

**GOVERNOR'S ADVISORY COUNCIL FOR EXCEPTIONAL CITIZENS**

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December 17, 2015

Tina Shockley
Education Associate – Policy Advisor
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

RE: 19 DE Reg. 462/14 DE Admin. Code 1009 [DOE Proposed High School Interscholastic Athletics Regulation (December 1, 2015)]

Dear Ms. Shockley:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Department of Education (DOE) revised proposal to adopt revisions to the Delaware Interscholastic Athletic Association (DIAA) covering school-sponsored sport and athletic activities at the high school level. Council commented on an earlier version of this proposed regulation (19 DE Reg. 111) in August. A copy of that letter is attached for your reference. Council would like to share the following observations on the revised regulations and reiterate some of our earlier comments.

First, §2.1.1 remains unchanged; therefore, Council would like to reiterate the following comment from our earlier letter:

Second, §2.1.1 is difficult to interpret. It recites that a student turning 19 on or after June 15 immediately preceding the student's year of participation shall be eligible for all sports provided all other eligibility requirements are met. There is no definition of "student's year of participation". Moreover, there is no comparable guidance for a student who becomes age 20 or 21 on or after June 15. Students are generally eligible to attend school at least through age 20. See 14 Del.C. §202(a). An IDEA-classified student is often eligible for education past his/her 21st birthday. See 14 Del.C. §3101(1). The implication of §2.1.1 is that 19 year olds can play all sports but 20 year olds are barred from all sports. If this is accurate, it reflects a rather inflexible approach to eligibility which deters participation in athletics.

Second, Council noted in the August commentary that an attempt to create an age waiver protocol for students with disabilities was well intentioned but problematic in several respects. The age waiver protocol (former proposed §2.1.1.2) has been stricken from the revised proposed regulation to allow further analysis. The DOE provided the following rationale:

There were also comments regarding the age waiver protocol for students with disabilities being limited to students with an IEP and not covering students with 504 Plans and the involvement of the IEP team. After considering these public comments, the DIAA Board voted to remove this proposed change for further consideration and analysis at this time. Due to the fact that this is a substantive change, the regulation is being republished for comment.

At 463. The Council would be happy to provide technical assistance to the DOE in this context.

Third, in the August commentary Council noted that use of a definition of "student with a disability" which covered only IDEA-identified students to the exclusion of §504-identified students was ill-conceived. The DOE has attempted to address this observation by adopting the following revised definition of "student with a disability" in §1.1:

"Student with a Disability" means a "child with a disability" as that term is defined in 14 DE Admin Code 922 or Section 504 of the Rehabilitation Act of 1973.

There are two problems with the new definition:

A. Section 2.3.3.1 contains a definition of "Student with a Disability" which is limited to IDEA-identified students. Since the definition in §1.1 cover the entire regulation, the inconsistent definition in §2.3.3.1 should be stricken.

B. Section 504 of the Rehabilitation Act does not define "student with a disability". Consider the following revision:

"Student with a Disability" means a "child with a disability" as defined in 14 DE Admin Code 922 or a qualified person with a disability under Section 504 of the Rehabilitation Act.

Compare 14 DE Admin Code 930.1.3.

Fourth, §2.3.3.2.1 remains unchanged from the August version of the regulation. Council therefore reiterates the following italicized comment:

Fifth, §2.3.3.2 provides as follows:

2.3.3.2. A student with a disability who is placed in a special school or program shall be eligible to participate in interscholastic athletics as follows:

2.3.3.2.1. If the special school or program sponsors the interscholastic sport in question, the student shall be eligible to participate only at the school or program.

This violates federal and State law since it categorically bars a student with a disability from any opportunity to participate in a non-segregated team. It rigidly limits a student with a disability to participate in a team exclusively comprised of students with disabilities of the special school (e.g. Sterck). The DOE has an affirmative obligation to promote opportunities for participation in integrated extracurricular activities. See 14 DE Admin Code 923.17.0; 34 C.F.R. §§104.34(b) and 104.37(c)(2); and 34 C.F.R. §300.117.

The following italicized sentences could be added to the commentary:

For example, 14 DE Admin Code 923.17.0 recites as follows:

In providing or arranging for the provision of nonacademic and extracurricular services and activities, ...each public agency shall ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child".

[emphasis supplied]

The sponsors of the "unified sports" bill (H.B. No. 175) recently stressed that public policy and federal law support integrated athletics:

The General Assembly recognizes that unified sports offer benefits to all students and serve as a potential tool for schools that are required to meet Section 504 of the federal Rehabilitation Act of 1973, 29 U.S.C. §794, regarding providing extracurricular activities, and 14 Del. Admin. C. §923-7.1 and 7.2.

Fifth, §2.3.4, line 7, Council queries the use of the word 'eligible' in the sentence and suggests it may be removed.

Sixth, §2.6.1.1 remains unchanged from the August version of the regulation. Council reiterates the following italicized variation of the earlier comment:

Section 2.6.1.1 authorizes an accommodation for a student with a disability with an IEP but not a student with a disability with a Section 504 Plan. The section should be modified to also cover students with a Section 504 Plan. See discussion in item four above.

Seventh, §2.7 remains substantively unchanged from the August version of the regulation. Council reiterates the following italicized comment:

Seventh, §2.7 bars a student from participating in athletics after four consecutive years from the date of the first entrance of the student into the 9th grade. It also bars a student who had more than four "opportunities" to participate in sports. The regulation authorizes the DIAA to issue a "hardship" waiver. The standards place the "burden of proof" on the student and the DIAA considers disability-related factors such as extended illness, debilitating injury, and emotional stress. For a student with a disability, the decision of whether a student should participate in extracurricular activities such as athletics is the province of the IEP or Section 504 team. Such decision-making does not involve a "burden of proof". The team would decide if such participation is appropriate as part of a FAPE.

Eighth, Sections 2.8.1.1 and 2.8.1.2.1 are confusing. Foreign exchange students with J-1 Student Visas are allowed to participate in athletics for one year if eligible, with no mention of restrictions on varsity level sports. Students in Council on Standards for International Educational Travel (CSIET) foreign exchange programs are mentioned in 2.8.1.1 as being eligible but are restricted in 2.8.1.2.1 to sub-varsity level activities and are "not eligible for state tournament competition during the first year of attendance." There is

also an explanation that the first year is 365 calendar days after the first day of attendance. Council questions the restrictions and the use of 365 calendar days for eligibility purposes.

Ninth, based on the August "Special Olympics" comment, the DOE added the following section:

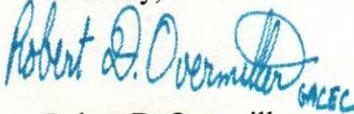
6.6.2.6 Nothing in this regulation shall be construed as prohibiting schools from providing transportation or school supplied assistive technology and equipment to or for non-school activities for students with disabilities.

Council thanks the DOE for this revision.

Tenth, the new regulation is filled with a common grammatical error which did not appear in the August version. The DOE has substituted a plural pronoun ("their" or "they") with a singular antecedent ("student") throughout the regulation. The following sections are illustrative: §§2.2.1; 2.2.1.1; 2.2.1.2; 2.2.1.3; 2.2.1.7; 2.3.1; 2.3.2; 2.6.1.1; 2.6.2.2; 2.7.1.2; and 2.7.1.2.3. To correct the error, the DOE could substitute "student" or "student's" as done in §§2.2.1. and 2.2.1.8. Alternatively, consistent with the Delaware Administrative Code Style Manual, §7.2 and Title 1 Del.C. §304, the masculine version of the pronoun could be used.

Please contact me or Wendy Strauss at the GACEC office if you have any questions on our observations.

Sincerely,



Robert D. Overmiller
Chairperson

RDO:kpc

CC: The Honorable Dr. Steven H. Godowsky, Secretary of Education
Dr. Teri Quinn Gray, State Board of Education
Mr. Chris Kenton, Professional Standards Board
Mary Ann Mieczkowski, Department of Education
Matthew Korobkin, Department of Education
Kathleen Geiszler, Esq.
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Enclosures