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Adam Baker, CEO
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Dear Dr. Baker:

The question that we were working on with Mr. Obana was how Perspective's clients (school aged children who have been admitted for day treatment) can remain enrolled in their local school districts *and* receive class credit while they are receiving day treatment. Over the last year or so we have visited with Mr. Obana regarding the various laws and regulations that address this issue. At the time of his departure there were some additional issues that we were to follow up on to try and answer this question.

We have conducted further review and here is our assessment of the situation. This assessment is based on our review of specific laws and regulations as well as our conversations with local school districts regarding how the laws and regulations work in practice.

Background

Many schools have worked with Perspectives by providing homework and lessons so the students at Perspectives could try to keep up with their lessons – similar to a student who may be homebound as a result of physical injury. We don't know whether these schools were also giving the students credit for courses.

Just over one year ago the Department of Education ("DOE") sent a memo to school districts that addressed the residency of students in facilities that provide residential care. As a result of this memo, some school districts told Perspective's clients' parents that their children would be dropped from the school district's rolls because the students were not "residents" of the district. The parents called Perspectives and

Perspectives called us. The residency issue appears to have been resolved. Nevertheless some schools became less cooperative with Perspectives and the question of how the students can receive credit for school work surfaced.

Initially we attempted to file an application with the DOE to have Perspectives approved by the DOE as a facility with whom school districts could contract to provide educational services to the students receiving day treatment. The DOE said that Perspectives did not qualify because it was not a "residential" facility. The application was filed under DOE regulations which, on their face, appeared to apply only to facilities where students resided at the facility. This was done because the DOE did not have an application that precisely fit your situation.

In light of the DOE's response, we recommended that Perspectives begin sending physician letters to all the schools explaining that the student at Perspectives was hospitalized and requesting help from the schools with the student's studies. At our recommendation, Perspectives also began collecting consent forms from the parents/guardians authorizing our office, if needed, to communicate with the schools and/or DOE regarding the student's status.

Our objective was to keep the students from being dropped from enrollment and, hopefully, when a problem surfaced, to persuade the respective districts to help the students keep up with their work and to provide the students with course credit.

Mr. Obana kept hearing from school districts that Perspectives needed to become an approved facility with DOE. He also came to understand that there were students in day treatment at other facilities who were receiving an education, sanctioned by the DOE. However, it appeared these facilities also had a residential component. He asked us about what he was hearing. We could not find any guidance in the regulations or laws.

The laws and regulations address only (a) the education of students who live at approved residential facilities; and (b) the education of a limited number of students with emotional disturbances at an on-campus day treatment programs (programs located on a school's campus). When Mr. Obana left we were still trying to figure out whether there were, in fact, approved off-campus educational programs for children with emotional disturbances.

From the information we have gathered so far, we have reached the following conclusions, discussed more fully below:

1. There are facilities with a both a residential program and a day treatment program that have been "approved" by the DOE to provide educational services for certain students. We have not confirmed approval of any program through a provider without a

residential program, though we cannot be positive that there are none without doing a Freedom of Information Act request or further inquiry. At the very least, it is obvious that the DOE frowns upon any provider providing day treatment services to students unless the provider also has a residential component. This is a gray area that will require further investigation, most likely a Freedom of Information Act request to the DOE.

2. In addition, all the DOE "approvals" appear to include the approval of a "special education" program under the IDEA. That is to say that all of the facilities are educating, at least in part, students who qualify for educational services under the IDEA (special education). It also appears that the facilities are educating students who qualify for education services under Section 504 of the Rehabilitation Act (disability). We do not know if any of these facilities are providing an education for students who do not qualify for educational services under the IDEA and/or Section 504.

Here's our review of the current laws and assessment of what is happening in the field based on the information at hand. We've broken our discussion down by categories of students.

Students Out of School Due to Extended Illness

Category One: Students who cannot attend school in a regular school classroom due to a medical condition *and* the students *do not* qualify for educational services under any IDEA regulations or Section 504.

For these students there is a specific law that covers students who are absent from school due to a medical condition. Under Ark. Code Ann. § 6-18-222, excessive absences can be used by a school district to deny course credit, promotion or graduation but excessive absences *cannot* be used as a basis for expulsion or dismissal of a student. That same Code section says that the "legislative intent" of the law is that students having excessive absences "because of illness, accident or other unavoidable reasons" "should be given assistance" in obtaining credit for courses.

Under this language, a school district is under no obligation to help a student who is absent due to illness even though the district "should" provide assistance. Since the law says that excessive absences "can" be used to deny course credit, promotion or graduation, excessive absences due to illness will not *automatically* result in the denial of course credit. A school district appears to have discretion to decide whether or not it is going to give these students credit for their course work.

When a student does not attend school, the school does not receive any state funding for the student. Thus, there is no financial incentive for districts to provide assistance to a student who is out due to illness. The lack of funding may have some impact on the amount of assistance a school is willing to provide to a student who is absent due to an extended illness.

This is the law we referenced in the physician letters that Perspective's sends to the clients' respective school districts.

IDEA and Section 504 Students

Category Two: Students who cannot attend school in a regular school classroom due to a medical condition and *who qualify* for educational services under the IDEA or Section 504.

These students are covered by regulations dealing with the education of students in residential facilities and special education regulations.

The DOE has a set of rules entitled "Rules Governing Residential Placement." The "residential" regulations only apply to facilities with and students in "residential" programs. The regulations do apply to students with disabilities under the IDEA *and* students without disabilities under the IDEA. While the regulations do not define "students without disabilities under the IDEA", it's our understanding that this refers to students who have a disability under Section 504 of the Rehabilitation Act. (IDEA and 504 have considerable overlap, but generally IDEA has greater protections for students but a narrower definition of "disability.")

The facilities covered by this regulation are inpatient psychiatric treatment facilities licensed by the Arkansas Department of Health and Human Services ("DHHS"), alcohol and drug treatment facilities licensed by the DHHS, Easter Seals of Arkansas, Arkansas Pediatric facility in Pulaski County, Mill Creek ICF-MR in Fordyce and Brownwood ICF in Fort Smith. Each of these facilities has an approved IDEA education component that has been approved and is monitored by the DOE. There are numerous regulations governing the special education components at these facilities such as student/teacher ratio, the certification of teachers in special education, classroom size, etc. The school district in which the residential facility is located is responsible for the education of each student and prepares individual education plans for each student.

When a student is placed in one of these residential facilities, the facility must then notify the responsible school district at which time a series of conferences and team reviews occur with representatives from the district, the state and the residential treatment facility to make determinations regarding the student's placement and education. School districts are on the front line for educating and overseeing the education of all students.

The student's placement and education is determined by an "Individual Education Plan" for IDEA students and a similar plan for Section 504 students. As noted above, each of these facilities has an approved IDEA component for special education students.

Because there was no application or regulations that fit your situation, these are the regulations under which we initially sought DOE approval for Perspectives. However, because Perspectives was not a residential facility, the DOE determined that it did not qualify for approval under this regulation. They provided no other explanation.

Now let's turn to the special education regulations. The special education regulations provide for the education of IDEA students at a "day treatment" facility *on a school campus*. This is the only reference in any state law to a "day treatment" facility for students. Nevertheless, it's our understanding that the DOE has also approved "off campus" facilities for the education of IDEA students. It makes practical sense that DOE would approve some "off campus" facilities for the education of IDEA students. The IDEA contemplates that sometimes the best place for an IDEA student to be educated is off campus. Under the IDEA school districts must educate qualified children in the "least restrictive environment." Sometimes such an environment can not be found on the school's campus. In those cases a school may be required to pay for the education of an IDEA student at an off campus facility.

Since most schools do not have the facilities needed to educate these students on campus, they contract with day treatment facilities. There are no regulations that specifically address an approval process by the DOE for IDEA programs at day treatment facilities but it appears that, at a minimum, the DOE has approved programs for the education of these students at residential facilities that have a separate day treatment program.

Moreover, regardless of where the students are being educated in DOE-approved programs, it appears they all qualify for educational services under the IDEA or Section 504 of the Rehabilitation Act. It's also our understanding that most if not all of the clients at Perspectives would *not* qualify for educational services under either of these laws. If this is correct, there would be no legal obligation for school districts to provide these students with an education. If the students do not qualify for educational services under the IDEA or Section 504 for an education, we would be back to the initial law dealing with students who are absent due to an extended illness.

Students With An Emotional Disturbance

Category Three: Students who cannot attend school in a regular school classroom due to a medical condition *and* who do not qualify for services under the IDEA or Section 504 *but* who do have an emotional disturbance recognized under the DSM-IV-R.

The DOE special education regulations have a section on "School-Based Day Treatment Programs." The educational services provided under this regulation must be on a school campus. This special education regulation allows for a *limited number* of students with an emotional disturbance to be included in the same day treatment classroom as students who qualify for special education services under the IDEA. For example, for every six IDEA students in a class the regulations might permit two additional students who have an emotional disturbance. The regulations also require that the students with emotional disturbances meet a number of criteria. For example, the student's emotional disturbance must not interfere with the education being provided to the IDEA students.

So, the law only provides for the education of a limited number of emotionally disturbed students at on-campus facilities in a classroom with IDEA students.

We do not whether and, if so, to what extent students with an emotional disturbance who do not qualify for educational services under the IDEA or Section 504 may be receiving an education off-campus, but again, the off-campus programs appear tied to providers with residential components.

Conclusion and Recommendations

Because the DOE has not fully promulgated regulations in this area, we still don't know for sure whether DOE has approved facilities with only a day treatment program and, if so, what students are attending those programs. In order to asses what is really happening in the field you may want us to send a FOIA request to DOE and/or visit with those DOE officials in charge of these programs. There is more happening than is provided for in the regulations.

It appears that all of the DOE-approved programs have an IDEA (special education) component. All the facilities, at a minimum, appear to serve IDEA and Section 504 students. We don't know to what extent students with an emotional disturbance who are not qualified under IDEA or Section 504 might also be receiving an education at these facilities. If these facilities are also providing an education to emotionally disturbed students who do not qualify for an education under the IDEA or Section 504, it is likely being done on a limited and adjunct basis.

If in fact Perspectives does not have any IDEA or Section 504 qualified students in its day treatment program, then securing some sort of "approval" from DOE under the existing DOE rules and practices seems unlikely. Everything appears to be tied to educating students under IDEA and 504. If this is correct, then the solution for Perspectives will be legislative. The most obvious legislative solution would seem to be a modification of the law dealing with students who are absent due to an extended illness in a way that ensures those students can receive credit for their classes and graduate.

Adam Baker, CEO
Perspectives Behavioral Health Management, LLC
August 12, 2008
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Obviously, this is a multi-faceted issue, so if you wish to discuss options and strategy further, or if you have any other questions, please do not hesitate to call.

Sincerely,


Clayton Blackstock

CB/sst