

February 27, 2013

J. C. Benton
Director of Board Relations
Ohio Department of Education
25 South Front Street
Columbus, OH 43215-4183

Re: Public Comment on Proposed Standards 3301-35-15 for the Implementation of Positive Behavior Intervention Supports and the Use of Restraint and Seclusion

Dear Board Members:

As a national expert on the Individuals with Disabilities Education Act ("IDEA"), I write this letter to offer my public comments on the Proposed Standards. While I am pleased to see Ohio take the important step of offering some guidance on this important subject, I believe the Proposed Standards fail to take into account the requirements of the IDEA.

To clarify my concerns with the Proposed Standards, I thought it would be helpful to remind the Ohio Department of Education of the rules that apply to Ohio's operation of all schools, including what Ohio calls "community" schools.

Child Find Obligations

In order for a state to be eligible for assistance under the IDEA, it must have policies and procedures in place under its Child Find requirement to that ensure that:

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

20 U.S.C. § 1412(a)(3).

In other words, the state must ensure that school districts are identifying and locating children with disabilities. Nonetheless, the Proposed Standards make no reference to this Child Find requirement.

One would expect that a student, whose behavior could trigger the use of restraint or seclusion under your Proposed Standards, is a student who a school district might suspect is a child with a disability. Frustration with an inappropriate educational plan or an emotional disturbance can trigger misbehavior at school. Thus, I would recommend that the Proposed Standards state that each school district must implement a Child Find review for any child found to be eligible for restraint or seclusion.

Least Restrictive Environment

The use of a seclusion room would result in a child being placed in a highly restrictive environment. For a child with a disability, such a placement would have to meet the “least restrictive environment rule.” Under that rule:

To the maximum extent possible, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5).

The Proposed Standards make no reference to the use of “supplementary aids and services” to avoid placing a child in a highly restrictive environment. There is also no cross-reference in the seclusion rule to determining whether the child has been provided with the supplementary aids and services that might be specified in an Individualized Educational Program (“IEP”).

The IDEA also refers to the placement as an “educational environment.” It is hard to imagine that a seclusion room, as defined by the Proposed Standards, is an “educational environment.” Hence, it is not clear that any set of rules can justify the placement of a child with a disability in a seclusion room. That child should always be in an “educational environment.”

Manifestation Determination Review

When a student violates a code of student conduct, the school district must conduct a “Manifestation Determination” hearing if the student has been subject to placement in an alternative educational setting or suspended for more than 10 days. 20 U.S.C. § 1415(k). Although the Proposed Standards refer to placement in seclusion rooms for “the minimum amount of time necessary,” there is no requirement that schools keep track of the amount of time spent in such a setting. If the time exceeds 10 days then the IDEA’s Manifestation Determination rule is triggered.

Because of the severity of the restraint and seclusion rules, however, I would suggest that the state require school districts to conduct a Manifestation Determination review *whenever* a child with a

disability is subject to restraint or seclusion. The reason for this recommendation is that a Manifestation Determination can result in two important results. It causes the IEP team to:

- (i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such a child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement or
- (ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior.

20 U.S.C. § (k)(1)(F).

Application of the IDEA's Manifestation Determination review is consistent with the Proposed Standards' emphasis on the creation of "positive behavior interventions and support." The Proposed Standards, however, refer to those positive behavior interventions and support as school-wide policies. The IDEA creates a mechanism to develop a behavioral intervention plan for each child as an individual.

Individualized Educational Program

The most problematic aspect of the Proposed Standards is that they do not cross-reference a child's IEP or Behavior Modification Plan ("BMP") that might be part of an IEP. The Proposed Standards require schools to have a "school-wide systematic approach" to improve school climate and culture. While it is certainly a good idea to have such an approach, such an approach should never trump a child's IEP or BMP.

Other Less Restrictive Means

The Proposed Standards emphasize the importance of only using physical restraint or seclusion when there are not "less restrictive means of assisting a student in regaining control." A child's IEP or BMP may specify the content of those "less restrictive means." It is important that the Proposed Standards cross-reference the IEP or BMP so that school personnel are reminded to look at those documents before choosing a course of action.

Covered Age Range

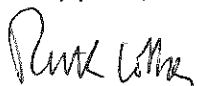
One minor ambiguity that I would recommend correcting is the age range of who is covered by your rules. The IDEA specifies that it covers "children with disabilities residing in the State between the ages of 3 and 21, inclusive." 20 U.S.C. § 1412(a)(1)(A). Under the IDEA, the rule is understood to cover children on the day they turn 3 years old until the day they turn 22 years old. By not using the word "inclusive" in your definition of a "student," it is possible that a school district would not understand that the rule extends from the student's third birthday until the student's twenty-second birthday.

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In sum, I hope the adoption of the Proposed Standards will result in no child in Ohio being subject to restraint or seclusion. If school personnel, however, are considering either of those options, the Proposed Standards need to be revised to make sure they do so consistently with the safeguards contained in the IDEA. Further, the use of restraint or seclusion should immediately trigger the school district's Child Find obligation so that the district can determine if the child is disabled and needs an individualized BMP rather than the implementation of school district-wide policy.

If I can be of further assistance as you revise these rules, please feel free to contact me. I welcome an opportunity to testify on these Proposed Standards at a public hearing.

Sincerely yours,



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cc: Chris Castle, Rules Coordinator, ODE
Sharon Jennings, Deputy Chief, Legal Counsel, ODE
Michael Sawyers, Acting Superintendent of Public Instruction