

December 15, 2009

Will H. Burrow, Ph.D.
RSU #4
971 Gardiner Rd.
Wales, ME 04280

RE: Complaint Investigation #10.032C, "D.R.C. v. RSU #4"

Dear Dr. Burrow:

This request for a systemic complaint investigation was filed on October 16, 2009. The complaint alleged a failure to provide a free appropriate public education to students attending your district's Alternative Education program. Attached to the request was a letter from you dated May 27, 2009 in which you stated: "In the future all special education students who request an assignment to the Alternative Education program will be automatically dismissed from special education approximately 30 days after they start the new program. This procedure is being put into place because the Alternative Ed program is not a special education program and no special education services are provided to students who enroll in that program."

A complaint investigation meeting was held in this case on November 9, 2009, at which you acknowledged that the "automatic dismissal" described in your letter was problematic, and you represented that the policy described in your letter was not, in fact, the actual practice of the district. You represented, for example, that there is presently a student in the Alternative Education program who continues to be identified under special education and who remains subject to a behavioral intervention plan.

You described the program as being essentially student-centered and student-directed, as well as entirely standards-based. Students work independently through a series of pre-programmed units at their own pace, concluding with assessments that demonstrate mastery of each of the units' content. There are two educators assigned to the program who are available to help students with questions about their schoolwork, but who do not provide instruction at any regularly scheduled time. Students are assigned a time slot in which to attend the program, but they are free to come to the program or not whenever they wish within that time slot. You described as intrinsic to the program the fact that students are not required to be present at a specific time to receive scheduled direct instruction from an adult. You also explained that successful participation in the program necessarily required that students be capable of accessing the pre-programmed material.

At the meeting, you also submitted a proposal to resolve the complaint. Your proposal was to institute a policy that provides that, before any student receiving special education services is placed in your district's Alternative Education program, the student's IEP team will make an individualized determination as to: whether the student remains eligible for special education services; if so, what special education services the student requires at that time; and whether those services that the student requires can reasonably be delivered in the Alternative Education program. In addition, you proposed that, in connection with this meeting of the IEP team, the student or the student's family would be given the opportunity to request a re-evaluation.

The Complainant, Disability Rights Center ("DRC"), submitted a response to your resolution proposal. DRC asserted that the Alternative Education program is a "school" as defined in Maine DOE regulations, and is therefore subject to requirements of federal and state law relating to children with disabilities. DRC compared the Alternative Education program to an Adult Education program, which the Department has described as being obligated to provide services to special education students when the students' IEP teams determine that Adult Education is an appropriate placement, and to public charter schools, citing an OSEP letter which concludes that students with disabilities attending public charter schools retain all rights under Part B of IDEA. DRC further references a 2001 report prepared for the Department which found that 16% of such programs in Maine excluded special education students from their programs, while 81% served identified special education students within their programs. DRC understood your proposal to adhere to a policy that requires students to be dismissed from special education in order to participate in the Alternative Education program, and asserted that special education eligibility is a determination that is distinct from determinations as to program and placement and can only be made by the IEP team.

You subsequently submitted a response to the complaint via a letter dated November 12, 2009. In that response, you describe the following characteristics of the program: it serves students who have not been successful in the regular high school program, typically due to an inability or unwillingness to function in a larger school setting with its many social distractions and relatively large classes; it serves students who are looking for an environment in which they set the pace and have control of their own learning; it provides an environment that is quieter and consistently supervised; its single-room setting virtually eliminates the opportunity for disciplinary issues to arise; its standards-based approach eliminates deadlines and homework and allows students to demonstrate competence on an individual level and on their own terms; and it reduces the likelihood of conflict with authority. You acknowledge that the nature of the program provides a type of intervention that is appropriate to the needs of some special education students, as well as of many students not identified as eligible for special education.

In your response you further state that before a student is admitted into the Alternative Education program, the student assistance team ("SAT") that approves placements into the program explains the program, including the "lack of any direct special education services." You then go on to discuss the possibility that a form of specialized instruction would be considered.

Following the complaint investigation meeting, you engaged in discussions with the complaint investigator, Jonathan Braff, Esq., regarding your resolution proposal, and arrived at a resolution agreement. The terms of that agreement are as follows:

1. It will be the policy of the school district that a student of the district currently receiving special education services will not be required to be dismissed from special education in order to participate in the district's alternative education program.
2. Before any student receiving special education services is placed in the alternative education program, the student's IEP team will make an individualized determination as to: whether the student remains eligible for special education services; if so, what special education services the student requires at that time; and whether those services that the student requires can reasonably be delivered in the alternative education program. Before the IEP team makes a determination to change the student's eligibility status, the student or the student's family, pursuant to MUSER §VII.3, will have the opportunity to request a re-evaluation.
3. Consistent with the above policy, the SAT will cease its representation that, as a blanket rule, there cannot be any direct special education services provided in the Alternative Education program. Instead, once an IEP team has determined that the Alternative Education program is appropriate for a student, SAT will make the determination on a case-by-case basis as to whether the specific specially designed instruction provided under the student's IEP is capable of being delivered within the context of the Alternative Education program.
4. The district shall identify any and all students currently being served by the district who expressed interest in the alternative education program but who declined to attend out of concern that it would necessitate their being dismissed from special education. Those students and their families shall be informed of the above policy, and expressly offered the opportunity to reconsider placement in the program.

The DOE is sensitive to the unique characteristics of the Alternative Education program that make it effective (for example, that it is entirely self-guided and requires students to possess a certain level of academic proficiency) and does not intend to cause policy changes that would fundamentally alter the program. Your resolution proposal properly focuses on the IEP team as the body that must initially determine what services, if any, a given student requires, the least restrictive educational environment in which that student's program can be delivered and whether those determinations are compatible with placement in the Alternative Education program.

The DOE does not believe that a special education student, by virtue of that status, is automatically entitled to participate in the Alternative Education program. The Courts and educational agencies have repeatedly held that a student does not have the right to dictate placement in a particular school or program, so long as the district provides a full continuum of alternative placement opportunities. *See, e.g., Flour Bluff Indep. Sch. Dist.*

V. Katherine M., 91 F.3d 689, 24 IDELR 673 (5th Cir. 1996)(A district may have students attend a regional special education program rather than place such programs in each of its schools); *Murray v. Montrose County Sch. Dist.*, 51 F3d 921 (10th Cir. 1995)(IDEA does not give a student the right to placement in a particular school in the district); *OSEP Letter to Trigg* (Nov. 30, 2007)(IDEA does not require that each school in a district be able to provide all special education and related services for all types and severities of disability); *Baltimore County Public Schools*, 46 IDELR 57 (MD SEA, 2005)(A student with an interest in a particular vocational program may apply to the program, but the IEP process does not permit the student to circumvent that application process). To the contrary, a district has an obligation to place students where their IEPs can be implemented. *Schuldt v. Mankato Indep. Sch. Dist.*, 937 F.2d 1357, 18 IDELR 16 (8th Cir. 1991).

As you yourself acknowledge, however, a district policy that students identified as eligible for special education are ineligible for the Alternative Education program is unacceptable under the law. See *Tanque Verde School District*, 51 IDELR 111(OCR, March 14, 2008)(District's declaration that students with disabilities were ineligible for open enrollment program was discriminatory and illegal).

The resolution agreement set forth above is hereby accepted and this complaint shall be dismissed. Implementation of the policy described in paragraphs 1 and 2 shall be achieved through its adoption by the School Board, news of which shall be circulated among all district high school personnel. To document the school district's compliance with the resolution agreement, the district shall submit to the Due Process Office, with a copy to the Disability Rights Center: proof of the district School Board's adoption of the policy; proof of the dissemination of news of the policy to school personnel; written assurances as to the identification of those students described in the immediately preceding paragraph and proof of the extension to them of the offer to reconsider placement in Alternative Education.

Thank you.
Sincerely,

Susan Gendron

CC: James Hodgkin, Superintendent
Karen Farber, Disability Rights Center
Jonathan L. Braff, Esq., Complaint Investigator
Pauline Lamontagne, Esq., Due Process Coordinator
Susan J. Parks, Due Process Consultant
Shelley Reed, Truancy/Dropout Prevention Consultant
Ansley Newton, Field Service Consultant