

April 30, 2012

Susan Haberstroh, Education Associate
Regulation and Review
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

RE: DOE Proposed Extracurricular Activities Regulation [15 DE Reg. 1404 (April 1, 2012)]

Dear Ms. Haberstroh:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Department of Education's existing regulation covering participation in extracurricular activities as part of its normal five year schedule. It was determined that no changes were warranted and the DOE is therefore proposing to "readopt" the current regulation. In December, 2011, the GACEC forwarded a critique of the DIAA standards. The DOE responded that it was reviewing the concerns. Since these regulations mention the DIAA standards, Council would like to re-submit the earlier critique. There is tension between the DOE "comment" in the regulation promoting flexibility in the context of students with disabilities versus the DIAA standards which are highly prescriptive. Council would like to reiterate the following comments from our December 2011 letter on 15 DE Reg. 838:

First, the GACEC recommended substituting "health examination" for "physical examination" since evaluations should preferably include mental health diagnoses and treatment. The DOE agreed and substituted fifteen (15) references to "health" for "physical" throughout the regulation.

Second, the Council recommended that the DOE consider whether dental health exams should be required with some provision in place to ensure availability to low income children. The Council noted that both Medicaid and CHIP cover dental services. The DOE responded as follows:

The Department agrees dental examinations are important to health. It could be a resource burden on families. The Department will investigate adding a provision to the "Delaware School Health Examination Form" that the qualified healthcare provider check for dental health and provide a referral or recommendation for further dental examination if needed.

As a follow up to the Council's commentary, the GACEC obtained the attached Delaware School Physical Examination Form and the DIAA pre-participation physical evaluation and consents form for review. The Council has the following observations.

Delaware School Physical Examination Form

First, the GACEC recommends inclusion of "head injury" or "head injury/concussion" to the listed conditions at the top of page 1. The DIAA form (Par. 34) asks if the student has ever had a head injury or concussion. The current research on concussions underscores the critical need to avoid a second head injury until a first head injury has fully resolved. That was part of the impetus behind Senate Bill No. 111 enacted in 2011. A student with an unresolved

concussion would be “at risk” in intramural sports and in PE classes if engaging in activities such as dodge ball, soccer, or other contact activities.

Second, the GACEC recommends inclusion of a field for at least long-term or maintenance prescription drugs. The DIAA form (p. 4) includes a medications field. It would be important for a school nurse to be aware of medications prescribed for a student. If the student were to check-in at the nurse’s office with symptoms of illness or dysfunction, it would facilitate a nursing assessment if there were a record of the student’s medications. The symptoms or dysfunction could be manifestations of a medication side effect or the failure of the student to take his/her medication prior to school. In some cases (e.g. young child; child with intellectual disability), the child will not know the identity of prescribed medications. Moreover, in the event of a medical emergency occurring at school, EMS personnel would likely benefit from information on medications.

DIAA Pre-participation Physical Examination and Consents Review Form

First, it appears from notes on the bottom of the form that the document may be based on a standardized template from medical associations. Therefore, the DIAA may be somewhat disinclined to consider refinements and amendments.

Second, the characterization of sports as “collision”, “contact”, or “non-contact” is questionable. In particular, listing “cheerleading” as non-contact suggests the lowest level of risk of injury. This is inaccurate. See attachments. Listing “swimming” as “non-contact” similarly suggests the lowest level of risk. To the contrary, the attachments confirm that swimming/diving ranks 5th among sports in head injuries. Likewise, there is more competitor “contact” in cross country races (which can lead to pushing and crashing into trees and rocks on narrow trails) than in volleyball (where opponents are on the other side of a net). Moreover, playing “net” in tennis exposes a player to an overhand “smash” from the opposing player at close proximity. The DIAA may wish to consider whether the categories are accurate or better deleted.

Third, the form contains the following recital:

I have also discussed with him/her and we understand that physical injury, including paralysis, coma or death can occur as a result of participation in interscholastic athletics. I waive any claim for injury or damage incurred by said participant while participating in the activities not checked above.

Public school students, particularly IDEA and §504-identified students, should not be required to sign a liability waiver as a precondition of participation in public-school sponsored activities. Federal and State regulations contemplate inclusion of extracurricular activities in student IEPs. See 34 C.F.R. §300.320(a)(4)(iii) and 14 DE Admin Code 925, §20.1.4.2. Likewise, based on a Disabilities Law Program (DLP) complaint, the Office for Civil Rights recently prompted the Delaware DOE to execute a Resolution Agreement and rescind a regulation requiring students with disabilities to waive liability as a precondition of accessing an inhaler or epipen in school. J. v. Delaware Department of Education, No. 03094034 (Region III OCR), closed by on June 8, 2011. See 13 DE Reg. 882, 886 (January 1, 2010) (proposed); 13 DE Reg. 1201 (March 1, 2010) (final). See also attached Region III OCR LOF to Berlin Brothersvalley (PA) School District, IDELR 353:124 (December 23, 1988)[school violated §504 by requiring parental liability waiver as precondition of assistance with medication). Students are not required to sign a liability waiver as a precondition of riding a school bus, eating cafeteria food, or enrolling in driver education. The liability waiver should be deleted or, at a minimum, IDEA and §504-identified students should be exempt.

Fourth, p.5 contains a lengthy (21 paragraph) list of conditions which automatically disqualify a student from participating in sports. A number of them would disproportionately impact students with disabilities. For example, Par. 7 bars student participation based on the following criteria:

If you do not pursue a regular course of study and pass at least five credits per marking period (equivalent to four credits in junior high/middle school), two credits of which must be in the areas of Mathematics, Science, English, or Social Studies. IF YOU ARE A SENIOR, YOU MUST PASS ALL COURSES WHICH SATISFY AN UNMET GRADUATION REQUIREMENT. (Reg. 1008.2.6; Reg. 1009.2.6.1)

Obviously, many students with disabilities are in ungraded settings, may not take Science, and may not be in a diploma track. This standard would categorically bar their participation in sports and ostensibly violate §504, the

ADA, and the Delaware Equal Accommodations law (Title 6 Del.C. Ch. 45).

Please feel free to contact me or Wendy Strauss should you have any questions or concerns on our comments.

Sincerely,

Terri A. Hancharick
Chairperson

TAH:kpc

CC: The Honorable Lillian Lowery, Secretary of Education
Dr. Teri Quinn Gray, State Board of Education
Charles Michels, Professional Standards Board
Mary Ann Mieczkowski, DOE
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