

Delaware Developmental Disabilities Council

Margaret O'Neil Building, 2nd Floor
410 Federal Street - Suite 2 Dover, Delaware 19903
Phone: 302.739.3333 ♦ Fax: 302.739.2015 ♦ Website: www.ddc.delaware.gov



MEMORANDUM

DATE: June 16, 2011
TO: Jennifer Rangi
FROM: Harline Dennison, Chairperson
Developmental Disabilities Council
RE: Draft "Flexible Funding" Legislation

The Developmental Disabilities Council (DDC) would like to thank you for giving us the opportunity to review this draft piece of legislation. The DDC reviewed the draft and Brian Hartman's legal analysis on this proposed draft. Our comments concur with Brian's and are as follows.

1. Proposed §134(a) includes the following caveat: "The flexibility provided by such plan shall not apply to or impact funding for special education." This is problematic. There is no definition of "special education" in the bill or the Code. The federal and State definition of a FAPE for a "child with a disability" has two (2) disjunctive components: 1) special education; and 2) related services. See 34 C.F.R. §300.17 and Title 14 Del.C. §3101(5). By only mentioning "special education", there would literally be no protection for "related services". The two page definition of "related services" from 34 C.F.R. §300.34 is attached to provide perspective on the vast array of services that could be undermined by the bill. See also Title 14 Del.C. §1716A.
2. Proposed §§134(e) and 134(f) are problematic. These subsections allow districts to either "substitute" positions or "cash in" positions. Subsection (e) contains a caveat excluding units generated by pupils under Preschool, Basic, Intensive, and Complex categories from the pilot. This caveat would not prevent "substitution" or "cashing in" of positions needed to support children with disabilities:

For example, one category is "nurse". Obviously, children with disabilities will disproportionately rely on nursing services in school for medications, insulin injections, catherization, and other health-related supports. It is our understanding that nurses are funded in large part by non-special education units and revenue. Indeed, the definitions of "Preschool" and "Basic Special Education" list the types of professionals expected to be supported by these units. There is no reference to "nurse" among the listed positions. See Title 14 Del.C. §1703(d). Thus, the bill could easily result in loss of school nurses.

A second example is "related services". Pursuant to Title 14 Del.C. §1716A, related services are funded by both regular and special education units. However, they exclusively support students with disabilities. See Title 14 Del.C. §1716A(d)(e). The bill would allow "substitution" and "cash in" of units generated by K-3 and 4-12 (regular education) units supporting related services. This could seriously undermine "related services" supports and "mainstreaming" of students with disabilities in



regular classroom settings.

Finally, the bill explicitly includes in its table of positions subject to “substitution” or “cash in” professions which exclusively or disproportionately support children with disabilities, including the following: 1) speech therapist; 2) psychologist; and 3) specialists (OT/PT). It would be preferable to simply delete these positions from the table or otherwise categorically exclude nurses, related services, psychologists, and speech, occupational, and physical therapists from the flexible funding scheme.

3. The bill would authorize “substitution” or “cash in” of “academic excellence” positions/units. This includes instructional aides, counselors, intervention specialists, support for “at risk” students, discipline programs, etc. See Title 14 Del.C. §1716(c). Authorizing districts to divert funds from such supports could have a disproportionate impact on children with disabilities.

4. The impact of the bill on “homebound” instruction funds is unclear. The DOE regards “homebound” instruction as a “non-special education” program. However, it is used disproportionately for students with disabilities. See 14 DE Admin Code 930. The report which generated this bill [DOE “Financial Flexibility Report (April, 2009)] recites that “homebound” funds were previously collapsed into the “academic excellence” block grant. At p. 5. However, the current Code defining the scope of the “academic excellence” funding does not mention homebound. See Title 14 Del.C. §1716(c). The main concern is that the bill includes “academic excellence” in the table of positions/units which can be “substituted” or “cashed in” AND the “special education” exclusion in proposed §134(a) would not apply to homebound since it is not considered “special education”.

5. The “(n)otwithstanding any other provision of the Delaware Code” recital in proposed §134(f) could be problematic. For example, if a district opts to “substitute” or “cash in” positions, does this exempt the district from such otherwise applicable requirements of 20% special education teachers per building [Title 14 Del.C. §1703(d)(2)b5] and 22 students per teacher in K-3 settings [Title 14 Del.C. §1705A]? Non-compliant districts could simply argue they “cashed” in the “special education teacher(s)” or “K-3” teacher position(s) as authorized by the bill.

6. The bill undermines accountability and transparency. The current law already allows some flexibility in the allocation of personnel resources based on a public vote by the local board after notice to the union, PTA, and others with an invitation to comment. See Title 14 Del.C. §1704. Instead of this “open” process, proposed §134(e) allows the district to circumvent this process simply by participation in the pilot.

Again, the Developmental Disabilities Council appreciates that you gave us the opportunity to review this prior to being introduced. Please feel free to contact me or Pat Maichle should you have questions or concerns at 302-739-2232.

Attachments



The Delaware Developmental Disabilities Council is federally funded in compliance with the DD Act.

(7) Orientation and mobility services—

(i) Means services provided to blind or visually impaired children by qualified personnel to enable those students to attain systematic orientation to and safe movement within their environments in school, home, and community; and

(ii) Includes teaching children the following, as appropriate:

(A) Spatial and environmental concepts and use of information received by the senses (such as sound, temperature and vibrations) to establish, maintain, or regain orientation and line of travel (e.g., using sound at a traffic light to cross the street);

(B) To use the long cane or a service animal to supplement visual travel skills or as a tool for safely negotiating the environment for children with no available travel vision;

(C) To understand and use remaining vision and distance low vision aids; and

(D) Other concepts, techniques, and tools.

(8)(i) *Parent counseling and training* means assisting parents in understanding the special needs of their child;

(ii) Providing parents with information about child development; and

(iii) Helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP.

(9) *Physical therapy* means services provided by a qualified physical therapist.

(10) *Psychological services* includes—

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning;

(iv) Consulting with other staff members in planning school programs to meet the special educational needs of children as indicated by psychological tests, interviews, direct observation, and behavioral evaluations;

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents; and

(vi) Assisting in developing positive behavioral intervention strategies.

(11) *Recreation* includes—

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(12) *Rehabilitation counseling services* means services provided by

qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to a student with a disability by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 *et seq.*

(13) *School health services and school nurse services* means health services that are designed to enable a child with a disability to receive FAPE as described in the child's IEP. School nurse services are services provided by a qualified school nurse. School health services are services that may be provided by either a qualified school nurse or other qualified person.

(14) *Social work services in schools* includes—

(i) Preparing a social or developmental history on a child with a disability;

(ii) Group and individual counseling with the child and family;

(iii) Working in partnership with parents and others on those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school;

(iv) Mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program; and

(v) Assisting in developing positive behavioral intervention strategies.

(15) *Speech-language pathology services* includes—

(i) Identification of children with speech or language impairments;

(ii) Diagnosis and appraisal of specific speech or language impairments;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech or language impairments;

(iv) Provision of speech and language services for the habilitation or prevention of communicative impairments; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language impairments.

(16) *Transportation* includes—

(i) Travel to and from school and between schools;

(ii) Travel in and around school buildings; and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.

(Authority: 20 U.S.C. 1401(26))

§ 300.35 Scientifically based research.

Scientifically based research has the meaning given the term in section 9101(37) of the ESEA.

(Authority: 20 U.S.C. 1411(e)(2)(C)(xi))

§ 300.36 Secondary school.

Secondary school means a nonprofit institutional day or residential school, including a public secondary charter school that provides secondary education, as determined under State law, except that it does not include any education beyond grade 12.

(Authority: 20 U.S.C. 1401(27))

§ 300.37 Services plan.

Services plan means a written statement that describes the special education and related services the LEA will provide to a parentally-placed child with a disability enrolled in a private school who has been designated to receive services, including the location of the services and any transportation necessary, consistent with § 300.132, and is developed and implemented in accordance with §§ 300.137 through 300.139.

(Authority: 20 U.S.C. 1412(a)(10)(A))

§ 300.38 Secretary.

Secretary means the Secretary of Education.

(Authority: 20 U.S.C. 1401(28))

§ 300.39 Special education.

(a) *General.* (1) *Special education* means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including—

(i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(ii) Instruction in physical education.

(2) *Special education* includes each of the following, if the services otherwise meet the requirements of paragraph (a)(1) of this section—

(i) Speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards;

(ii) Travel training; and

(iii) Vocational education.

(b) *Individual special education terms defined.* The terms in this definition are defined as follows:

(1) *At no cost* means that all specially-designed instruction is provided without charge, but does not preclude incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program.

(2) *Physical education* means—

language normally used by the child in the home or learning environment.

(b) For an individual with deafness or blindness, or for an individual with no written language, the mode of communication is that normally used by the individual (such as sign language, Braille, or oral communication).

(Authority: 20 U.S.C. 1401(20))

§ 300.30 Parent.

(a) *Parent* means—

(1) A biological or adoptive parent of a child;

(2) A foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent;

(3) A guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State);

(4) An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or

(5) A surrogate parent who has been appointed in accordance with § 300.519 or section 639(a)(5) of the Act.

(b) (1) Except as provided in paragraph (b)(2) of this section, the biological or adoptive parent, when attempting to act as the parent under this part and when more than one party is qualified under paragraph (a) of this section to act as a parent, must be presumed to be the parent for purposes of this section unless the biological or adoptive parent does not have legal authority to make educational decisions for the child.

(2) If a judicial decree or order identifies a specific person or persons under paragraphs (a)(1) through (4) of this section to act as the "parent" of a child or to make educational decisions on behalf of a child, then such person or persons shall be determined to be the "parent" for purposes of this section.

(Authority: 20 U.S.C. 1401(23))

§ 300.31 Parent training and information center.

Parent training and information center means a center assisted under sections 671 or 672 of the Act.

(Authority: 20 U.S.C. 1401(25))

§ 300.32 Personally identifiable.

Personally identifiable means information that contains—

(a) The name of the child, the child's parent, or other family member;

(b) The address of the child;

(c) A personal identifier, such as the child's social security number or student number; or

(d) A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

(Authority: 20 U.S.C. 1415(a))

§ 300.33 Public agency.

Public agency includes the SEA, LEAs, ESAs, nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of the State that are responsible for providing education to children with disabilities.

(Authority: 20 U.S.C. 1412(a)(11))

§ 300.34 Related services.

(a) *General. Related services* means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.

(b) *Exception; services that apply to children with surgically implanted devices, including cochlear implants.*

(1) Related services do not include a medical device that is surgically implanted, the optimization of that device's functioning (e.g., mapping), maintenance of that device, or the replacement of that device.

(2) Nothing in paragraph (b)(1) of this section—

(i) Limits the right of a child with a surgically implanted device (e.g., cochlear implant) to receive related services (as listed in paragraph (a) of this section) that are determined by the IEP Team to be necessary for the child to receive FAPE.

(ii) Limits the responsibility of a public agency to appropriately monitor and maintain medical devices that are needed to maintain the health and safety of the child, including breathing, nutrition, or operation of other bodily functions, while the child is transported to and from school or is at school; or

(iii) Prevents the routine checking of an external component of a surgically implanted device to make sure it is functioning properly, as required in § 300.113(b).

(c) *Individual related services terms defined.* The terms used in this definition are defined as follows:

(1) *Audiology* includes—

(i) Identification of children with hearing loss;

(ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of children, parents, and teachers regarding hearing loss; and

(vi) Determination of children's needs for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) *Counseling services* means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) *Early identification and assessment of disabilities in children* means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

(4) *Interpreting services* includes—

(i) The following, when used with respect to children who are deaf or hard of hearing: Oral transliteration services, cued language transliteration services, sign language transliteration and interpreting services, and transcription services, such as communication access real-time translation (CART), C-Print, and TypeWell; and

(ii) Special interpreting services for children who are deaf-blind.

(5) *Medical services* means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

(6) *Occupational therapy*—

(i) Means services provided by a qualified occupational therapist; and

(ii) Includes—

(A) Improving, developing, or restoring functions impaired or lost through illness, injury, or deprivation;

(B) Improving ability to perform tasks for independent functioning if functions are impaired or lost; and

(C) Preventing, through early intervention, initial or further impairment or loss of function.