



WRITTEN TESTIMONY OF THE DISABILITY LAW CENTER OF ALASKA
HOUSE FINANCE COMMITTEE
APRIL 2, 2016

RE: HB 102 An Act Relating to Education in Residential Psychiatric Treatment Centers

Good Morning Chairman Neuman, Chairman Thompson, and Members of the House Finance Committee.

ANCHORAGE

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The Disability Law Center of Alaska thanks you for the opportunity to comment on HB 102, proposed legislation that seeks to improve the educational programming for students in residential psychiatric treatment centers in Alaska. In general, any considered effort that seeks to improve educational programming for students is a worthy effort. Unfortunately, based on our collective experience and a preliminary review of the facts and the law, HB 102 is not likely to have the intended effect of improving educational programming for students in residential psychiatric treatment centers.

The Disability Law Center is the State's designated Protection and Advocacy system for people who experience a disability. Incorporated in 1977, our mission is to vigorously enforce and advance the rights and interests of people with disabilities.

PROBLEMS WITH HB 102

The Facts

Perhaps the most troubling aspect of this legislation is the absence of a well-defined problem. HB 102 proposes to redirect scarce public education funding from local school districts to private institutions to solve a problem that has been almost exclusively defined by those who stand to gain or lose financially from the passage of this bill. Can the delivery of educational services to students in residential settings be improved? Without question. Is this current problem so dire that the only solution is the drastic redirection of public funding into private hands? No.

Every year the Disability Law Center of Alaska (DLC) assists approximately two hundred students and parents from across the state in securing appropriate educational programming as mandated by the Individuals with Disabilities Education Act (IDEA). Many if not most of these requests for assistance involve students whose behavioral health problems are interfering with their education. Generally, the relief sought by the student/parent is to maintain their placement in the least restrictive environment with appropriate supports and services. Events

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triggering contact with us include the restraint or seclusion of the student in school, the suspension or expulsion of the student, the harassment of the student by peers or staff, or a district's referral of a student to a special school or institutional care. Over the course of the last several years, not a single parent has contacted us to complain about educational program deficiencies in a residential psychiatric treatment center.

Also informative in this regard is that DLC staff regularly works with agencies that, as part of their responsibilities, receive public complaints about problems with educational programming, such as the Governor's Council on Disabilities and Special Education, the Department of Education and Early Development, Stone Soup Group, and LINKS. Looking back through our records, none of these groups have identified educational programming in residential psychiatric treatment centers as a systemic issue or even as a significant issue within any particular center. In fact, the last such complaint filed with the Department of Education and Early Development was recorded in 2006 and it was filed by DLC.

Notwithstanding the fact that educational programming in residential psychiatric facilities can be improved, the dearth of complaints about educational services is not surprising. In 2004, in response to parent and guardian complaints, DLC contracted with an outside expert to conduct a review of treatment practices in North Star's acute care facility. The complaints we received focused on over medication, the use of restraints and seclusion, inappropriate discharge planning, allegations of abuse and neglect, and the provision of a safe treatment environment for patients. When questioned by DLC staff about parent/guardian concerns over educational programming, the expert noted that parents were not concerned about education services, rather were more focused on medication and treatment issues.

The concerns of parents/guardians from over a decade ago are echoed today in the calls we receive from parents and guardians of children in residential psychiatric treatment centers. Over the last several years, the dozen or so complaints received by DLC have focused on inadequate medical care, inappropriate touching by staff, and threats by staff to report parents/guardians to Office of Children Services. Our database shows no record of a parent or guardian contacting DLC to complain about the educational services in a residential psychiatric treatment center.

It is also instructive to note that DLC staff met with a North Star administrator in January of 2015. While a variety of topics were covered during this conversation, the issue of inadequate educational programming within their centers never came up.

It is against this backdrop of simply no parental/guardian complaints about educational services to any of the several agencies responsible to receive and act on those complaints that we view this current legislation. If parents, guardians and students are not complaining about the educational services in residential psychiatric treatment centers, then what problem(s) is this legislation supposed to resolve? Before thousands, if not hundreds of thousands of public dollars allocated for education are transferred to private institutions, there should be an effort to better understand the problem this legislation is supposed to address. Without this critical knowledge, how is it possible to conclude that a center can succeed where the local district is purportedly failing. Presently, in the absence of facts describing an education problem,

preferably from the perspectives of students and parents and including assessment data, HB 102 would appear to be no more than a transfer public funds to private hands with no discernable benefit to students.

The Law

In addition to our concerns over the absence of a clearly defined problem is the legal confusion created by HB 102. Our review of the proposed legislation within the context of Federal and State education law, primarily with respect to those laws governing the provision of special education to students with disabilities, is ongoing. Although the review continues, several initial questions became apparent.

- Why does HB 102 create a right to a free appropriate public education (FAPE) to students who are otherwise not eligible for special education? What educational purpose would that serve? FAPE is a right guaranteed under federal and state law to students eligible for special education and is term of art in special education law. And it should be noted that not all students in a residential psychiatric treatment centers are eligible for special education services. Regular education students do not need, nor are they entitled to, specialized instruction, modified curriculum, or individualized educational plans that address obstacles caused by disability; why would the state require those services for a student simply because they are admitted to a residential psychiatric facility?
- If the state will be establishing a new entitlement to FAPE for students not otherwise eligible for special education services, where will the funds come from to support those enhanced services? What procedural mechanisms will a parent follow to enforce this new right to FAPE for a non-special education student?
- Why does HB 102 align educational goals with therapeutic goals? Would that mean that a residential psychiatric facility could bill districts for therapy that is described by the center-based educational team as being integral to education? If residential psychiatric treatment centers are getting Medicaid dollars to provide clinical behavior/social skills therapy, and are also including behavior and social skills goals as part of an Individualized Educational Plan for which they are getting district funding, does that facilitate the billing of two sources for the same services? What protection or assurances would parents have that their student is getting the maximum cumulative benefit of both Medicaid and district education resources?
- Currently, several residential psychiatric treatment centers have residential students who are not in an acute crisis that attend public schools during the school day and return to the center after school is over. In the Individuals with Disabilities Education Act (IDEA), districts have an obligation to provide a FAPE in the least restrictive environment (LRE). The LRE is a term of law which means the setting (location) and placement (services) in which the student would be educated, but for the disability. It is defined more by the proximity to nondisabled peers, than by what we might

commonly think of as “restrictiveness”. If this legislation were enacted, would residential psychiatric treatment centers have a financial incentive to keep a student in the center’s educational program longer than is appropriate? Would a residential student who was not in an acute crisis be retained in the residential educational program, and so be denied of the right to placement in the LRE as guaranteed by the IDEA?

- The IDEA has specific timelines for providing parents with educational records, and the consequences for preventing parents from fully participating in the IEP process by not providing records are significant. Parents have the right to work samples and data collection sheets and progress notes, in advance of any meeting at which services will be discussed. Our office has had difficulty getting copies of treatment records from some centers in a timely manner. It is especially important that parents have complete information from the center because the student is not readily available for the parent to observe and communicate with. How will centers ensure that parents have access to the records and data that allow their full participation in the IEP development process that is anticipated by the IDEA?
- Under this HB 102, a school board must enter into a contract with a residential psychiatric treatment center if a student from the district is admitted there. If the center fails to provide services as described under the contract, for example, by not complying with the IDEA, the school board must continue to contract with that facility and the only recourse for the district’s board would be a lawsuit on the contract. Is a parent a third party beneficiary to that contract? If the student remains enrolled in their home district, as proposed, the family must file a due process hearing complaint against their home district for relief under the IDEA. In that scenario, all of the information regarding the alleged violations would be in the control of the residential psychiatric facility, who is not a party to the due process action. Would the hearing officer be able to compel the center employees to testify in a due process hearing? Would the hearing officer have authority to compel production of therapeutic clinical records (not educational records) if the district intended to rely on them in the hearing? Would parents have the right to prevent those records from being accessed? If there was simultaneous parallel litigation in civil court on the contract, would the parent’s right to a due process hearing be compromised by the fight between the district and the facility? Congress intended dispute resolution to be a parent-friendly process. Will HB 102 effectively require parents to hire a lawyer for every special education dispute, if only to navigate their third-party rights and whether administrative exhaustion is required? Does HB 102 create unnecessary uncertainty about legal relationships that are currently established under the IDEA?
- Alaska is a local control state. In Alaska, districts may adopt the state’s content and performance standards or may create their own that align with the state education standards. District educators develop their own curriculum plans based in part on

local cultural and local natural environments, and with consideration of the diverse needs of their student population. Does HB 102 run counter to the state's policy of preserving local control over education by granting the Commissioner of Education and the state board of education authority to determine whether the detailed provisions of the contract --regarding local education -- that are listed in proposed subsection AS 14.30.800(c) are valid? Under HB 102, a rejection by the school board of a contract with a residential psychiatric treatment center could be appealed first to the Commissioner, and then to the state board of education. The questions on appeal at both levels are whether the detailed provisions of the contract provide fairly specific services. This allows two levels of the state department of education to substitute their judgment for the judgment of local school district educators and local school boards. The Commissioner may not have any special expertise about the details that are to be evaluated, such as "written objectives for student achievement", or "plans for providing special education, vocational education, gifted education, and bilingual education". If the rejection of the contract by the school board is based on disagreement about the content and substance of plans for education, the Commissioner would be required to make a decision about a matter that currently is left to the local school boards and districts to determine.

There are also broader legal questions that remain outstanding, such as the Legislative Counsel's analysis on whether HB 102 violates Article VII, section 1 of the Constitution of the State of Alaska. And what if the residential psychiatric treatment center is part of a religious institution? Finally, could the laws regulating charter schools, which have been tried and tested, be modified so that residential psychiatric treatment centers could open a school under that regulatory structure?

CONCLUSION

Could school districts and residential psychiatric treatment centers work better together to ensure that students temporarily residing in residential centers receive better educational services? Most certainly. However, we remain unconvinced that this 'nuclear option' - the transfer of increasingly scarce public education funds to a private entity with no history of providing educational services to students - is sufficiently justified by the facts in evidence and the confusion it creates in the law.

Thank you.