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February 13, 2009

**VIA EMAIL**

Matt DeTemple  
Chief Legal Counsel  
Ohio Department of Education  
25 South Front Street  
Columbus, Ohio 43215-4183  
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**Re: OLR'S' Comments to Proposed Rules 3301-51-20 and 3301-46-01**

Dear Mr. DeTemple:

OLRS submits the attached comments to the above referenced rules, which were scheduled for hearing on February 9, 2009. Thank you for the opportunity to provide comments to these rules.

If you have any questions, please feel free to contact me.

Sincerely,

Kristin E. Hildebrant  
Supervising Attorney



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**Ohio Legal Rights Service (OLRS)** is an independent state agency and the federally and state designated Protection and Advocacy (P&A) system and Client Assistance Program for people with disabilities in the State of Ohio. The mission of OLRS is to protect and advocate, in partnership with people with disabilities, for their human, civil and legal rights. In keeping with its mission, OLRS monitors legislation in order to educate and inform policy makers on the impact of federal and state laws and regulations. OLRS submits these comments to proposed rules 3301-51-20 and 3301-46-01 of the Ohio Administrative Code.

OLRS is concerned that the proposed rules conflict with federal and state law. Specifically, the rules conflict with the requirements of the Individuals with Disabilities Education Improvement Act (IDEA) and the Operating Standards for Ohio Educational Agencies Serving Children with Disabilities, Ohio Administrative Code Rules 3301-51-01 through 11, which implement the IDEA, and have the potential to conflict with Section 504 of the Rehabilitation Act of 1973. OLRS' comments focus on three main areas of conflict:

- Federal law requires a child's IEP team to make determinations regarding the appropriateness of the child's educational placement and services and prohibits unilateral decisions regarding placement and services by a provider of services to the child;
- Federal law requires parental consent for educational decisions, including evaluation and changes in placement; and
- Federal law provides to parents of children with disabilities a comprehensive scheme of procedural safeguards including the right to notice and a remedial process.

These comments are provided both to identify conflicts and to propose language aimed at reconciling the conflicts between the proposed rules and the requirements of federal and state law.



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## Comments to Proposed Rules by the Ohio Department of Education

### **Rule: 3301-46-01**

#### **Recommendation:**

Require a notice component to parents if a right given by statutory provisions or rules will be waived by participating in an innovative education pilot program.

#### **Rationale:**

The IDEA guarantees children and parents procedural safeguards with respect to the provision of a "free appropriate public education" (FAPE). Appropriate notice ensures parental participation in decisions concerning the education of their children, a goal central to the IDEA. For example, the following notice is provided to parents whose children participate in the Autism Scholarship Program: "Districts are relieved of the requirement to provide a free and appropriate public education (FAPE) for any resident child approved and participating in the Autism Scholarship Program."

### **Rule: 3301-51-20**

#### **1. Recommendation:**

Under Section (A) Admission, Section (1) Assessment, subsection (a), end of sentence "may include the following," change language to "may include, but is not limited to, the following."

#### **Rationale:**

Evaluations under the IDEA must be comprehensive and tailored to the educational needs of the individual child. The child must be assessed in all areas related to the suspected disability. The current language is limiting and could prevent the evaluation of other needs, e.g., the needs of children who have disabilities in addition to hearing impairment or vision impairment.

#### **2. Recommendation:**

Clarify parental consent rights to be provided under (A) Admission, Section (1) Assessment, subsection (b). Subsection (b) appears to contemplate evaluation conducted outside of rules 3301-51-05 and 3301-51-06 of the Administrative Code. Add the following language to clarify that parental consent is required for the evaluation of a child

with disabilities: "Evaluation by the residential school's educational clinic shall also be conducted in accordance with rules 3301-51-05 and 3301-51-06 of the Administrative Code."

**Rationale:**

It is unclear under the rule if further evaluation at the request of the superintendent of the residential school includes the consent rights guaranteed to parents by the IDEA. The ambiguity of the current rule should be resolved and evaluation teams should have clear direction that evaluations of a child with a disability must include notice to parents that describes any evaluation procedures the school district proposes to conduct in accordance with rules 3301-51-05 and 3301-51-06 of the Administrative Code.

**3. Recommendation:**

Under (A) Admission, Section (2) Placement, subsection (b), placement should not be based solely upon eligibility requirements. Add language that requires placement decision to be based on FAPE requirements in addition to eligibility requirements.

**Rationale:**

A free appropriate public education is available to all children with disabilities. Failure to incorporate FAPE requirements violates the law and could allow placement decisions that do not comply with FAPE requirements of IDEA.

**4. Recommendation:**

Under (A) Admission, Section (2) Placement, subsection (b)(iii), OLRs recommends the removal of the language in subsection (iii) of this section.

**Rationale:**

General FAPE discussions and requirements should ensure the appropriateness of the placement of a particular child in the residential school. OLRs is concerned with language in the current rule which bases placement decision on the child's potential for physical and social maturity to adjust to the discipline of formal instruction and group living. This language has the potential to screen out children with more significant needs and violate Section 504 of the Rehabilitation Act of 1973.

Further, FAPE obligations require the provision of services in the child's placement to meet the individual needs of the child. The current language requires the child to fit into



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the placement instead of requiring the provision of services to support the child's needs in the placement. *See Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983) (Placement should not be in segregated facility unless services provided there are superior to services in non-segregated setting).

**5. Recommendation:**

Under (A) Admission, Section (3) Appeal procedure, delete "referring school district superintendent" and replace with "IEP team."

**Rationale:**

Decisions on placement are made by IEP teams as part of developing Individualized Education Programs for children with disabilities. A referring school district superintendent is unable to decide upon placement unilaterally. The recommended language brings the form into compliance with OAC 3301-51-07 and the IDEA.

**6. Recommendation:**

Under (A) Admission, Section (3) Appeal procedure, subsections (b) - (d), include language giving notice to parents at each stage of the appeal procedure regarding objections to placement decisions.

**Rationale:**

The IDEA and Operating Standards require that parents receive notice when a school district of residence refuses or proposes to initiate or change the placement of the child or provision of FAPE to the child. *See* OAC 3301-51-05(H). Because Section (3) of the proposed rule allows for decisions about the placement of the child, notice should be provided to the parents. Appropriate notice ensures parental participation in decisions concerning the education of their children, a central requirement of the IDEA and the Operating Standards. *See* OAC 3301-51-05(F)(2).

**7. Recommendation:**

Under (A) Admission, Section (3) Appeal procedure, subsections (b) - (d), include language "Nothing in this rule shall preclude a parent or guardian from exercising rights available to them in the operating standards for Ohio educational agencies serving children with disabilities."



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### **Rationale:**

The language of the proposed rule is unclear and could be interpreted to prevent parents from exercising their conflict resolution and due process rights required by the IDEA and OAC 3301-51-05(K). Clarifying that the appeal process available to superintendents regarding placement decisions is separate from and does not preclude parental due process rights provided in the IDEA will ensure that parental rights are protected.

### **8. Recommendation:**

Under (B) Dismissal program, Section (1), notwithstanding ORC section 3325.03,<sup>1</sup> delete language that allows dismissal "in the judgment of the residential school superintendent" and add language that requires the IEP team to determine if the program is not appropriate for the child, and placement change should be considered. Changing this language will ensure that the decision is made by the IEP team which is equipped to address the issues outlined in the rationale below.

### **Rationale:**

Decisions about the appropriateness of a child's placement are made by the IEP team. Unilateral decisions about appropriateness of educational placements are prohibited by the IDEA and state law and are inconsistent with the team-based emphasis of IDEA. Further, the language of the current rule disregards the general obligation of the IEP team to discuss and provide supplementary aids and services necessary to support a child's placement and the specific obligation of OAC 3301-51-07 (L)(b)(i), which requires an IEP team to meet to determine if additional supports and services could maintain a child's placement when a child's behavior impedes his or her learning or the learning of others. Moreover, the school district of residence is still responsible for providing FAPE regardless of which educational agency implements the child's IEP under OAC 3301-51-07(C).

### **9. Recommendation:**

Under (B) Dismissal program, Section (2), clarify that parental consent is required for evaluation.

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<sup>1</sup> Like the proposed rules under comment here, ORC 3325.03, which allows for a unilateral decision by the superintendent of the residential school to return a child to his parent for lack of progress, violates federal law. ORC 3325.03 allows for a unilateral placement decision in violation of the IDEA when, instead, it should require the IEP team to make the decision about progress and continued appropriateness of placement. Further, it allows for a change in educational placement without ensuring that notice and procedural safeguards are provided to the parent.

**Rationale:**

See rationale for Recommendation 2, above.

**10. Recommendation:**

Under (B) Dismissal program, Section (3), clarify the meaning of "this intention." It is unclear whether the rule refers to the intention of the residential school supervisor to dismiss or to the intention of the residential school supervisor to get an evaluation, or both.

**Rationale:**

The confusion in the current rule should be resolved to ensure proper notice to parents of their rights under the appeal procedure.

**11. Recommendation:**

Under (C) Suspension, expulsion and temporary removal, Section (2)(b), subsection (iii), replace "residential school shall consult with the school district of residence regarding" FAPE with "residential school shall consult with the school district of residence to ensure the provision of " FAPE.

**Rationale:**

For children with an IEP, a change in placement for disciplinary reasons requires a continued provision of FAPE. The rule's current language does not ensure this requirement and creates the potential for a child to be removed from school without a continuation of services, especially if the school district of residence is not well versed in IDEA requirements.

**12. Recommendation:**

Under (C) Suspension, expulsion and temporary removal, delete Section (2)(c), and ensure that discipline of children in residential schools complies with the IDEA and the requirements of OAC 3301-51-05 (K)(20) to (K)(26). The current language violates the law as it allows for the removal of a child for an indeterminate amount of time without notice and hearing requirements. Because this removal does not have time limits, there is a potential that a child with a disability in the residential school could be treated differently than a child with a disability in another Ohio school.



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### **Rationale:**

The IDEA and state law do not allow for the temporary removal of children (beyond 10 school days) without procedural safeguards. IDEA and state law provisions which allow a change in placement unilaterally by a school require "special circumstances." Those special circumstances are 1) weapons; 2) drugs; and 3) serious bodily injury. Removal for special circumstances requires notice and the opportunity for a hearing. Removal of a child who is alleged to be a danger (substantial likelihood of injury to self or others) requires the decision of a court or hearing officer. The law prohibits removals (beyond 10 school days) whether "temporary" or not, without notice and hearing rights.

### **13. Recommendation:**

If section (C)(2)(c) is not removed as recommended above, under (C) Suspension, expulsion and temporary removal, Section (2)(c), provide the definition of "temporary" such that the rule is consistent with OAC 3301-51-05 (K)(20) to (K)(26). Specifically, add language that ensures that this section is not used to circumvent federal and state law which puts limits on the suspension of students with disabilities, and ensures that any "temporary" removals are counted in the 10 school day limit.

### **Rationale:**

OAC 3301-51-05 (K)(20) to (K)(26) provide for removals of up to 10 school days without notice and hearing rights unless "special circumstances" exist involving weapons, illegal drugs, or infliction of serious bodily injury upon another person. "Temporary" should be defined in the current rule so that suspensions of children in the residential school cannot go beyond suspensions applied to students with disabilities in other Ohio schools.

### **14. Recommendation:**

If section (C)(2)(c) is not removed as recommended above, under (C) Suspension, expulsion and temporary removal, Section (2)(c), subsection (i), modify language of subsection (i) to require actual disruption, not a mere threat of disruption prior to a temporary removal.

### **Rationale:**

Children with disabilities need additional supports and services to benefit from their education because they are often at an educational disadvantage due to a learning disability or behaviors that interfere with educational progress. Because of this disadvantage, a child with a disability should only be removed from his placement when



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a behavior is an actual disruption to the classroom, not a mere threat of disruption. Allowing removal for a mere threat of disruption only compounds the educational disadvantage.

#### **15. Recommendation:**

If section (C)(2)(c) is not removed as recommended above, under (C) Suspension, expulsion and temporary removal, Section (2)(c), subsection (iv), include language "or, addition of supplementary aids and services to diminish the danger or disruption so the child can return to the residential school."

#### **Rationale:**

The IEP team process is fluid and designed to be responsive to the changing needs of students with disabilities. When a child's needs or behaviors change, the IEP team should respond by determining if additional services are required to support and maintain the child in his current educational placement before deciding upon a change in placement. As stated above in Recommendation 8, OAC 3301-51-07 (L)(b)(i) specifically requires the IEP team to address behaviors which interfere with learning.

#### **16. Recommendation:**

Under (D) Appeal, proposed deleted language should stay in the rule. Children attending other Ohio schools have district level appeal rights and children attending the residential school and their parents should have the choice to appeal to the superintendent, prior to or in lieu of a due process hearing.

#### **Rationale:**

The appeal procedure contemplated by this language is a separate mechanism, distinct from the rights available through IDEA. It provides an avenue for disputes to be addressed at the lowest administrative level.

**Thank you for the opportunity to comment on the proposed rules. If you have any questions, or would like further clarifications about these comments, please contact Kristin Hildebrant by email at [khildebrant@olrs.state.oh.us](mailto:khildebrant@olrs.state.oh.us) or by telephone at 614-466-7264 x109.**