Plan in place:

Student A, a fifth-grader classified as "Emotionally Disturbed" on his 2013-2014 IEP, was physically restrained at least 13 times during the 2013-2014 school year. Nearly all

⁸ 34 C.F.R. §300.324(a) (2) (i); 8 N.Y.C.R.R. 200.22(b).

⁹ "Use of emergency interventions. (i) Emergency interventions shall be used only in situations in which alternative procedures and methods not involving the use of physical force cannot reasonably be employed. (ii) Emergency interventions shall 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.*" 8 N.Y.C.R.R. 200.22(d) (2) (emphasis added).

¹⁰ *Disability Rights New York v. N. Colonie Bd. of Educ.*, No. 1:14-CV-0744, Doc. No. 58-1, Ex. E.

of these restraints resulted in injury to staff and about one-third caused injury to the student, including rug burns. Based on the records reviewed, during the entirety of the 2013-2014 school year, a FBA was never conducted nor was a BIP developed. The District states it relied on a FBA and BIP conducted in February 2012 during the 2013-2014 school year. It is noted that under that 2012 BIP, Student A was restrained 15 times during the prior (2012-2013) school year, causing assault or injury to staff in 12 of those incidents. After two years of significant use of restraints, the District conducted a new FBA and developed a new BIP in July 2014.

Student B, a first-grader classified as “Other Health Impaired” who attended Boght Hills and Blue Creek Schools in the 2013-2014 school year and a District summer program in 2014, was physically restrained at least 11 times. Five of these incidents resulted in assault or injury to staff, two involved assault to other students, and one resulted in injury to the student. Although two serious restraint incidents occurred in September 2013 resulting in a more restrictive placement at Blue Creek Elementary, and restraints continued throughout the school year, no FBA was conducted and no BIP was in place. Student B remained without an FBA-based BIP until November 2014. Between September 22 and November 14, 2014, Student B was physically restrained an additional 10 times. At a meeting with Student B’s parent in November 2014, the Director of Pupil Services, admitted there was no BIP in place but said the District was working on one.

Even when a behavior plan was required in a student’s IEP, the District failed to follow the requirements set forth in 8 N.Y.C.R.R. § 200.22 in developing the BIP.

Student C, a fourth grader in the ASC 4-6 classroom and classified as a student with Multiple Disabilities, was restrained at least 3 times from September to October 2013. At that time, Student C’s BIP was four years old. As a result of parent advocacy and direct staff input, the District agreed to update the BIP in October 2013. However, no FBA was conducted nor was the 2009 FBA updated. Rather, the new BIP dated November 19, 2014 simply states that the “functions [of the behavior] **appear** to be the same.” (emphasis added). Based on the records DRNY received, data was not systematically collected to develop a current FBA as required by 8 N.Y.C.R.R. §200.22 (a), nor did the District update the data from Student C’s four year-old FBA.

The District must document whether a student who was restrained has a “current [BIP].” 8 N.Y.C.R.R. § 200.22(d) (4). The very purpose of a FBA is to assess the factors that cause behavior in order to develop a detailed, fact-based BIP to reduce the occurrence of target behavior and eliminate the need for highly restrictive emergency interventions such as restraints.¹¹ Both the FBA and the BIP inform the CSE and staff of the specific behavioral

¹¹ See New York State Educ. Dept., *Behavioral Intervention Plans*, (May 2011) at [http://www.p12.nysed.gov/specialed/publications/topicalbriefs/Behavior Intervention Plan.htm](http://www.p12.nysed.gov/specialed/publications/topicalbriefs/Behavior%20Intervention%20Plan.htm)

supports and accommodations needed to address a student's specific behavior. BIPs also require regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals to allow systematic assessment of the effectiveness of the plan and supports.¹²

The District failed to take into account the impact of the use of restraint on these students by failing to conduct timely FBAs and implement timely BIPs which could have reduced the needs for this serious intervention. According to a recent Congressional Report:

*Even if children suffer no physical harm as the result of the use of seclusion and restraints, studies have shown they remain severely traumatized and may even experience post-traumatic stress disorder. As a result of their experiences, children who have been restrained have reported nightmares, anxiety, and mistrust of adults in authority.*¹³

In fact, “[e]ach occurrence of [restraint and seclusion] is high risk ... and creates the possibility of severe physical injury and emotional trauma to the child, staff, and other children in the setting.”¹⁴ Moreover, the use of restraint and seclusion, “can trigger strong emotions such as humiliation, fear, loss of control, and anger and negatively impact the quality of any relationship.”¹⁵

The continued failure to develop timely FBA-based BIPs for Students A, B, and C prevented the District from identifying and implementing effective behavioral interventions when classroom and schoolwide strategies were ineffective, and increased the likelihood of harmful and unnecessary physical intervention.

CORRECTIVE ACTION IMPLEMENTED BY THE DISTRICT:

Based on the above Findings, DRNY recommended the District:

- Designate one or more staff (administrator, school psychologist or behaviorist) in each school building to periodically review all Emergency Intervention Forms to identify

(6/6/16); New York State Educ. Dept., *Guide to Quality Individualized Education Program Development and Implementation*, Attachment 2 (Dec. 2010).

¹² *Id.*; 8 N.Y.C.R.R. § 200.22(b).

¹³ U.S. Senate, Committee on Health, Education, Labor and Pensions, *Dangerous Use of Seclusion and Restraints in Schools Remains Widespread and Difficult to Remedy: A Review of Ten Cases*, February 12, 2014; available at <http://www.help.senate.gov/imo/media/doc/Seclusion%20and%20Restraints%20Final%20Report.pdf> (accessed 6/29/2016) (internal citations omitted).

¹⁴ *Id.*

¹⁵ *Id.*

developing patterns of behavior and ensure that FBAs and BIPs are current, accurate and consistently followed.

- Require a timely team meeting which includes the school psychologist, teacher, parent and CSE administrator to review and modify, as needed, the most recent FBA, BIP and IEP whenever an emergency intervention is used on a student more than three times in a three week period.
- Promptly initiate a FBA conducted in accordance with 8 N.Y.C.R.R. § 200.22(a) for any student with a disability who demonstrates one or more instances of behavior involving physical aggression, self-injury, elopement, or property destruction, or any behavior resulting in physical intervention by staff.
- Implement a BIP developed in accordance with 8 N.Y.C.R.R. § 200.22(b) upon completion of the FBA.
- In instances where a student has required multiple emergency interventions in a two week period and no FBA has been recently completed or updated, a team comprised of the school psychologist, teacher, parent and CSE administrator will convene to develop an interim BIP that includes positive behavioral interventions and de-escalation strategies pending the completion of a FBA and BIP.
- Pursuant to 8 N.Y.C.R.R. § 200.22(b) (5), ensure the implementation of a student's BIP includes regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the behavioral intervention plan and on the student's IEP. The results of the progress monitoring must be documented and reported to the student's parents and to the CSE and shall be considered in any determination to revise a student's BIP and IEP.

The District has adopted some, but not all, of these recommendations. In November 2016, following receipt of DRNY's Draft Report, the District revised the form used to document the use of physical restraints. However, the District's current policy on restraints does not specifically require the persons receiving the form to review or analyze it or specify what steps should be taken if there is frequent use of restraints.

The District's policy on CSE Procedures, dated October 24, 2011, requires it to assess student behavior when behavior impedes learning and consider the use of a BIP when developing an IEP. This policy was in place at the time of the violations found by DRNY. In addition, in response to DRNY's Draft Report, the District stated it is part of its "practices" to consider conducting or updating a FBA or BIP when a student is restrained multiple times in a short period of time or when a student with a disability demonstrates one or more behaviors involving physical aggression, self-injury, elopement, or property destruction, or any behavior resulting in

physical intervention by staff. However, the District's policies related to behavior and restraints do not require FBAs and BIPs to be reviewed at a particular frequency or after increased use of restraints, nor did the District incorporate a review policy when it amended its restraint policy in March 2016. Therefore, there is no more protection for students at risk of repeated restraint than was in place at the time the violations identified herein occurred.

Following an investigation by the New York State Education Department, the District now ensures that regular progress monitoring of BIPs occurs pursuant to 8 N.Y.C.R.R. § 200.22 (b).

Finally, the District conducted an FBA and developed a BIP for Students A, B and C after DRNY initiated litigation to enforce its investigatory rights in June 2014.

- **FINDING:** *THE DISTRICT CONSISTENTLY FAILED TO IDENTIFY AND DOCUMENT "PHYSICAL ESCORTS" AS "EMERGENCY INTERVENTIONS" IN VIOLATION OF 8 N.Y.C.R.R. § 200.22.*

The District wrongly characterized the use of physical force as an "escort" rather than an "emergency intervention." In doing so, the District abandoned its duty to inform parents about each use of restraint. Consequently, parents were prevented from addressing the overuse of restraints, and any physical and psychological harm that the restraint may have caused to their child. Students subject to escorts were vulnerable to even greater risk due to this underreporting. Indeed, Student B's parent was shocked to discover Student B had been restrained during an "escort" over 6 times at Blue Creek School from November 2013 to June 2014. Upon learning this information months later, the parent immediately requested a FBA and BIP.

New York's regulations on emergency intervention define "emergency" to mean "a situation in which immediate intervention involving the use of reasonable **physical force** . . . is necessary" (emphasis added) 8 N.Y.C.R.R. § 200.22(d). When an emergency intervention is used, New York State imposes specific requirements regarding documentation, notification and staff training. See 8 N.Y.C.R.R. § 200.22(d).

The District created a separate reporting process to report incidents of "Physical Restraint" from the use of "Physical Escort." The District titled the two reports: "Report – Incident Involving Physical Restraint" and (2) "Incident Involving a Physical Escort." The District and complainants provided DRNY with 30 "Incident Involving a Physical Escort" forms. Interviews with District staff and review of the documents themselves reveal that the escort forms were used when one or more staff moved a physically resistant student to another location using physical force. District staff reported that the Director of Pupil Personnel and the Principal of Blue Creek School advised them to use the "escort" form rather than the "physical restraint" form to document these types of physical interventions even though the student is physically restrained

in the relocation process. Indeed, none of the 30 “escort” forms reviewed by DRNY described an intervention where a student voluntarily relocated without forceful physical intervention.

Specifically, of the 30 “Physical Escort” forms reviewed by DRNY, all involved the use of physical force and 83% involved 2 or more staff completing the “escort” of these elementary-age students. In nearly two-thirds of these interventions, students resisted these restraints by biting, kicking, hitting and/or punching staff and in some cases causing serious injury to staff.

DRNY notified the District of its improper distinction between escorts and physical restraint at a meeting with the Director and the then Assistant Director of Pupil Services and the Principal of Blue Creek School on June 23, 2014, in the presence of District counsel. The Director of Pupil Services said that staff “should” be calling parents in either case but admitted there was no District policy on reporting the use of escorts to parents. Failing to properly document and notify parents of the frequency and intensity of these restraints denies parents critical information. Parents are unable to assess the physical condition of their child following a restraint. Moreover, it prevents parents from addressing behavioral issues and interventions with the District to prevent future restraints.

CORRECTIVE ACTION IMPLEMENTED BY THE DISTRICT:

To address the District’s failure to recognize physical escorts as emergency interventions, DRNY recommended the District revise its definition of “emergency intervention” to:

- Include the use of physical force to “escort” a student from one location to another.
- Limit the use of emergency interventions to only those instances where there is a threat of imminent danger of serious physical harm to the student or others.

The District no longer uses a separate form for physical escorts and considers all physical contact situations to be “emergency interventions” requiring the documentation set forth in 8 NY.C.R.R. § 200.22 (d).

Nevertheless when the District amended its policy on Physical Restraint on March 28, 2016, it did not describe the actions or conduct that constitute an “emergency intervention” or “physical restraint”. The policy simply states that a physical restraint shall not be a substitute for systematic behavioral intervention to modify in appropriate behavior.” However, it further states “[p]hysical restraint may be used in an emergency where no other approach would be effective in **controlling the student’s behavior**”; there is no reference to imminent danger or safety. The District’s broad definition still leaves students at risk of unnecessary physical restraint.

- **FINDING:** *THE FORMS USED BY THE DISTRICT TO REPORT RESTRAINTS AT THE TIME THE COMPLAINTS WERE RECEIVED BY DRNY DID NOT INCLUDE INFORMATION REQUIRED BY REGULATION INCLUDING WHETHER THE STUDENT HAD A CURRENT BIP AND THE DURATION OF THE INCIDENT IN VIOLATION OF 8 N.Y.C.R.R. § 200.22(d) (4).*

The District failed to create and maintain required documentation regarding the use of emergency interventions. None of the 43 restraint and escort forms DRNY reviewed included any information about the existence of a current BIP. The vast majority of forms reviewed also failed to identify the specific type of restraint used (e.g. prone, supine, standing, seated, small child, etc.), or the duration of the restraint.

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 shall be notified and documentation of emergency interventions shall be reviewed by school supervisory personnel and, as necessary, the school nurse or other medical personnel. 8 N.Y.C.R.R. § 200.22(d) (4) (emphasis added).

The District's failure to maintain this information prevents any review of the incident to determine if the intervention was even necessary, appropriate, or safe.

CORRECTIVE ACTION IMPLEMENTED BY THE DISTRICT:

To ensure parents and the District staff have essential information regarding the use of emergency interventions, DRNY recommended the District revise its Emergency Intervention Form to comply with 8 N.Y.C.R.R. § 200.22(d) (4), and also include: a description of the incident including the behaviors prompting the use of the emergency intervention; the intervention strategies used prior to the use of the emergency intervention; the date of the student's BIP (if applicable); and a requirement that all persons implementing the emergency intervention sign the form. DRNY further recommended that the District require the completion of the "Emergency Intervention Form" within one school day for each incident in which an emergency intervention is used and that parents be notified of the incident the same day the incident occurs and provided a copy of the form within two days.

In October 2016, the District adopted some of DRNY's recommendations by revising its form documenting physical restraints. The form now includes fields for all information required by regulation and as well as a description of the incident, the date and method by which the parent or guardian was notified and documentation of a "Life Space Interview" with the student

including discussion with the student about alternate strategies the student can use in the future.

The District rejected the following restraint policy changes: identify the antecedents leading to the restraint; all involved staff must sign and date the form; and prescribe a specific timeline for reporting to parents. This is concerning because information about antecedents as well as the individuals involved provides important insight as to the behavior leading to the restraint, and thus critical insight as to how to prevent future restraints. Moreover, failure to immediately notify a parent prevents the parent from monitoring the child for physical or emotional injury resulting from the restraint.

- ***FINDING: A STUDENT WAS RESTRAINED IN A NON-EMERGENCY SITUATION.***

The District used physical force against a student even though there was no imminent risk of any injury to the student or others. The use of physical force is limited to situations in which immediate intervention is necessary as specified in 8 N.Y.C.R.R. § 19.5(a) (3). According to guidance from the New York State Education Department, the use of reasonable physical force is limited only to those circumstances that pose an imminent risk of injury to the student or others.¹⁶

On June 24, 2014, at Blue Creek School, a DRNY attorney observed the use of an unnecessary physical restraint involving Student B in the ASC 1-3 class. When the DRNY attorney started observing, Student B was agitated and throwing papers. The other students had already been removed from the classroom and only one male adult staff was present in the room. The staff monitored, but did not touch, the agitated student. In less than 5 minutes, Student B crawled under a table, and stopped throwing objects. The adult staff continued to observe the student. Two additional staff then entered the classroom and one bent down to where the student was sitting under the table. The staff pulled the student from under the table and, with the assistance of the second staff, moved the student to the time out room in the classroom. This use of physical force was unjustified; the student posed no risk to self or others at the time he was pulled from under the table and physically moved to the time out room.

Equally concerning is the District's contradictory documentation of this incident. The "Escort" form signed by the two staff states that when the two staff entered the room, Student B ran at them and punched one of them. The form also states that Student B then hid under a table and punched the staff again when she confronted him under the table. This description of the incident is inconsistent with what DRNY observed. Student B did not approach the staff when

¹⁶ Assessment of Public Comment, Attachment 4; [Proposed Amendment to the Regulations of the Commissioner of Education Relating to Behavioral Interventions, Including the Use of Aversive Interventions](#), Rebecca H. Cort to EMSC-VESID Committee, N.Y. Board of Regents, N.Y. State Educ. Dept. December 19, 2006.

they entered the room. One of the staff approached the student under the table. The student was not in imminent danger under the table when the staff confronted him under the table. The fact that the District was aware DRNY observed this incident and yet falsely documented it calls into question the District's documentation of all incidents involving physical restraint.

CORRECTIVE ACTION IMPLEMENTED BY THE DISTRICT:

The District has taken no action to address the use of physical restraints when there is no risk of imminent harm to the student or others. Rather, the District's restraint policy, revised on March 26, 2016, permits physical restraint in an emergency where no other approach would be effective in **controlling the student's behavior.**¹⁷ Under this definition, the physical restraint of Student B described herein would presumably be permissible, and therefore the definition leaves students at risk of unnecessary physical restraint.

- **FINDING:** *FOUR DISTRICT STAFF WHO PHYSICALLY RESTRAINED STUDENTS WERE NOT TRAINED IN ACCORDANCE WITH THE DISTRICT'S RESTRAINT PROTOCOL.*

The District failed to ensure that only properly trained staff imposed restraints, consequently exposing students to serious risk of physical and emotional injury. Three of the students whose records were reviewed by DRNY were physically restrained multiple times by District staff. DRNY identified at least seven District staff who played an active role in physically restraining these students one or more times. Four of these individuals had been trained or retrained within two years of the restraint(s) they imposed. Of the remaining three individuals – all district administrators – one had not been trained or retrained in over three years and two had not been trained or retrained in at least 8 years.

Pursuant to 8 N.Y.C.R.R. § 200.22(d) (3), “[s]taff who may be called upon to implement emergency interventions shall be provided with appropriate training in safe and effective restraint procedures . . .” According to the District's policy on physical restraints, “[s]taff who may be called upon to physically restrain a student will be trained on safe and effective ways to do so.”¹⁷ At the time DRNY received the complaints prompting its investigation, the District used the Therapeutic Crisis Intervention system (TCI) to meet the requirements of 8 N.Y.C.R.R. § 200.22(d) (3).¹⁸ TCI protocol requires that an individual imposing a restraint successfully complete a training course and evaluation and that such individual take a refresher course at least

¹⁷ *Disability Rights New York v. N. Colonie Bd. of Educ.*, Director of Pupil Services Affidavit, Doc. No. 58-1, Ex. E.

¹⁸ *Disability Rights New York v. N. Colonie Bd. of Educ.*, Director of Pupil Services Affidavit, Doc. No. 58 ¶ 13.

every two years; 19 the Director of Pupil Services stated that “TCI training includes yearly refresher courses.”²⁰ Therefore, the District was not in compliance with its own policy and the requirements of TCI certification. An investigation by the Special Education Quality Assurance office at NYSED also determined that untrained staff were imposing emergency interventions.²¹

Moreover, the District ignored requests for training. District staff working with students in the ASC classes made multiple requests for the support staff in the ASC classes to be trained in TCI. These requests rose from concerns about frequent aggressive behavior among students, staff injuries, and the lack of TCI-trained staff in the classroom and the building. District staff reported that this issue was discussed at a spring 2013 ASC department meeting. The Director of Pupil Services reportedly said that the District was no longer training support staff in TCI. In fact, the Director of Pupil Services confirmed the District does not provide TCI or other comprehensive behavior intervention training to support staff in the ASC classes.²²

CORRECTIVE ACTION IMPLEMENTED BY THE DISTRICT:

The District has changed its training documentation policies. In March 2016, the District adopted a new policy that, “training for staff on the policies and procedures related to the use of time out rooms, physical restraint and related behavior management practices will be provided quarterly **or as needed**” (emphasis added). The District uses the “Handle with Care” training program.²³ “Handle with Care” does not provide the comprehensive training on de-escalation strategies the TCI program formerly adopted by the District demands. Instead, Handle with Care is a 1 day program which focuses almost exclusively on teaching staff how to apply a physical restraint. DRNY therefore recommends the District provide consistent, comprehensive training to staff working with students with behavior challenges to ensure they have sufficient knowledge of de-escalation strategies so that restraint is, in fact, only imposed in emergency situations where there is an imminent risk of harm to the student or others.

FAILURE TO PROVIDE A SAFE ENVIRONMENT AND/OR ADEQUATE STAFF

¹⁹ See Cornell University, Therapeutic Crisis Intervention System; <http://rccp.cornell.edu/tcicertification.html> (November 2, 2014); Cornell University, Therapeutic Crisis Intervention System for Schools Information Bulletin, p.9: http://rccp.cornell.edu/assets/TCIS_SYSTEM_BULLETIN.pdf. November 2, 2014).

²⁰ *Disability Rights New York v. N. Colonie Bd. of Educ.*, Director of Pupil Services Affidavit, Doc. No. 58 ¶ 14.

²¹ *Disability Rights New York v. N. Colonie Bd. of Educ.*, Principal of Blue Creek School Affidavit, Doc. No. 57-1, Ex. J.

²² *Disability Rights New York v. N. Colonie Bd. of Educ.*, Director of Pupil Services Affidavit, Doc. No. 58 ¶ 14.

²³ cite

- **FINDING:** *THE DISTRICT FAILED TO DEVELOP AND IMPLEMENT POLICIES, INDIVIDUALIZED PLANS AND STAFF NECESSARY TO PREVENT AND ADDRESS STUDENT ELOPEMENT BEHAVIOR.*

On several occasions, students with disabilities in the ASC classroom eloped from the building into dangerous conditions. In the 2013-2014 school year, Student A was a fifth grader with cognitive impairment and classified as Emotionally Disturbed.²⁴ Records demonstrate Student A eloped from Blue Creek School on at least 3 occasions in 2014:

- An escort form dated March 6, 2014, states Student A locked himself in a bathroom stall and then ran out of the building toward the parking lot. It is unclear whether the form is referring to the bus parking area adjoining the building or the parking lot across the street.
- On June 2, 2014, Student A's guardian was called by school staff and advised that Student A had run out of the classroom and building and that he was restrained by the Principal of Blue Creek and a teacher. While the records provided to DRNY confirm the restraint, the few notes on the form do not mention the elopement. However, this incident was reported to DRNY on June 3, 2014, the day after the incident.
- A restraint form dated June 10, 2014, states Student A ran outside and "darted for the road almost getting hit by a car." He was "escorted" inside and then subjected to a 2-person restraint.

In the 2013-2014 school year, **Student C** was a fourth grade student with cognitive impairments and other disabilities participating in the ASC 4-6 class. Student C's parent reported to DRNY that in late April or early May 2014, Student C ran out of the classroom, out of the building and half way down Clinton Road before he was stopped by Blue Creek School staff.

The District must identify students behaviors which impede a students' learning, including "consideration of whether a student has the tendency to wander or elope and, if so, to ensure that a [FBA] of the behavior is conducted and that the behavior is addressed through proper supervision and through an individualized [BIP] based on the results of the [FBA]."²⁵ The District must also have building policies, procedures and protocols in place to prevent and address instances of wandering and elopement, "particularly for students with cognitive impairments."²⁶

On June 26, 2014, Director of Pupil Services informed DRNY that if a student is known to try to

²⁴ Student A's most recent psychoeducational testing shows a full score IQ score of 51 on a 2013 administration of the Wechsler Intelligence Test for Children-IV.

²⁵ New York State Educ. Dept., *Special Education Field Advisory regarding Health and Safety Precautions for Students with Disabilities* from James P. DeLorenzo (November 2013); accessed at <http://www.p12.nysed.gov/specialed/publications/elopement-healthsafety.htm> (4/15/16).

²⁶ *Id.*

run out of the building, the District ensures that the student has an adult walking in front and behind whenever the student is out of the classroom. However, in Student A's case, the District failed to follow its own policy on June 2 or June 10 despite the prior elopements. Moreover, in the July 9, 2014 BIP developed **after** Student A's three elopement incidents, elopement behavior was not noted or identified as a target behavior, as it should have been.

The District's failure to have in place policies, individualized plans and staff necessary to prevent and address student elopement behavior exposes students to serious risk of physical harm.

CORRECTIVE ACTION IMPLEMENTED BY THE DISTRICT:

In the Draft Report, DRNY recommended that the District adopt a policy to address student elopement. Thereafter, in October 2016, the District Board of Education adopted a policy "Regarding Student Wandering and Elopement for Students with Disabilities" (No. 4320). The policy defines elopement and requires annual training of staff regarding student supervision and specific procedures and safety protocols. Consistent with DRNY's recommendation, the policy requires a FBA and development of a BIP.

- **FINDING:** *THE DISTRICT FAILED TO PROVIDE A SAFE AND APPROPRIATE PHYSICAL ENVIRONMENT TO ADDRESS THE BEHAVIORAL AND LEARNING NEEDS OF STUDENTS IN THE ASC 4-6 CLASS.*

Students and staff in the ASC 4-6 class were more vulnerable to injury and emotional harm due to the District's inability to provide appropriate physical space for students in the ASC 4-6 class. In the 2012-2013 school year, the ASC 4-6 class was located in a classroom suite comprised of a classroom, padded time out room and another small room. The availability of multiple, proximate rooms ensured that students who were agitated had access to separate spaces where de-escalation techniques could be employed with minimal disruption to other students. However, for the 2013-2014 school year, the ASC classroom was relocated to a single classroom with no immediate access to a separate, dedicated "quiet space" or a time out room. ²⁷

²⁷ Pursuant to 8 N.Y.C.R.R. § 200.22 (c), 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. Time out rooms are to 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 to remove a student from a potentially dangerous situation and as provided in paragraph (3) of this subdivision." 8 N.Y.C.R.R. § 200.22 (c)(3) provides: "Except for unanticipated situations that pose an immediate concern for the physical safety of a student or others, the use of a time out

Staff specifically advised the District in September and October 2013 that the ASC 4-6 classroom was not adequate to meet the needs of students with severe behavioral challenges. At least three Blue Creek School staff expressed concerns about the lack of separate quiet rooms in ASC 4-6 class. Two staff met with the Blue Creek School Principal on September 4, 2013. No change was made. By email dated October 18, 2013 to the Director and Assistant Director of Pupil Services, two District staff stated they were “extremely concerned” about the physical set up of the ASC 4-6 classroom, stating that “a program designed to meet the needs of severely behaviorally challenged students could not function successfully in an open setting without quiet, distraction-free spaces for de-escalation and quiet work time.” Staff also reported to Director of Pupil Services

“If students are becoming aggressive, it can happen very quickly. One of the important strategies in deescalating a child is removing the audience. Other students and too many staff around can greatly interfere with the ability to calm a student down. It is over stimulating and some students will further escalate their behaviors to obtain a reaction from these other individuals or to attempt to demonstrate that they are in control. A quiet setting with a calm individual is essential at these times.”²⁸

Staff further asserted the availability of a quiet room “plays a key role in providing some of the district’s most volatile children a safe quiet space to calm down and practice their coping strategies.”²⁹ In response to these concerns, the District created a separate area within the ASC 4-6 classroom by placing one or two dividers in the room so that a student could be visually out of sight of other students. Staff were also advised ASC 4-6 students could use the time out room in the ASC 1-3 class located next door to the ASC 4-6 classroom. To access that time out room, it was necessary to cross through the instructional area of the ASC 1-3 classroom.

Despite these changes, similar safety concerns were repeated by another staff in November 2013 and March 2014. “When the students have nowhere they deem quiet and safe to go when they are angry, they often attack others or damage materials and belongings.”³⁰ However, no further modifications were made. That year, the District imposed restraints on Student A at least 8 times when Student A was highly agitated in the ASC 4-6 classroom. Nearly all these incidents

room shall be used only in conjunction with a behavioral intervention plan that is designed to teach and reinforce alternative appropriate behaviors.”

²⁸ Email to Director of Pupil Services dated October 19, 2013.

²⁹ Email to Director of Pupil Services dated October 21, 2013. DRNY does not have the complete email chain of correspondence that occurred between October 18 and October 21, 2013. The information reported here is from copies of email correspondence in DRNY’s possession. The District refused to provide DRNY with this and other correspondence.

³⁰ Email to North Colonie Human Resource staff and the teacher’s union president dated November 12, 2013.

involved assault or injury to staff, and, in two instances, Student A.

CORRECTIVE ACTION IMPLEMENTED BY THE DISTRICT:

The District now ensures there is ready access to a time out room and appropriate quiet space for students whose behavior or BIPs require such access.

- **FINDING:** *AN UNSAFE BATHROOM ADJACENT TO THE ASC CLASSROOM WAS USED FOR BEHAVIORAL INTERVENTION.³¹*
- **FINDING:** *THE SCHOOL AND DISTRICT ADMINISTRATORS FAILED TO RESPOND TO SAFETY AND OTHER CONCERNS FROM SCHOOL STAFF RELATED TO THE USE OF A BATHROOM AS A “QUIET ROOM”, OR “BREAK ROOM”, OR PLACE OF INSTRUCTION FOR STUDENTS IN THE ASC 4-6 CLASSROOM.*

The District knowingly chose to use a bathroom for behavioral intervention and an alternate classroom space. In October 2013, the Director of Pupil Services and the Principal of Blue Creek School designated the bathroom adjoining the ASC 4-6 classroom as a “quiet room” for Student C, a student whose behaviors had been escalating and whose BIP required the use of a “quiet spot.” The parent agreed to this arrangement only after being informed by the Director of Pupil Services that the only other spaces available were a small area in the classroom separated by freestanding dividers that blocked visual but not audible stimulation and a time out room in the ASC 1-3 classroom which was also used by the students in that class. Student C’s parent reported to DRNY that she believed it was better than nothing at all and necessary to avoid future restraints.

DRNY examined the bathroom space on its visits to Blue Creek in June 2014. It was a functioning bathroom and was used in that capacity during DRNY’s observation. Photographs of the bathroom are attached as Exhibit 1. The bathroom was approximately 12 feet by 6 feet with an open toilet stall at one end and an open shower stall at the other. The shower stall had a metal and wood seat attached to the wall and a fixed showerhead. There was very limited open space. The floor was hard ceramic tile and the walls were sheetrock. The presence of the toilet, shower,

³¹ DRNY did not find any evidence that the bathroom was used as a time out room within the meaning of 8 N.Y.C.R.R. § 200.22(c). Two staff reported a reluctance to use the bathroom as a time out room because the staff determined it was too dangerous to use in that capacity.

and bench were safety hazards, particularly if a student was agitated or engaged in self-injurious behavior. An approximately 6-foot long vanity with a sink separated the two stalls. There were desks across from the vanity and next to the door. A pillow in the shape of a bear was on the tile floor. A standing electric floor fan with an unplugged electrical cord was near the shower.³²

The door to the room was solid; there was no window or other manner of seeing inside the bathroom from the outside. The door also had a functioning lock on the inside, thereby allowing any student to lock him or herself in the room. A complainant with direct knowledge and another District staff person reported to DRNY that there have been at least two instances where an ASC 4-6 student had locked himself in the bathroom and refused to exit.

Two District staff referred to the presence of the shower fixtures as a “safety hazard”. One of these staff also wrote to the Director of Pupil Services and the Principal of Blue Creek School on October 26, 2014, describing the fixtures as a safety hazard, but neither the bench nor shower was removed.³³ Student C’s BIP designated the bathroom as Student’s C’s “break room.”³⁴ Given the hazards posed by the bathroom, the District failed to provide a safe and appropriate “quiet space” for Student C in violation of his BIP and IEP. It also placed Student C and any other students for whom the bathroom was used as a “quiet space” at serious risk of physical harm.

In addition, three District staff reported to DRNY that the bathroom was used on multiple occasions as a place of instruction or simply a location for ASC 4-6 students to go when the regular classroom had to be cleared to address a behavioral episode by a classmate. It was reported that students were sometimes eating lunch or snack in the bathroom as well. While District administrators claim use of the bathroom for such purposes was against District policy, and a small foyer outside the classroom and the hall was available to students cleared from the room, the fact remains there was insufficient space for students to go when the classroom was unavailable due to a prolonged student behavior incident. This was documented in an email dated March 12, 2014 from a staff to the Principal of Blue Creek School and the then Assistant Director of Pupil Services.³⁵ The staff reported that three students in the ASC 4-6 class had “significant aggressive meltdowns” in recent weeks forcing the classroom to be cleared of remaining students.³⁶ Due to lack of space, these students were being removed to the bathroom

³² At the time of DRNY’s observation, the room had boxes on the vanity and the desks. The ASC 4-6 teacher said he had placed the boxes in the bathroom the prior week as part of year-end clean-up.

³³ Email to the Director of Pupil Services, the Principal of Blue Creek School and others dated October 26, 2013.

³⁴ “Updated “Behavior Intervention Plan” dated 11/18/13 for Student C.

³⁵ Email to the Principal of Blue Creek School and the then Assistant Director of Pupil Services, and others dated March 12, 2014.

³⁶ Id.

and a foyer area. “Students have been completing work and eating snack in the bathroom” since no other rooms were available.³⁷

Not only is a functioning bathroom an unsafe environment for such activities, it is also a highly discriminatory one. Staff confirmed that general education students were not forced to learn, have a break, or eat in a bathroom, yet this was an option for students with disabilities in the ASC 4-6 class.

CORRECTIVE ACTION IMPLEMENTED BY THE DISTRICT:

To address the safety and discrimination concerns posed by the use of a bathroom for instruction and snack time, DRNY recommended the following changes in the Draft Report:

- The District will not use bathrooms as a place of instruction, recreation, study or meals.
- The District will provide safe and sufficient physical space(s) to ensure effective implementation of each student’s IEP and BIP.
- The District will employ sufficient instructional and support staff in all special classes serving students with disabilities to ensure that students are not denied instructional time from a qualified special education teacher if a classmate is engaging in disruptive behavior.

Based on the District’s written responses and exhibits to the findings in this section, the District no longer uses bathrooms for any purpose but their intended purpose. Likewise, the District is now providing sufficient and appropriate space and staff to ensure a student’s BIP can be implemented. The District provided evidence it comports with regulatory staffing requirements, but did not provide DRNY with any written policy related to instruction of students who are removed from the classroom due to another student’s behavior.

CONCLUSION

DRNY’s investigation uncovered serious systemic practices that put students with disabilities in the ASC classrooms at Blue Creek School at risk of serious injury, death, psychological harm, and educational neglect. Of particular concern was the District’s failure to comply with State requirements for the use and reporting of physical restraints. Physical restraints cannot be a substitute for consistent, preventive behavioral interventions. Students at risk of restraint or with a history of behavior requiring restraint must have a specific, measurable BIP that is based on a thorough FBA incorporating data from a variety of sources in a systematic manner. The failure to develop FBA-based BIPs needlessly exposed students to the use of restraints and the serious physical and psychological injury that can result from such interventions.

³⁷ Id.

Since the time DRNY initiated this investigation in 2014, the District has taken substantial steps to remedy the most egregious issues. The District now has a policy addressing student elopement behavior. Another important change is the District's March 2016 modification of its policy on the use of emergency interventions and the form documenting physical restraints. The revised policy and form better ensures that all physical restraints are properly reported.

However, the revised policy fails to identify or specify the roles of FBAs and BIPs in reducing the use of physical restraints. Similarly, the District has become more diligent in ensuring that staff called upon to impose physical restraints are trained, but has opted to abandon Therapeutic Crisis Intervention model in favor of "Handle with Care", a training model which is significantly less thorough, particularly in training on de-escalation strategies. Finally, in revising its policy on emergency intervention, the District elected to omit provisions requiring periodic review of the number and frequency of physical restraints at the student, building and district level.

While the District's current policies and practices appear to meet the minimum requirements of State and federal law and regulation, they are far from proactive. DRNY urges the District to consider the recommendations that follow.

RECOMMENDATIONS

1. Revise the District's written policy regarding the use of emergency interventions specific to students with disabilities to include the following provisions:
 - a. Define "emergency intervention" to include the use of physical force to "escort" a student from one location to another.
 - b. Require parent notification by phone, email or text immediately and provide a copy of the completed and signed Emergency Intervention Form within two school days.
 - c. Designate one or more staff (administrator, school psychologist or behaviorist) in each school building to periodically review all Emergency Intervention Forms to identify developing patterns of behavior and ensure that FBAs and BIPs are current, accurate and consistently followed.
 - d. Require a timely team meeting which includes the school psychologist, teacher, parent and CSE administrator to review and modify, as needed, the most recent FBA, BIP and IEP whenever an emergency intervention is used on a student more than three times in a three week period.
2. Amend the Emergency Intervention policy to provide that all District staff responsible for instructing or supporting students with BIPs for behavior that involves physical aggression, self-injury, elopement, property destruction or any behavior resulting in an emergency intervention by staff will be trained in Therapeutic Crisis Intervention or a similar,

comprehensive behavior intervention training methodology that emphasizes research-based de-escalation strategies and safe physical interventions strategies, and retrained at the frequency recommended by the training program.

3. Amend the Emergency Intervention policy to provide that parent consent for a FBA conducted in accordance with 8 N.Y.C.R.R. § 200.22(a) will be sought promptly and an FBA initiated for any student with a disability who demonstrates two more instances of behavior involving physical aggression, self-injury, elopement, or property destruction, or any behavior resulting in a physical restraint by staff in a 30 day period.
4. Amend the Emergency Intervention policy to provide that a BIP developed in accordance with 8 N.Y.C.R.R. § 200.22(b) will be implemented upon completion of the FBA. All staff who provide instruction or support to the student will receive training on implementation of the BIP by the school psychologist supervising the development of the Plan.
5. Amend the Emergency Intervention policy to provide that in instances where a student has required multiple emergency interventions in a two week period and no FBA has been recently completed or updated, a team comprised of the school psychologist, teacher, parent and CSE administrator will convene to develop an interim BIP that includes positive behavioral interventions and de-escalation strategies pending the completion of a FBA and BIP.
6. Amend the Emergency Intervention policy to provide that pursuant to 8 N.Y.C.R.R. § 200.22(b) (5), the implementation of a student's BIP 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 on the student's IEP. The results of the progress monitoring must be documented and reported to the student's parents and to the CSE and shall be considered in any determination to revise a student's BIP and IEP.
7. Enact a District policy stating the District will employ sufficient instructional and support staff in all special classes serving students with disabilities to ensure that students are not denied instructional time from a qualified special education teacher if a classmate is engaging in disruptive behavior.

--END--



EXHIBIT 1

Photographs of Bathroom Used as Quiet Space Taken on June 23, 2014









APPENDIX A

DRNY'S AUTHORITY TO INVESTIGATE ALLEGATIONS OF ABUSE AND NEGLECT OF STUDENTS WITH DISABILITIES

Protection and Advocacy Systems (“P&A Systems”) have the authority to pursue legal, administrative and other appropriate remedies to protect and advocate for individuals with disabilities.³⁸ These authorities include the investigation of allegations of abuse or neglect when allegations of such incidents are reported to the P&A System, or there is probable cause to believe abuse or neglect has occurred.³⁹

In 1975, Congress enacted the Developmental Disabilities Assistance and Bill of Rights Act [DD Act] because of the concerns it had regarding instances of abuse of developmentally disabled persons. The DD Act established the P&A System “to protect the legal and human rights of individuals with developmental disabilities.” [42 U.S.C. § 15001\(b\) \(2\)](#). To accomplish this goal, Congress granted broad authority to “investigate incidents of abuse and neglect of individuals with developmental disabilities if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred.” [42 U.S.C. § 15043\(a\)\(2\)\(B\)](#).

In 1986 Congress enacted the Protection and Advocacy for Individuals with Mental Illness Act. [42 U.S.C. §§ 10801-10827](#)[PAIMI Act].⁴ Congress found that “[s]tate systems for monitoring compliance with respect to the rights of individuals with mental illness vary widely and are frequently inadequate.” [42 U.S.C. § 10801\(a\)\(4\)](#). Accordingly, Congress granted P&A Systems the same powers found under the DD Act: the power to “investigate incidents of abuse and neglect of persons with mental illness if the incidents are reported to the system or if there is probable cause to believe that incidents occurred.” [42 U.S.C. § 10805\(a\)\(1\)\(A\)](#).

In order to conduct investigations, both the DD Act and the PAIMI Act provide a P&A System with broad authority including access to facilities at times when service recipients are present. [42 U.S.C. § 10543\(a\)\(2\)\(H\)](#) and (1), [42 U.S.C. § 10805\(a\)\(3\)](#) and (4), [42 U.S.C. § 10806](#); [45 C.F.R. § 1386.27](#) and [42 C.F.R. § 51.42](#).

A P&A system shall have reasonable unaccompanied access to public and private service providers, programs in the State, and to all areas of the service provider’s premises that are used by individuals with developmental disabilities or are accessible to them. Such access shall be provided without advance notice and made available immediately upon request. This authority shall include the opportunity to interview any individual with developmental disability, staff, or other persons, including the person thought to be the victim of such abuse, who might be reasonably believed by the system to have

³⁸ See, e.g., Connecticut Office of Prot. & Advocacy for Persons with Disabilities v. Hartford Bd. of Educ., 464 F.3d 229, 238 (2d Cir. 2006).

³⁹ [42 U.S.C. § 15043](#) and [42 U.S.C. § 10805\(a\) \(1\) \(A\)](#).

knowledge of the incident under investigation. The P&A may not be required to provide the name or other identifying information regarding the individual with developmental disability or staff with whom it plans to meet; neither may the P&A be required to justify or explain its interaction with such persons.

45 C.F.R. § 1386.27(b) (2).⁴⁰

Finally, the Protection and Advocacy of Individual Rights Act [PAIR Act] provides services to individuals with disabilities that neither have developmental disabilities as defined by the DD Act nor are mentally ill as defined by PAIMI Act. [29 U.S.C. § 794e \(a\)](#) (l) (B). P&A Systems providing services under PAIR enjoy the same general authorities as those set forth in the DD Act, and are similarly able to investigate incidents of abuse and neglect of individuals with disabilities if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred. [42 U.S.C. § 15043\(a\) \(2\) \(B\)](#). [29 U.S.C. § 794e\(f\)](#); see also, *Connecticut Office of Prot. & Advocacy For Persons With Disabilities v. Hartford Bd. of Educ.*, 464 F.3d at 240-241; *Disability Rights New York v. N. Colonie Bd. of Educ.*, No. 1:14-CV-0744, 2016 WL 1122055 (N.D.N.Y. Mar. 21, 2016).

⁴⁰ See also *id.*; 45 C.F.R. § 1386.27(b) (The P&A system “shall have reasonable unaccompanied access to individuals with developmental disabilities at all times necessary to conduct a full investigation of an incident of abuse or neglect.”).

APPENDIX B

Definition of Abuse under the Protection and Advocacy System

Pursuant to the regulations governing the Protection and Advocacy System for the Rights of Persons with Developmental Disabilities (“PADD”) and the Protection and Advocacy System for Individual Rights (“PAIR”) at the time of the allegations: “Abuse means any act or failure to act which was performed, or which was failed to be performed, knowingly, recklessly, or intentionally, and which caused, or may have caused, injury or death to an individual with developmental disabilities, and includes such acts as: Verbal, nonverbal, mental and emotional harassment; rape or sexual assault; striking; the use of excessive force when placing such an individual in bodily restraints; the use of bodily or chemical restraints which is not in compliance with Federal and State laws and regulations or any other practice which is likely to cause immediate physical or psychological harm or result in long term harm if such practices continue. 45 C.F.R. § 1386.19 (2013); 29 U.S.C. § 794e (f) (2). The definition of abuse is similar under the regulations of the Protection and Advocacy for Individuals with Mental Illness Act (“PAIMI”). See 42 C.F.R. § 51.2.

Definition of Neglect under the Protection and Advocacy System

Pursuant to the regulations governing the Protection and Advocacy System for the Rights of Persons with Developmental Disabilities (“PADD”) and the Protection and Advocacy System for Individual Rights (“PAIR”) at the time of the allegations: “Neglect means a negligent act or omission by an individual responsible for providing treatment or habilitation services which caused or may have caused injury or death to an individual with developmental disabilities or which placed an individual with developmental disabilities at risk of injury or death, and includes acts or omissions such as failure to: establish or carry out an appropriate individual program plan or treatment plan (including a discharge plan); provide adequate nutrition, clothing, or health care to an individual with developmental disabilities; provide a safe environment which also includes failure to maintain adequate numbers of trained staff.” 45 C.F.R. § 1386.19 (2013). The definition of abuse is similar under the PAIMI Act. See 42 C.F.R. § 51.2; 29 U.S.C. § 794e (f) (2).