



March 12, 2013

Michael Sawyers
Acting Superintendent of Public Instruction
Ohio Department of Education
25 South Front Street
Columbus, Ohio 43215

President Debe Terhar and Board Members
Ohio State Board of Education
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February 28, 2013

Re: Proposed Rule 3301-35-15
Standards for the implementation of Positive Behavior Intervention
Supports and the use of Restraint and Seclusion

Dear Mr. Sawyers, President Terhar, and Members of the Ohio Board of
Education:

Good morning and thank you for the opportunity to appear today and provide
comments on proposed rule 3301-35-15: Standards for the implementation of
positive behavior intervention supports (PBIS) and the use of restraint and
seclusion. My name is Jennifer Martinez Atzberger, and I am the Senior Staff
Attorney for the American Civil Liberties Union of Ohio.

The ACLU of Ohio is the Ohio Affiliate of the national ACLU, with hundreds
of thousands of members nationwide and over 30,000 members and
supporters across Ohio. The ACLU and ACLU of Ohio are non-profit, non-
partisan membership organizations devoted to protecting basic civil rights and
civil liberties for all Americans and all Ohioans. Through litigation, advocacy,
and public education, we work to ensure that conditions of confinement are
constitutional and consistent with health, safety, and human dignity. This
includes children who are secluded and restrained within the educational
setting.



We want to express our appreciation for the efforts made by the Ohio Department of Education ("ODE") to draft a seclusion and restraint policy and rule. We believe that the policy and rule provide much needed guidance to Ohio schools about the use of seclusion and restraint as an absolute last resort in a continuum of behavior management techniques used to address the actions of children who are at immediate risk of causing serious physical harm to themselves or others.

While we are pleased overall with the proposed policy and rule, we do still have a few concerns we request the ODE address as soon as possible:

1. **Preserving Rights and Protections in Community Schools**

According to the 2011-2012 Ohio Community Schools Annual Report over 100,000 Ohio children were enrolled in 355 community schools. Thirty three community schools are classified as special education schools because more than half of the student population has an Individual Education Plan. While community schools are public, nonprofit, nonsectarian schools exempt from some state laws and rules pertaining to schools, some important exceptions exist.

- Under current Ohio law, community schools are **required** to follow the same standards applied to traditional school districts in many circumstances, including rules regarding parental notification pursuant to O.R.C. § 3314.04 and health and safety standards pursuant to O.R.C. § 3314.05(B)(5). This policy and rule would minimally apply to parental notification and health and safety standards.
- Community schools are **mandated** by federal and state law to evaluate and provide children with disabilities special education services.

We recognize the State Board of Education's broad authority to supervise the state system of public education under O.R.C. § 3301.07 and community schools are part of Ohio's system of public education as defined by O.R.C. § 3314.01. In order to protect the health, safety and education rights of community school students and for parental rights to be preserved pursuant to state and federal law we suggest that ODE simply incorporate community schools into its definition of "school district" under section (A)(9), as it has done in other circumstances.

2. **Compliance with the Ohio School Board's "Diversity Strategies for Successful Schools Policy"**

- On May 15, 2012, the Ohio Board of Education adopted this policy with a goal to "promote and monitor diversity and reduce racial isolation" in the state's school districts.

- One of the key strategies identified in this policy was that, “Districts are to Develop Reasonable Disciplinary Policies and to Support Interventions that Reduce Student Push-Out.”

The ACLU of Ohio supports the ‘Diversity Strategies for Successful Schools Policy.’ We are committed to seeing an end to school push-out and overly punitive and discriminatory school practices. Thus, we suggest that the policy clearly state that every effort should be made by schools to avoid the involvement of law enforcement unless absolutely necessary and the need to provide cultural competency training for staff to reduce the incidence of racially disparate impact in the use of seclusion and restraint on students of color.

3. **Compliance with the Individuals with Disabilities Education Improvement Act (“IDEA”)**

Under state and federal law no student shall be denied admission into a community school on the basis of a disability. Additionally, Ohio Administrative Code §§ 3101-51-01(2)(A) and (B)(11) require that community schools comply with all laws and rights pertaining to the education of children with disabilities.

- Definitions in the policy and rule must align with those in IDEA.
- Pursuant to 20 U.S.C. § 1412(a)(3) all school districts must identify children with disabilities.

To ensure that Rule 3301-35-15 complies with federal and state law as it pertains to children with disabilities regardless of what type of school they attend we suggest that the rule define “student” under (A)(11) as a child or adult age three to twenty-two pursuant to Part B of IDEA; “community schools” must be included in the definition of a school district under (A)(9). Additionally, we suggest that the rule be amended so that “child find” requirements under 20 U.S.C. § 1412(a)(3) are identified as being necessary for students whose behaviors result in restraint or seclusion.

4. **Restrict Use of Restraint and Seclusion**

For the protection of students and staff alike, and to ensure that the policy and rule are in compliance with U.S. Department of Education guidelines, we suggest that physical restraint under (D)(2)(a) or seclusion under (E)(1)(a) only be used when a student’s behavior poses an immediate risk of *serious* physical harm.

Seclusion in and of itself is a loss of liberty. For this reason, we suggest that the “minimum amount of time” under (E)(1)(c) necessary to seclude a child must be recorded and limited to no longer than 15 minutes. Otherwise extended seclusion should require immediate notification to an administrator and parent due to the need to apply procedural due process requirements.

Thank you and we are hopeful that with the addition of these changes, a commitment to monitoring implementation, and dedication to training for school staff in the use of positive behavior intervention techniques, this policy and rule will eventually lead to an end to the use of seclusion and restraints in Ohio schools.