Disability Rights WASHINGTON
Washington's protection and advocacy system

Northwest Justice Project

August 7, 2020

Assistant Superintendent Glenna Gallo
Washington Office of the Superintendent of Public Instruction
Sent via email to: glenna.gallo@k12.wa.us

Re: Special Education Rulemaking

Dear Glenna,

The undersigned organizations are advocates for students with disabilities. We appreciate the opportunity to participate in improving state regulations for special education. This letter summarizes our reaction to the draft rules circulated on July 9, 2020 for public comment.

Positive changes

We support the following amendments included in the draft:

- Adding to WAC 392-172A-01035: "(e) Special education services may not be solely based on the disability category for which the student is eligible."

We had proposed language to prevent school districts from misapplying the criteria for eligibility in the developmental delay category (i.e., two standard deviations below the norm), as if it's a threshold to receive services in any area of need regardless of the student's category of eligibility. While this is not the language we proposed, we think it clarifies that no single standard applies to all services.

- Broadening "developmental delay" eligibility from ages 3-8 to ages 3-9.

We proposed this change to be consistent with federal regulations and to help 9-year-olds who may not qualify in other categories. Thank you for including it in the draft rule.

- Adding to WAC 392-172A-02050: "(3) The public agency responsible for providing FAPE to a preschool child with a disability must ensure that FAPE is provided in the LRE where the child's unique needs (as described in the child's IEP) can be met, regardless of whether the local education agency (LEA) operates public preschool programs for children without disabilities. An LEA may provide special education and related services to a preschool child with a disability in a variety of settings, including a regular kindergarten class, public or private preschool program, community-based childcare facility, or in the child's home."

We support opportunities for preschool children to be with typically developing peers, including in community settings and private schools. Too often, the only public program offered is a preschool exclusively for children with disabilities.

> Adding to WAC 392-172A-02076 a ban on physical restraint of students "against a wall or the floor," and prohibiting "prone, supine and wall restraints…. or any restraint that interferes with the student's breathing."

This is a very welcome change that parents and other advocates have requested at the state and local level in the past. In the George Floyd era, there is no question that our society will not tolerate the government holding a person face down. This protection for children is overdue.

- Requiring staff members who use restraint or isolation to "be trained and certified by a qualified provider in the use of trauma-informed crisis intervention (including de-escalation techniques)" and in "the safe use of" isolation and restraint.

This will help staff members understand how to protect their own safety, and the safety of students, without using restraint and isolation. Parents can still use emergency response protocols to be more specific about the training required for particular staff members.

- Requiring a supervising adult to stay within visual, not just auditory, range of students in isolation.

Isolation is inherently dangerous. It is confining a dysregulated student alone in a locked room. Merely remaining within earshot is not enough to prevent self-harm. Moreover, in order to end isolation as soon as the imminent likelihood of serious harm has dissipated – as the law requires – the responsible adult must be watching the student. This is a good change.

- Requiring substantial professional training for *any* personnel providing, designing, supervising, monitoring or evaluating the provision of special education services, not just teachers.

Washington schools rely too heavily on paraeducators to provide specially designed instruction. This change to WAC 392-172A-02090(b) appropriately recognizes that teachers are not the only service providers who need substantial training in order to meet the needs of students.

- Adding to WAC 392-172A-03005: "(c) The school district shall make a referral request for an initial evaluation form available and provide it upon receipt of an oral request."

We agree with the preproposal comments of the Governor's Office of the Education Ombuds on this issue. While we prefer to allow parents to make oral requests for initial evaluations of special education eligibility, providing a written request form upon receiving an oral request is a step in the right direction.

- Requiring parental notification of Individualized Education Plan (IEP) meetings to "[i]nclude whatever action is necessary to ensure that the parent understands the

notification being provided, including providing the notification in writing in a parent's native language when necessary for the parent's understanding and arranging for an interpreter for parents with deafness or whose native language is other than English."

This is similar to the language we proposed to require notice in the parent's language. Thank you for recognizing the importance of communicating effectively with all parents.

- Requiring schools to document the family's preferred language and whether interpreter requirements were met.

Adding this requirement to WAC 392-172A-03100 is another step towards ensuring that all families are engaged in important planning decisions. We support it.

- Requiring parent consent to invite a representative from an outside agency to the IEP meeting.

State agencies such as the Developmental Disabilities Administration and the Division of Vocational Rehabilitation are underfunded and understaffed, such that caseworkers may not always develop expertise in the needs of particular students. We support empowering parents to decide when the presence of state and other caseworkers will be helpful in developing IEPs. Additionally, we recommend that OSPI add language requiring Districts affirmatively ask parents prior to the IEP meeting, if there is anyone, from any outside agency, who they wish to invite to the meeting.

- Requiring districts to inform teachers and service providers of their IEP responsibilities "in a timely manner."

We proposed adding a "timely" requirement here. Thank you for including it in the draft rule.

- Requiring district contracts with nonpublic agencies to include: "[a]ssurance that the requirements of WAC 392-172A-02105 through 392-172A-02110 are met (including requirements for parental consent, notification, and reporting)."

We proposed this change as well. Too often, districts do not collect or report data on the frequency of restraint and isolation in contracted private schools. This prevents parents, legislators and OSPI from identifying and addressing the excessive use of restraint and isolation in "therapeutic" private schools dealing with severe behavior challenges. Thank you for including this important accountability measure in the draft rule.

- Requiring nonpublic agencies to report complaints about services to school districts and OSPI.

This is another good step toward ensuring that contracted private schools are safe and effective in serving students with disabilities.

- Requiring school districts to report all disciplinary removals, not just long-term suspensions and expulsions, to OSPI.

Students with disabilities are disproportionately affected by discipline. We support expanded monitoring so that the state can identify and address patterns of excessive or discriminatory discipline.

Concerns

- WAC 392-172A-01109, defining likelihood of serious harm, includes substantial harm to property in subsection (1)(c). This is not in alignment with federal guidance and promotes overuse of restraint and isolation.

The U.S. Department of Education Guidance, in its Resource Document on Restraint and Seclusion, says "physical restraint or seclusion should not be used except in situations where the child's behavior poses imminent danger of serious physical harm to self or others and other interventions are ineffective and should be discontinued as soon as imminent danger of serious physical harm to self or others has dissipated." The guidance goes on to say restraint and seclusion should never be used for punishment, coercion, to retaliate, or as a planned response to behavior that does not pose imminent danger of serious physical harm to self or others. (See pages 12, 13, 14, 15, and 16, of Restraint and Seclusion Resource Document, U.S. DOE, https://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf). When restricting restraint and isolation in 2015, the Legislature used the definition of "likelihood of serious harm" in RCW 70.96B.010. The restraint law, RCW 28A.600.485(3)(b), still cites RCW 70.96B.010 even though the latter statute was repealed in 2016. We believe the repeal creates an opportunity to align the regulatory definition with federal guidance. If a student is at serious risk of physical harm because that student is going to injure himself or others by way of property destruction, restraint may be necessary. If the student is about to destroy property and is not posing an imminent likelihood of serious harm to self or others, restraint is not warranted. Restraint is a dangerous practice that may induce trauma and shame at best and at worst may result in serious injury or death. It is extremely important that schools understand the gravity of its application.

- Add the definition "regular early childhood program" (or, a "general education setting for pre-schoolers") which specifies at least 50% nondisabled peers, to WAC 392-172A-02050.

Thanks to OSPI for including our other asks around least restrictive environment (LRE) and preschool. Including this definition would clarify that peer programs with only a few non-disabled students are not considered general education settings per federal rule. There is confusion on this matter among LEA providers of special education services to children ages 3-5. It affects both placement of children and reporting of general education settings.

- The definition of Universal Design for Learning (UDL) in proposed WAC 392-172A-01197 seems unrelated to any requirement.

Universal design for learning can transform classrooms and ensure access to FAPE and reasonable accommodations essential for learning. It is also critical, during COVID, to think through platforms that are accessible for all students as we build remote learning structures. UDL is an important component of this process that will improve access to education for all students. While we appreciate the reference to UDL in the proposed rules, we would like to see language requiring or at least incentivizing use of UDL.

- Home/Hospital Instruction in WAC 392-172A-02100 generates confusion, as districts often conflate administrative decisions for students who need temporary home/hospital-based instruction with regulatory requirements for students on IEPs who need home/hospital-based instruction. It will be important to provide clarification around this, especially during the time of COVID and the advent of remote learning.

Pursuant to 34 CFR 300.115(b) (1), home and hospital-based instruction falls within the continuum of placements for special education students. Students on IEPs who receive home/hospital-based instruction are still eligible for FAPE, and still require access to general education curriculum, the least restrictive environment, and implementation of the IEP. Districts, however, typically provide the minimal amount of home instruction (i.e.; a few hours a week) to all students who receive home/hospital-based instruction, regardless of what is in the IEP. Because this section addresses students without IEPs who are eligible for home/hospital-based instruction, this is not clear.

Advocates also proposed changing the timeframe from four weeks to three. Three weeks without school creates major setbacks for students, and requiring a student to miss a whole month of school prior to offering home/hospital-based instruction could cause greater or more serious regression, especially for students with disabilities.

- Non-public agencies must implement emergency response protocols, follow regulations regarding restraint and isolation, and must fulfill restraint/isolation documentation and reporting requirements. (WAC 392-172A-02105 and WAC 392-172A-02100) (WAC 392-172A-04085).

We appreciate the changes to WAC 392-172A-04085, which hold non-public agency (NPA) schools to state learning standards and assure they comply with restraint, isolation, and emergency response protocols. NPAs are practicing restraint/isolation and utilize emergency response protocols with their students; but it is not clear they follow these regulations, nor do they document and report restraint/isolation incidents to OSPI. The WACs should clearly state that <u>each NPA must report restraint and isolation data</u> <u>to ***both*** the school district and to OSPI</u>.

Currently, NPAs may report, to the school district, instances of restraint/isolation; but they do not typically report to OSPI. Districts, in turn, may or may not include NPA restraint/isolation aggregate data when they report to OSPI. If they do, it is generally not broken down by NPA. Lake Washington School District, for example, lists "contractual schools" in the OSPI 2017 data,

which reflects isolation and restraint incidents from all NPAs in its district. Excelsior Youth Center appears to be the only other in-state NPA found in OSPI restraint data out of 30 in-state NPAs listed on OSPIs website. This is problematic because OSPI has indicated it wants to use restraint and isolation data to target technical assistance to schools with high incidents. NPAs have students with some of the most significantly involved disabilities and most complex behavioral needs, but their restraint and isolation data is not available by school. There is no means by which to gauge or remedy high use. OSPI needs this data to assist schools and fulfill its state education role of ensuring each Washington student has access to a free and appropriate public education.

- Adjust reevaluation and evaluation timelines to meet the needs of highly mobile students and avoid loss of educational opportunity due to slow or delayed evaluation. (WAC 392-172A-03015 and WAC 392-172A-03020).

Both the Office of the Education Ombuds and advocates proposed tightening timelines and more promptly initiating consent procedures necessary to trigger the 35-day timeline for reevaluations. For parents who request special education evaluation around spring break, it may be autumn before an evaluation can be completed with current processes and timelines. This delays much-needed educational access, particularly for students who are highly mobile or homeless or in foster care and may move on to other schools. Failure to promptly initiate reevaluation can delay service or placement requests by a parent and result in lost educational opportunity for the student. This can be managed by requiring a deadline for districts to provide necessary consent paperwork to families once an evaluation decision is made. Advocates proposed language to change reevaluation timelines to thirty-five calendar, instead of school, days. We also requested that OSPI add language that a reevaluation would not unreasonably delay a response to parents' placement or service proposals. Language to assure summer does not delay evaluations, and to shorten the initial 25 school day period for deciding whether or not to evaluate a student would address this, too.

- Require districts to provide written materials for meetings (including IEPs) well in advance of the meeting. (WAC 392-172A-03100).

Advocates requested adding, to subsection (8), the requirement that a school district give the parent a copy of any draft IEP prior to the meeting. Other states require this. When parents initially see the IEP draft during the meeting, they often try to read the IEP while listening to meeting comments, which means they cannot fully participate in the IEP meeting. They have not had the opportunity to think through what these proposed services mean for the student or how IEP implementation may or may not work. Additionally, parents are not generally versed in education data, evaluations, instruction techniques, or the law, and have had no opportunity to look up information or come prepared with questions. This is especially problematic for parents who do not use English as their native language. This proposed change, though not yet included, makes meetings more productive and ensures the parent is an informed and effective member of the IEP team. This change should be included.

- Eliminate unnecessary barriers to parent participation in meetings and protect parent observation rights in special education settings. (WAC 392-172A-05010).

Parents ask to record IEP team meetings for a variety of reasons, including reasonable accommodations for their own disability, unavailability of a parent or grandparent, to avoid misunderstanding, or to mitigate language difficulties. We are grateful that regulations were changed to reflect this right to request permission for recording. Regulations should also prohibit unreasonable denial of recording requests, and require explanation of denial in a prior written notice.

Similarly, we appreciate that the draft rules recognize the parent's right to request permission to observe students in current and proposed educational placements. Regulations should also prohibit unreasonable denial of observation requests, so that parents can participate effectively in the IEP process and engage fully informed with the IEP team. Denial of parent requests to observe should be explained in a prior written notice.

- Clarify Independent Educational Evaluation regulations so districts do not impose their restrictions to evaluation scope or timeline. Districts must not control whether information is shared with a parent prior to meetings to discuss findings. (WAC 392-172A-05005).

We proposed clarifying language to fulfill the intent that evaluations remain independent of the district. Too often, a district directs or restricts the evaluation. The district may impose limits in evaluation scope, require results be produced to the district first, or demand a district representative be present at all meetings to discuss the evaluation. Regulations should protect the parents so that they can have private discussions with the evaluator, manage the evaluation scope and be empowered with information as to the results to be prepared for discussion at district meetings. Additionally, the district should pay for the evaluator to attend the review meeting to make sure the team understands the data and evaluation outcomes and efficiently utilizes this information for the student's individualized education plan.

- Avoid changing WAC 392-172A-03090(1)(d), which now requires the statement of services in an IEP to be "based upon peer-reviewed research to the extent practicable," to include "input from IEP team members" as an additional basis for IEP services.

We are concerned that this proposed change will dilute the importance of science in determining which services will meet the student's needs. For example, services from behavior technicians are supported by science for many students with severe behavioral disabilities. The draft rule could be interpreted as giving non-scientific "input" the same weight as peer-reviewed research, which is contrary to the IDEA and (we suspect) probably not your intention. We understand from informal conversations that OSPI simply wanted to clarify that evaluations are not the sole basis for IEP services (such that a new evaluation is needed to change services.) We think that is already clear from WAC 392-172A-03110, which lists evaluations as merely one of several factors to be considered in developing and revising IEPs. However, we support eliminating any misperception that a service must be specifically recommended in an evaluation before it can be included in an IEP. To that end, we suggest the following alternative language in bold below:

WAC 392-172A-03110(3): Each public agency must ensure that, subject to subsections (4) and (5) of this section the IEP team:
(a) Reviews the student's IEP periodically, but not less than annually, to determine whether the annual goals for the student are being achieved; and
(b) Revises the IEP, as appropriate, to address:
(i) Any lack of expected progress toward the annual goals described in WAC 392-172A-03090 (1)(b) and in the general education curriculum, if appropriate;
(ii) The results of any reevaluations;
(iii) Information about the student provided to, or by, the parents, as described under WAC 392-172A-03025;
(iv) The student's anticipated needs; or
(v) Other matters.
[ADD] **PROVIDED, that nothing in this regulation requires an evaluation to specifically recommend a service or accommodation before such service or accommodation can be included in an IEP.**

Thank you for the opportunity to comment and for your proposed consideration of these changes.

Sincerely,

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