

September 30, 2009

Via Email policy@doe.k12.ga.us and U.S. Mail

Rules Comments
Policy Division
Georgia Department of Education
2053 Twin Towers East
205 Jesse Hill Jr. Drive, SE
Atlanta, GA 30334

Re: Proposed New Rule 160-4-2-.31 Hospital/Homebound Services

Dear Policy Division:

The National Women's Law Center is a non-profit organization based in Washington, DC that engages in litigation, advocacy, and public education to protect and advance the progress of women and girls at work, in school, and in virtually every aspect of their lives. Among other things, we advocate on behalf of pregnant and parenting students and work to ensure that recipients of federal educational funds comply with Title IX of the Education Amendments of 1972 ("Title IX"). We appreciate the opportunity to comment on the State Board of Education's proposed repeal of Rule 160-4-2-.31 Hospital/Homebound Instruction and adoption in its place of a new Rule 160-4-2-.31 entitled "Hospital/Homebound (HHB) Services."

As a policy matter, independent of applicable legal requirements, the Georgia Department of Education and the community it serves would benefit from taking steps to encourage Georgia high schools to support their pregnant and parenting students. Georgia has one of the lowest graduation rates in the country for girls, as only 61.9 percent of female high school students in Georgia finish with a standard diploma in four years.¹ And a nationwide survey conducted by the Gates Foundation found that nearly half of female dropouts cited becoming a parent as a factor in their decisions to drop out.² Furthermore, the consequences of dropping out are even worse for women than for men – females who do not graduate are more likely than their male counterparts to be unemployed, to earn lower wages, and to lack access to health insurance coverage, and as a result are more likely to need to rely on public support programs to support

¹ EPE Research Center, *Diplomas Count 2009: Broader Horizons: The Challenge of College Readiness for All Students*, Education Week, June 2009, available at http://www.edweek.org/media/ew/dc/2009/33sos_gains.pdf.

² Peter D. Hart Research Associates, *Gates Foundation Dropouts Survey*, (Sep./Oct. 2005). In the same survey, those who left school to care for a family member or because they became a parent, more than any other group of dropouts, were "most likely to say they would have worked harder if their schools had demanded more of them and provided the necessary support." Bridgeland et al., *The Silent Epidemic: Perspectives of High School Dropouts* 6 (Civic Enterprises, 2006).

themselves and their families.³ Therefore, providing the support necessary for pregnant and parenting students to stay in school – including by offering HHB Services where appropriate and where provided to other students who are temporarily unable to attend school – will help to improve graduation rates in Georgia and to bring Georgia’s students one step closer to economic security.

I. The proposed rule makes it clear that students who are pregnant or have related medical conditions can no longer be excluded on that basis from eligibility for Hospital/Homebound Services.

Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a). The law applies to all forms of sex discrimination, including discrimination on the basis of pregnancy or childbirth. Indeed, the regulations implementing Title IX expressly state:

A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient’s educational program or activity.

34 C.F.R. § 106.40(b)(4). Accordingly, it is a violation of federal law for Georgia’s public school system to discriminate against pregnant and parenting students.

The Center applauds the Board’s proposed repeal of the language excluding pregnancy as an eligible condition for the HHB services offered to students who miss school for extended periods of time, as that provision failed to comply with Title IX. Because Title IX requires that pregnant and parenting students be given equal access to education programs and activities, the exclusion of pregnancy from eligibility for HHB services constitutes unlawful sex discrimination.

The Board’s proposed language for the new rule makes it clear that HHB services can no longer be denied to students based on pregnancy-related absences, and that the eligibility criteria apply equally to all students who seek such services. It eliminates the discriminatory language above and in its place provides that “[s]tudents with absences due to pregnancy; related medical conditions, services, or treatment; childbirth; and recovery therefrom are eligible for HHB services.”

However, other provisions of the Proposed Rule raise concerns regarding students’ access to HHB services. In the comments that follow, we identify these concerns and propose recommendations to make the Proposed Rule consistent with the requirements of federal law and to ensure that all eligible students can benefit from the HHB services offered.

³ See, e.g., National Women’s Law Center, *When Girls Don’t Graduate, We All Fail: A Call to Improve High School Graduation Rates for Girls* (2007), available at www.nwlc.org/dropout.

II. HHB services should be available to a student for as long as the student’s physician deems it medically necessary for the student to be absent from school.

Although the proposed language of the Rule states that HHB services will be offered to eligible students on an intermittent, long-term, or temporary basis, we nonetheless have serious concerns that the Proposed Rule will not provide an appropriate amount of time for HHB services, consistent with Title IX. To begin with, the Rule states that qualifying students will be eligible for HHB services “for a length of time as determined by the [Educational Service Plan],” defined in the Proposed Rule as “an individual plan . . . developed by the local school team, to include a school reentry procedure.” In other words, the Proposed Rule leaves the determination of the length of time HHB services will be provided to the discretion of a local school team, which could permit school officials to apply the policy in a discriminatory fashion on account of a student’s pregnancy. But Title IX requires that schools excuse absences for students with pregnancy-related conditions for as long as the student’s doctor deems it to be medically necessary. 34 C.F.R. § 106.40(b)(5). Thus, to ensure that the Proposed Rule is consistent with Title IX, we recommend that HHB services be made available to a student who is absent from school for pregnancy-related reasons for as long as that student’s physician determines that she must be out of school. It is critical that pregnant and parenting students receive assistance to keep up with their school work while they are absent from school. Without this assistance, many pregnant and parenting students will fall behind and some will drop out of school completely.

Additionally, the rule should provide more guidance as to what factors must be considered by the local school team in developing an Educational Service Plan, to ensure that plan is responsive to a student’s particular circumstances. For instance, the definition should make it clear that the Educational Service Plan must be tailored to meet the best interests of each individual eligible student, taking into consideration input from the student, the student’s parents or guardians (if applicable), and the student’s medical provider.

III. The proposed student eligibility criteria should be modified to ensure equal access to HHB services by all students.

As it currently stands, the Proposed Rule would unfairly exclude many pregnant and parenting students from access to HHB services. Below we explain this and offer alternative language that would help to prevent such exclusion.

a. Minimum number of absences required

The Proposed Rule states that HHB services shall be made available to students who are “anticipated to be absent for a minimum of ten consecutive school days per year” (for non-chronic health conditions). *See* Proposed Rule 160-4-2-.31(2)(a)2. While there is no provision that explicitly provides for academic assistance to students who miss school for fewer than ten school days, LEAs are required to provide academic support and counseling to address the needs of at-risk students, including pregnant students, regardless of whether they are eligible for HHB services. *See* Board Rule 160-4-8-.1 (Student Support Services). Proposed Rule 160-4-2-.31 therefore should reference Rule 160-4-8-.1, to clarify that students who do not qualify for HHB services may still be eligible for support services under Rule 160-4-8-.1.

b. Parent/guardian authorization

The proposed eligibility requirements also provide that the student's parent or guardian must sign a "parental agreement" regarding HHB policies and procedures and parental cooperation, unless the student is designated as an emancipated minor or is 18 years of age or older. *See* Proposed Rule 160-4-2-.31(2)(a)3. But this overbroad requirement will serve as a barrier to the full participation of pregnant and parenting students in HHB services. Unfortunately, many pregnant and parenting teens lack the emotional and/or financial support of their parents. It is not uncommon for pregnant teens to be expelled from their homes by their parents or guardians who disapprove of the youth's pregnancy, refuse to tolerate the presence of an additional child in the home, or are financially unable to care for the grandchild. Others who left home before they got pregnant often want to return home but cannot, as conditions in the home such as abuse or drug addiction present risks to their own safety and that of their children. For all of these students, also known as homeless or "unaccompanied" pregnant/parenting youth, *see* McKinney-Vento Homeless Assistance Act, 42 U.S.C. § 11434a(6), the Proposed Rule would impose a real burden by tying access to HHB services to parent or guardian authorization. Therefore, we suggest that the Proposed Rule be amended to make clear that, in the event that a student alienated from her parent or guardian is neither emancipated nor 18 years of age or older, the student may bypass the parent/guardian authorization. The Rule should provide that in such cases, the approval for HHB services may be obtained from an authorized adult at the student's school, such as a guidance counselor, social worker, school nurse, or "Graduation Coach."

In addition, we note that the McKinney-Vento Homeless Assistance Act requires Georgia to ensure that "homeless youths and youths separated from the public schools are identified and accorded equal access to appropriate secondary education and support services" and demonstrate that "the State educational agency and local educational agencies in the State have developed, and shall review and revise, policies to remove barriers to the enrollment and retention of homeless children and youths in schools in the State." 42 U.S.C. § 11432(g)(1). The Act further requires that each LEA have a liaison who will ensure that "homeless children and youths enroll in, and have a full and equal opportunity to succeed in, schools of that local educational agency." 42 U.S.C. § 11432(g)(6). To ensure that all homeless youth have equal access to HHB services, Georgia should include the aforementioned procedure for bypassing the authorization requirement in Rule 160-4-2-.31(2)(a)3.

IV. Other definitions in the proposed rule should be revised so eligible students are not wrongfully excluded.

Certain definitions in the Proposed Rule place inappropriate limitations on who may receive HHB services, and should be modified as suggested below.

a. Hospital/Homebound (HHB) Services: The Proposed Rule states that HHB services are for eligible students whose confinement at home or in a health care facility prevent normal school attendance "based upon certification of need by the licensed physician or licensed psychiatrist who is treating the student for the presenting diagnosis." It is unclear from the Proposed Rule what a "certification of need" is. If it is anything other than the "completed medical referral form signed by a licensed physician or licensed psychiatrist who is currently treating the student" as provided in subsection (2)(a)4 of the Proposed Rule, then the certification

requirement creates an unnecessary additional burden on students seeking HHB services. The definition of “Hospital/Homebound (HHB) Services” therefore should be revised to read, in relevant part, “based upon a completed medical referral form by a licensed physician or mental health care provider who is treating the student for the presenting diagnosis, as outlined in subsection (2)(a)4 of this Rule.”

Additionally, to ensure that the Proposed Rule does not hinder the very individuals it is supposed to help, the Board should include a provision stating that a representative from the LEA or the school must assist students with the application process for HHB services, if the students request such help, and that students must be made aware that such help is available. The lengthy process of demonstrating student eligibility and then initiating HHB services may overwhelm some students at a time when they are most in need of support and guidance.

b. Licensed Psychiatrist: The Proposed Rule refers to a “licensed psychiatrist” as the only individual who may complete a medical referral form for a student suffering from a psychiatric and/or emotional condition, *see* Proposed Rule 160-4-2-.31(2)(a)4, and defines “Licensed Psychiatrist” as “a person licensed to practice medicine under state law . . . and trained to practice in the science of treating mental diseases to assess the student’s psychiatric and/or emotional condition for which student is referred.” Proposed Rule 160-4-2-.31(1)(h). In many cases, the students most in need of HHB services will not have health insurance or access to the services of a (likely very expensive) licensed psychiatrist. Therefore, the term “licensed psychiatrist” should be replaced by “mental health care provider” and the definition should include individuals such as psychologists, licensed social workers, mental health clinic staff, and other health care providers capable of diagnosing a mental health condition. This is of particular concern for pregnant and parenting students as some may experience post-partum depression following childbirth that could prevent them from returning to school when they otherwise would.

c. Temporary HHB Service: The Proposed Rule defines this term as “HHB instruction and other services for eligible students who have a medically diagnosed physical or psychiatric condition, which confines the student to home or hospital” for a certain defined period of time. Because the inclusion of the qualification “physical or psychiatric condition” in the definition may inadvertently exclude students who should be eligible for such services but do not have a health condition that squarely fits within the parameters of physical or psychiatric condition, we recommend that the definition be revised to read: “HHB instruction and other services for eligible students who have a medically diagnosed health condition, which confines the student to home or hospital”

V. The HIPAA release requirement creates an unnecessary hurdle and should be omitted.

Proposed Rule 160-4-2-.31(3)(a) states that an LEA may require the parent, guardian, emancipated minor or student who is 18 years of age or older to provide a signed release of HIPAA-protected medical information, authorizing the licensed medical provider who is treating the student “to provide all requested records related to the condition related to the request for HHB services to the LEA and to discuss the student’s situation and the need for HHB services with the school team.” The requirement of a HIPAA release is unnecessary and this provision

should be stricken from the Proposed Rule in its entirety. There is no need for an LEA to review the underlying medical records of a student requesting HHB services; the medical provider's signed "medical referral form" requesting HHB services (which, according to the Proposed Rule, must contain a description of the medical condition requiring the student to be absent for an extended period) should suffice as proof of the student's need for HHB services. Eliminating this requirement also would spare schools the added burden of securely storing protected health information in order to protect students' privacy.

VI. The Proposed Rule should include a non-discrimination provision.

Finally, we urge the Board to adopt the following additional provision making clear its intention to prevent all discrimination against pregnant and parenting students. The Board should include in the revised rule a statement demonstrating its commitment to gender equality and Title IX compliance. We suggest the following language:

- 1) No student shall be discriminated against because of his or her actual or potential marital or parental status.
 - a. Pregnancy shall be treated as any other temporary disability.
 - b. Pregnancy or parenthood shall not be considered cause for dismissal or exclusion from any program or activity.
 - c. Participation in special programs provided for pregnant students or students who are parents shall be at the student's option.
 - d. LEAs shall eliminate administrative and programmatic barriers to school attendance and school completion by pregnant students or students who are parents.

See, e.g., 23 IL Admin. Code § 200.50(e); 34 C.F.R. § 106.40(b)(4).

Again, we appreciate the opportunity to comment on the Proposed Rule. If you have any questions or would like to discuss any of our suggested revisions, please contact Lara Kaufmann at (202) 588-5180 or lkaufmann@nwlc.org. Thank you for your attention to these important issues and for your efforts to ensure the success of all of Georgia's students.

Sincerely,



Fatima Goss Graves
Vice President for Education and Employment



Lara S. Kaufmann
Senior Counsel