



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
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August 23, 2012

Ms. Susan K. Haberstroh
Education Associate
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

RE: 16 DE Reg. 160 [DOE Proposed Supportive Instruction Regulation]

Dear Ms. Haberstroh:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposal to amend its supportive instruction (homebound) regulation published as 16 DE Reg. 160 in the August 1, 2012 issue of the Register of Regulations. Some of the changes are prompted by the enactment of S.B. 112 from the 146th General Assembly (attached). SCPD has the following observations.

First, in §2.1, the term "public school" should be substituted for "school district". The entitlement applies to public school students enrolled in either a district or charter school.

Second, in §2.1.3.2, the second sentence should be amended to read as follows: "Postpartum absences must be certified by a physician or an advanced practice nurse who is employed by or has a collaborative agreement with a licensed physician." This amendment is required by S.B. 112.

Third, in §3.1.1.2, substitute "public school" for "school district" since the homebound entitlement applies to charter schools.

Fourth, §§1.0 and 4.0 authorize public schools to provide homebound to a student who is suspended, expelled or subject to expulsion. Without further guidance, this may result in public schools violating Title 14 Del.C. §1604(8). See also attached H.B. 326 from 144th General Assembly which established §1604(8). By law, the described students are presumptively eligible for enrollment in an alternative school. The regulation could easily be misconstrued as authorizing public schools to routinely place described students on homebound for 3-5 hours weekly rather offering full-time placement in an alternative school. At an absolute minimum, the new sentence in §1.0 should include an introductory phrase - "Subject to Title 14 Del.C. §1604(8)", (t)his may also include... Section 4.0 could then be amended by adding the following second sentence: "Such policy shall conform to, and not circumvent, any qualifying student's eligibility for enrollment in a consortium discipline alternative program pursuant to Title 14 Del.C. §1604 and 14 DE Admin Code 611."

Fifth, the 3-5 hour minimum standard in §3.1.1 is not even marginally adequate. See, e.g., Region IV OCR LOF to Memphis (TN) City School District, 20 IDELR 85, 86 (April 23, 1993) [provision of 3 hours weekly homebound instruction in IEP based on district policy violates §504]; and Region I OCR LOF to Boston Public Schools, 21 IDELR 170 (June 10, 1994) [four hours weekly of homebound instruction violates §504 and ADA]. Moreover, in practice, the minimum has historically been the norm. The U.S. Department of Education disallows homebound based on a formula or set number of hours for students with disabilities. See attached materials. At a minimum, the following third sentence should be added to §3.1.1.1 (or added as a new §3.1.1.3): “For students identified under the IDEA or §504 of the Rehabilitation Act, the extent of weekly supportive instruction must be individually determined to ensure FAPE.” This statement is consistent with long-standing DOE policy but absent from the regulation.

Sixth, the prevailing practice in Delaware is to offer homebound as an after-school hours option only. For students with disabilities, this may also violate §504 and the ADA. Region I OCR LOF to Boston Public Schools, 21 IDELR 170 (June 10, 1994)[disallowing practice of only offering “after-school hours” homebound]. The regulation contains no guidance in this context.

Seventh, S.B. 112 authorizes the DOE to “identify the licensed professionals authorized to certify eligibility for supportive instruction”. The DOE should consider adding “physician assistants” licensed under Title 24 Del.C. Ch. 17 and 24 DE Admin Code 1700, §24. Physician assistants, like APRNs, work under the supervision of a physician and can diagnose and prescribe treatment. Recent legislation has included physician assistants as well as APRNs as alternatives to physicians for authoritative medical opinions. See H.B. 261 (signed July 18, 2012); and S.B. 138 (signed July 6, 2009). See also Title 16 Del.C. §3003D(c).

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations on the proposed regulation.

Sincerely,



Daniese McMullin-Powell, Chairperson
State Council for Persons with Disabilities

cc: The Honorable Matthew Denn
The Honorable Mark Murphy
Dr. Teri Quinn Gray
Ms. Mary Ann Mieczkowski
Ms. Paula Fontello, Esq.
Ms. Terry Hickey, Esq.
Mr. John Hindman, Esq.
Mr. Charlie Michels
Mr. Brian Hartman, Esq.
Developmental Disabilities Council
Governor’s Advisory Council for Exceptional Citizens

16reg160 doe-homebound 8-23-12



SPONSOR: Sen. Hall-Long & Reps. Walker, Q. Johnson
Sens. Sokola, Cloutier, Ennis, Reps. Keeley, J. Johnson

DELAWARE STATE SENATE

146th GENERAL ASSEMBLY

SENATE BILL NO. 112
AS AMENDED BY
SENATE AMENDMENT NO. 1
AND
HOUSE AMENDMENT NO. 1

AN ACT TO AMEND TITLE 14 OF THE DELAWARE CODE RELATING TO SUPPORTIVE INSTRUCTION.
BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend §122(b), Chapter 1, Title 14 of the Delaware Code by inserting a new subsection "(24)" to read as follows:

"(24) Defining eligibility for supportive instruction for school district and charter school students. Such regulations shall identify the licensed professionals authorized to certify eligibility for supportive instruction and provide that the certification of an advanced practice nurse, who is employed by or who has a collaborative agreement with a licensed physician, be accepted on the same basis as a physician certification. For purposes of this subsection, 'supportive instruction' means an alternative educational program provided in a home, hospital, or other setting for students temporarily unable to attend their school of enrollment on a full-time basis due to sudden illness, injury, accident, episodic flare up of a chronic condition, or other basis authorized by the Department of Education through regulation."

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Sponsor:

CoSponsors: Reps. Blakey, Brady, Ewing, Hall-Long, Hudson, Kowalko, Longhurst, Manolakos, Mulrooney, Plant, Schooley, B. Short, Spence, Walls, Williams; Sens. Henry, McBride

Introduced on : 03/13/2008

Long Title: AN ACT TO AMEND TITLE 14 OF THE DELAWARE CODE RELATING TO SCHOOL DISCIPLINE.

Synopsis: This act establishes a presumption that students sixteen and younger who are expelled or suspended pending expulsion by a local school district or charter school are appropriate for placement in an alternative education program

Current Status: Signed On 07/21/2008

Volume 76:407

Fiscal Note: Not Required

Chapter

Date Governor acted: 07/21/2008

Full text of Legislation: (in HTML format) [Legis.html](#)

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Committee

Reports: House Committee Report 03/20/08 F=1 M=8 U=0---->

Voting Reports:

House vote: () Passed 7/1/08 2:39:39 AM----->

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Actions History:

Jul 21, 2008 - Signed by Governor
 Jul 01, 2008 - Passed by Senate. Votes: Passed 17 YES 1 NO 0 NOT VOTING 3 ABSENT 0 VACANT
 Jul 01, 2008 - Necessary rules are suspended in Senate
 Jul 01, 2008 - Passed by House of Representatives. Votes: Passed 41 YES 0 NO 0 NOT VOTING 0 ABSENT 0 VACANT
 Mar 20, 2008 - Reported Out of Committee (EDUCATION) in House with 1 Favorable, 8 On Its Merits
 Mar 13, 2008 - Introduced and Assigned to Education Committee in House

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Schooley, B. Short, Spence, Walls, Williams; Sens.
Henry, McBride

HOUSE OF REPRESENTATIVES
144th GENERAL ASSEMBLY

HOUSE BILL NO. 326

AN ACT TO AMEND TITLE 14 OF THE DELAWARE CODE RELATING TO SCHOOL DISCIPLINE.

1 WHEREAS, the intent of the General Assembly, as evidenced by Delaware's compulsory attendance laws, is that
2 all children between the ages of five and sixteen attend and have access to full-time public education; and

3 WHEREAS, recognizing that some students exhibiting behavior or discipline problems may not be appropriate for
4 placement in a regular classroom setting, the State of Delaware has enacted statutes and regulations providing for the
5 education of such students in Consortium Discipline Alternative Programs; and

6 WHEREAS, the intent of Delaware's compulsory attendance statutes is not met when students who are eligible for
7 placement in a Consortium Discipline Alternative Program are simply expelled by a local school district or charter school
8 and not placed in such a program.

9 NOW, THEREFORE:

10 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

11 Section 1. Amend §1604, Title 14 of the Delaware Code by adding a new subsection "(8)" thereto as
12 follows:

13 "(8) A student sixteen years of age or less who is expelled or suspended pending expulsion by a local school
14 district or charter school shall be presumed appropriate for placement in a Consortium Discipline Alternative Program site,
15 provided the student is not otherwise ineligible by statute or regulation for placement in such a program. The burden of
16 establishing that a student is not appropriate for placement in a Consortium District Alternative Program shall be on the
17 local school district or charter school. Any student not shown by preponderance of evidence to be inappropriate for
18 placement in a Consortium District Alternative Program shall be placed in such a program."

19 Section 2. The Department of Education shall promulgate regulations establishing the criteria, which may include
20 age, availability of funding, availability of space, and such other considerations the Department deems relevant, to be
21 applied to determine whether a student is inappropriate for placement in a Consortium Discipline Alternative Program.

SYNOPSIS

This act establishes a presumption that students sixteen and younger who are expelled or suspended pending expulsion by a local school district or charter school are appropriate for placement in an alternative education program



UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

ASSISTANT SECRETARY
FOR CIVIL RIGHTS

Mr. Brian J. Hartman, Acting Managing Attorney
Community Legal Aid Society, Incorporated
913 Washington Street
Wilmington, Delaware 19801

Dear Mr. Hartman:

This is in response to your request for interpretation of Section 504 of the Rehabilitation Act of 1973 with regard to a ceiling on weekly hours of special education. Your letter states that some local school districts in Delaware provide special education to handicapped students in hospitals or at home for medical reasons for a maximum of one or two hours per day regardless of individual need, based on State funding policy.

We agree that a policy which, regardless of individual need, places a ceiling on hours of special education provided to homebound and hospital-bound eligible children is inconsistent with Section 504. The implementing regulations (34 C.F.R. Part 104) at §104.33 provides that:

(a) General. A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) Appropriate education. (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§104.34, 104.35, and 104.36.

(2) Implementation of an individualized education program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b) (1)(i) of this section.

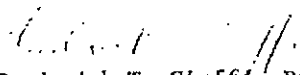
Thus, the Section 504 implementing regulation does not support the notion that a fixed number of special education hours can provide an appropriate education for special education students regardless of their handicapping conditions. Rather, §104.33 anticipates that an individualized program will be needed to provide the education and related aids and services necessary "to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met."

Page 2 - Mr. Brian J. Hartman

Your letter indicates that our regional office in Philadelphia advised you to send your inquiry to Mr. James Littlejohn, a member of my staff. We are sending a copy of this response to the Regional Director. Should you wish to file a complaint alleging a violation of Section 504, you may do so at that office.

Please let us know if we may be of further assistance.

Sincerely yours,


Frederick T. Cioffi, Director
Elementary and Secondary Education Division
Litigation, Enforcement and Policy Service

cc: Regional Director III

JUL 27 1982

STATE OF



DELAWARE

DEPARTMENT OF PUBLIC INSTRUCTION

THE TOWNSEND BUILDING

P. O. BOX 1402

DOVER, DELAWARE 19903

WILLIAM B. KEENE
STATE SUPERINTENDENT
JOHN J. RYAN
DEPUTY STATE SUPERINTENDENT

SIDNEY B. COLLISON
JAMES L. SPARTZ
ASSISTANT STATE SUPERINTENDENTS

June 10, 1986

Brian J. Hartman, Esq.
Community Legal Aid Society, Inc.
913 Washington Street
Wilmington, Delaware 19801

Dear Brian:

This letter is written in response to your letter of May 29, 1986 to Marcia Rees concerning DPI's interpretation of the "homebound" regulations, pp 28-29 of the Administrative Manual for Programs for Exceptional Children.

The extent of supportive (hospital/homebound) instruction for special education students is determined by individual need. Districts may utilize federal or local funds to supplement, when necessary, the State funds which are provided in accordance with the regulations, including the weekly schedule of hours, as outlined in the regulations.

Please contact me, if you have additional questions regarding this issue.

Sincerely,

A handwritten signature in cursive script, appearing to read "Carl".

Carl M. Haltom, Ed.D.
State Director
Exceptional Children/
Special Programs Division

CMH/pb
cc: Marcia Rees, Esq.

2. SUPPORTIVE INSTRUCTION (HOMEBOUND)

a. Definition

Supportive instruction is an alternative educational program provided at home, hospital or related site. For non-handicapped students hospitalized or at home for a sudden illness or accident considered to be of a temporary nature, procedures for eligibility shall be limited to medical certification that the student cannot attend school. For handicapped students, services shall be provided according to the Administrative Manual: Programs for Exceptional Children, and shall be processed under the district's special education authority.

b. Eligibility

To be eligible for supportive instruction as a non-handicapped student, the student shall be enrolled in the local school district and:

- (1) if absence is due to a medical condition, be certified by a physician's statement where absence will be for two weeks or longer; or
- (2) if absence is necessary due to severe adjustment problems, be certified by a staff conference, including a psychologist or psychiatrist; or
- (3) if for transitional in-school program, be certified by staff conference.

c. Pregnancy complicated by illness or other abnormal conditions as certified by a physician may be considered a valid reason for supportive instruction; however, a normal pregnancy is considered a condition for which other State supported instructional programs administered by local districts should be adequate.

d. Implementation

Supportive instruction for non-handicapped students will begin as soon as administratively feasible and may continue upon return to school only in those exceptional cases where it is determined that the student needs a transitional program to guarantee a successful return to the school program. Such unusual cases shall be referred to the State Director, Exceptional Children/Special Programs Division, Department of Public Instruction, for approval.

- (1) The following weekly schedule of hours of instruction will be supported by State funds to the extent that appropriations allow:

Out of School

Grades K-5	Minimum 3 hours	Maximum 5 hours
Grades 6-8	Minimum 5 hours	Maximum 7 hours
Grades 9-12	Minimum 5 hours	Maximum 10 hours

In School

Grades K-12	No minimum	Maximum 3 hours
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- (2) State funded instruction shall not exceed three visits per week. Summer instruction is permitted for a student who, as determined by the student's teachers and principal, needs the instruction to complete course work or to maintain a level of instruction in order to continue in a school program the following September.
- (3) A home-to-school telephone instructional system may be provided when economically feasible and educationally advisable as determined by the local district administration. Negotiations for installation, removal, and costs shall be between the telephone company and the local school district. (Payable from allocations for homebound instruction.) When a home-to-school telephone instructional system is provided, the coordinating teacher at the elementary level, or, in the case of departmentalized instruction, the teacher of each basic subject area may be authorized to visit the home for one hour per week to give assistance.
- (4) The student's curriculum shall be followed to the maximum extent possible.
- (5) When a student is in a departmentalized program, more than one teacher may be assigned.
- (6) Teachers providing home, hospital, and/or supportive instruction for a student shall be paid no less than the minimum hourly rate as set by the Department of Public Instruction.
- (7) A specific amount is allocated to each district for operation of this program, but nothing in these regulations shall be construed to prevent a local school district from providing additional hours of instruction, or paying a higher hourly rate for teachers' services so long as the

extension of services is supported by local or Division III funds. Summer instruction may be provided with State funds, subject to the availability of funds and approval by the Department of Public Instruction. Funds for teacher travel in the provision of home, hospital, or supportive instruction are to be provided by the local school district subject to reimbursement annually upon request to the State Director, Exceptional Children/Special Programs Division, Department of Public Instruction.

3. SUMMER SCHOOL PROGRAMS

- a. The organization and administration of the summer school instructional programs should be in accordance with acceptable educational procedures. Summer school programs, conducted under the auspices of the local school district or combined districts, may be established to provide the following experiences:
- (1) remedial or make-up courses for credit for those students who have failed the course or else who have received a low grade;
 - (2) programs designed for completing specific performance requirements;
 - (3) exploratory courses where the students acquire basic information and skills;
 - (4) occupational/vocational courses where students acquire personal or specialized skills and/or participate in cooperative work experience programs where appropriate credit is granted;
 - (5) personal or academic enrichment courses for the acquisition of information and skills;
 - (6) original or advanced courses for credit for students who want to complete their program of studies early; and
 - (7) recreational programs which do not grant credit but provide activities of a physical nature.
- b. In order to establish educational programs during the summer where credit for satisfactory completion of the scheduled courses is granted, these following guidelines should be considered:

Notice of the proposed amendment was published in the News Journal and the Delaware State News on May 24, 2000 in the form hereto attached as Exhibit A. The notice invited written comments and none were received from the newspaper advertisements.

**A.5 Amendment to Regulation Certification for
Speech Language Pathologists - For
Approval**

The Acting Secretary of Education seeks the consent of the State Board of Education to amend the regulation Certification for Speech Language Pathologist, page 23, Section 5 of the Specific Requirements in the *Manual for Certification of Professional Public School Personnel*. The amendment would remove the requirement of nine (9) credit hours of course work presently required. The content of this course work is covered in the content of the Master's Degree program that a Speech Language Pathologist is required to complete in order to obtain a state license. The nine hours have been an impediment for districts in the hiring process and the state license requirements already assure that the person has the required knowledge.

Notice of the proposed regulation was published in the News Journal and the Delaware State News on May 19, 2000, in the form hereto attached as Exhibit A. The notice invited written comments and none were received from the newspaper advertisements.

* **A.6 Amendment to Regulation Supportive
Instruction (Homebound) - For Discussion**

The Acting Secretary of Education seeks the consent of the State Board of Education to amend the regulation Supportive Instruction (Homebound) pages A-11 to A-13 in the *Handbook for K-12 Education*. The regulation has been amended to specify when services can begin for pregnant students who qualify, to address the issue of students with 504 plans and to update and clarify the language. The amended regulation also removes the cap on the number of hours of supportive instruction that can be provided at each grade level leaving only a minimum requirement. Local school districts may provide additional hours of supportive instruction from their academic excellence allotment or from other available funding sources.

**A.7 Amendment to Regulation Content
Standards - For Discussion**

The Acting Secretary of Education seeks the consent of the State Board of Education to amend the regulation Content Standards, and repeal as separate regulations Agriscience, Business Finance and Marketing, Foreign Languages and Visual and Performing Arts. The purpose of these changes is to consolidate the specific content standards with the