

December 16, 2008

Susan Haberstroh
Education Associate
Regulation Review
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

RE: DOE Prop. Discipline Alternative Program Regulation [12 DE Reg. 707 (December 1, 2008)]

Dear Ms. Haberstroh,

The Developmental Disabilities Council understands that the Department of Education proposes to adopt Discipline Alternative Program Regulations.

The Legislature first authorized and funded alternative schools through enactment of H.B. No. 247 in 1994 to ensure that expelled students, and students facing expulsion, would continue to be educated, albeit in more structured settings. Districts immediately objected, preferring to simply “dump” students with disciplinary problems without providing alternative programs. In response, the Attorney General’s Office issued the attached September 29, 1994 opinion interpreting H.B. No. 247 as contemplating enrollment of expelled students in alternative programs.

Over the years, districts have varied considerably in their commitment to offer alternative programs to students. The Legislature responded in 2008 with enactment of the attached H.B. No. 326. This bill notes that compulsory attendance laws apply to all children between the ages of 5 and 16. It also observes that “the intent of Delaware’s compulsory attendances statutes is not met when students who are eligible for placement in a Consortium Alternative Program are simply expelled by a local school district or charter school and not placed in such a program.” The bill amends the Delaware Code by establishing a presumption that eligible students “expelled or suspended pending expulsion” be placed in Alternative Programs. The bill directs the DOE to issue implementing regulations. The DOE has now published proposed regulations in the Register.

We offer the following observations.

First, H.B. No. 326 explicitly applies to charter schools. In contrast, the regulation directs that districts “shall place a student” in an alternative program (Section 1.2) while retaining an obtuse “may refer a student” reference (Section 12.1) for charter schools. A more affirmative mandate should be incorporated for charter schools.

Second, Section 1.2 merits wholesale revision.

A. It anomalously recites that “districts shall place a student at the ...Alternative Program site if the district board: (1.2.4) Determines the student is not eligible for placement at the “Alternative Placement”. I suspect that the DOE intended the term “eligible” to be “ineligible” in Section 1.2.4.

B. Section 1.2 contains subparts with conjunctions which are both cumulative (“and”) and disjunctive (“or”). This is confusing. If Subsections 1.1, 1.2, and 1.3 are meant to be disjunctive, it would be preferable to compile them into a separate subpart. For example, Section 1.2 could be restructured as follows:

1.2 Districts shall place... if board:

1.2.1 Has either:

1.2.1 Expelled...; or

1.2.2. Determined ...engaged in conduct...; or

1.2.3 Determined ...exhibited...; and

1.2.2 Determined student not ineligible...

C. Subsection 1.2.2 is “overbroad” and should be deleted. It essentially states that when a board decides that a student’s conduct “permits” expulsion, it must place the student in an alternative program. It is currently possible for a district to decide to not expel a student while pursuing other options (e.g. counseling; medication; behavioral contract). H.B. No. 326 is not intended to bar districts from retaining students in regular schools with supports in lieu of expulsion.

D. H.B. No. 326 imposes the presumption of placement in an alternative setting for students actually “suspended pending expulsion”. This concept is not reproduced in Section 1.2. It could be substituted for Subsection 1.2.2 which, as described in the preceding paragraph, should be deleted.

E. The “shall place” directive in Section 1.2 is overbroad as applied to students with disabilities. Districts cannot change the placement of a §504 covered student without convening an MDT, providing parental notice, conducting a manifestation determination, and offering a hearing accompanied by maintenance of the status quo placement. See excerpt from attached article on discipline. Likewise, unidentified students described at 14 DE Admin Code 926, Section 34.0, cannot be simply placed in an alternative program. Finally, although there is a pro forma reference to IDEA-eligible students in Section 11.0, it is obtuse. To correct these deficiencies, the DOE could adopt the following approach: 1) expand Section 11.0 to cover §504 students and unidentified students under Section 34.0; 2) expand Section 11.0 to include more affirmative references to procedural protections; and 3) amend Section 1.2 by adding the following introductory preface: “*Subject to Section 11.0, local school districts shall place...*”

Third, Section 3.0 requires a local board to document its specific rationale for non-placement in an alternative program. However, although the DOE may intend that this decision (with rationale) be sent to the DOE, Section 3.0 only requires a district to “report” the decision to

the DOE. Thus, a district could simply “report” to the DOE that it reached a decision not to place a student in an alternative program. The DOE should consider substituting “provided” or “submitted” for “reported”.

Section 3.0 should also be amended to also require forwarding a copy to the parent. The last sentence could be amended as follows: “Such decisions shall be submitted ...of such decision with a copy to the student’s parent.

Fourth, Section 13.0 would benefit from an amendment. The following sentence could be inserted after the existing first sentence: “The Department of Education shall annually evaluate the decisions acquired pursuant to Section 3.0 to assess the reasons for non-placement of students in alternative programs, including lack of space and the number, age, race, and special education status of excluded students by district.” In addition, the DOE should maintain data on the length of stay at the alternative school setting and the placement of the student after release from the alternative school. The DOE is already supposed to maintain the drop out rate data for all districts and schools.

The Developmental Disabilities Council thanks you in advance for your consideration of our remarks. Should you have any questions regarding these please contact our office at 739-3333.

Sincerely,

Jamie Wolfe

Chair

cc. State Board of Education

Senate Education Committee

House of Representatives Education Committee

State Council for Persons with Disabilities

Governor’s Advisory Council for Exceptional Citizens

