



**Governor's Advisory Council for Exceptional Citizens (GACEC)**  
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November 27, 2023

Department of Education  
Office of the Secretary  
Attn: Regulation Review  
401 Federal Street, Suite 2  
Dover, DE 19901

**RE: 27 DE Reg. 308/14 DE Admin. Code 1001 DDOE Proposed Participation in Extra Curricular Activities regulation (November 1, 2023)**

Dear Secretary Holodick:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Delaware Department of Education (DDOE) proposal to repeal the entirety of 14 DE Admin. Code 1001 Participation in Extra Curricular Activities.

DDOE gives the explanation that the regulation "is no longer necessary" as "academic eligibility criteria for middle and high school students' participation in extracurricular activities is established by the Delaware Interscholastic Athletic Association (DIAA) Board" pursuant to 14 Del. C. § 304(3)(listing as one of the DIAA's duties, powers, and authority to "[d]etermine the existence of a violation of the regulations by a member school, athlete, coach, administrator, official, or spectator and penalize a violation by official reprimand, placement on probation, fine, suspension, or other action as the Board deems appropriate.") Previously the regulation that is to be struck read:

**Local school districts and charter schools shall establish their own academic eligibility criteria for participation in all extra curricular activities except for interscholastic athletics. The academic eligibility criteria for interscholastic athletics is established in 14 DE Admin. Code 1009.2.6 DIAA Senior High School Interscholastic Athletics, and in 14 DE Admin. Code 1008.2.6 DIAA Junior High and Middle School Interscholastic Athletics.**

**Comment: In establishing and implementing academic eligibility criteria applicable to students with disabilities, districts are reminded that some flexibility may be contemplated by Federal guidelines. See 34 CFR Sec. 104.4.**

The comment that can be found in DDOE regulation 1001, above, cites to the potential need for eligibility flexibility per 34 CFR Sec. 104.4, which is a U.S. Department of Education regulation implementing Section 504 of the Rehabilitation Act's prohibition of discrimination based on disability. Under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act, the Delaware DIAA must offer an equal opportunity to students with disabilities to participate in sports, which may include the requirement to provide reasonable accommodations such as changes to policies. *In re: Dear Colleague Letter of Jan.*

25, 2013 (OCR), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf>. Likewise, students with IEPs must be afforded an equal opportunity to participate in extracurricular activities, including with supplementary aids and services deemed appropriate and necessary by their IEP team. 34 CFR § 300.107.

Council notes that the last provision of the current regulation, concerning potential eligibility criteria flexibility for students with disabilities, does not appear in the DIAA statutory language, or in other DIAA regulations. The DIAA regulations define an “IEP”, “Student with a Disability” and “Unified Athlete” (student with intellectual disability or autism) but otherwise only discuss eligibility in connection to “unified sports” (a co-ed program that combines students with and without autism or intellectual disabilities), or at what programs/schools students with disabilities who are placed in special schools or programs can participate in. See 14 Del. Admin. C. §§ 1108 and 1009. On an indirect note, § 1009.2.3.3.1 § 1008.2.3.2.1 excludes alternative schools from special schools or programs, although alternative schools are at times used as an IEP placement for a student with a disability, rather than a disciplinary placement.

When school systems have an eligibility requirement for a nonacademic program that is not strictly related to an ability to participate in the program, even with reasonable accommodations, it may rise to discrimination if the requirement tends to screen out students with disabilities. See, e.g., *Mowery v. Logan County Bd. of Educ.*, 58 IDELR 192 (S.D. W.Va. 2012) (allowing a student who was prohibited from attending his school's senior class dance on the basis that he was on homebound instruction to pursue Section 504 and Title II claims against his district). Likewise, eligibility criteria that are inflexibly tied to discipline may have discriminatory impact against students whose behavior problems may be a manifestation of their disability. See, e.g., *Ontario-Montclair (CA) Unified Sch. Dist.*, 24 IDELR 780 (OCR 1996) (instructing a district to modify its eligibility criteria where they had a behavior standard that made students with a specific number of disciplinary actions ineligible, to respond to the individual needs of students with behavioral health disabilities); and *Chrysalis (CA) Charter Sch.*, 113 LRP 27944 (OCR April 11, 2013) (concluding that because a district banned a child from recess, field trips, etc., based on grades and behaviors related to disability, it violated Section 504's antidiscrimination provisions).

Based on the information above, Council recommends that DDOE maintain a modified statement of non-discrimination, such as: “In establishing and implementing academic eligibility criteria applicable to students with disabilities, ~~districts are reminded that~~ some flexibility may be necessary to ensure that students with disabilities have an equal opportunity to participate in extracurricular activities, as contemplated by Federal guidelines...” rather than striking DDOE/DIAA regulation §1001 in its entirety. See e.g., 34 CFR Sec. 104.4 and 34 CFR § 300.107” (subtractions shown by strikethrough and additions by underlining), or DDOE could incorporate such a statement elsewhere in the DIAA regulations.

Thank you for allowing us the opportunity to share our recommendations with you. Please contact Pam Weir or me at the GACEC office if you have any questions on our comments.

Sincerely,

*Ann C Fisher*

Ann C. Fisher  
Chairperson

ACF: kpc

CC: Shawn Brittingham, State Board of Education  
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