



Governor's Advisory Council for Exceptional Citizens (GACEC)
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February 28, 2024

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

RE: 27 DE Reg. 476 DE Admin. Code 923 DDOE Proposed Children with Disabilities Subpart B, General Duties and Eligibility of Agencies regulation (January 1, 2024)

Dear Secretary Holodick:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Delaware Department of Education (DDOE) proposal to amend sections of 14 Del. Admin Code § 923, general duties and eligibility. Council opposes the proposed regulations since they would allow schools to ignore IDEA regulations and the rights of students with disabilities. The proposed regulations would provide schools with incentives to reframe suspensions as a behavioral removal and avoid their obligation under federal statute and regulation to educate students with disabilities in their least restrictive environment and provide them a free appropriate public education.

Federal and state law require that students with disabilities be educated in their least restrictive environment and with their nondisabled peers to the greatest extent possible. An IEP meeting is required for any change of placement. The underlined language is the proposed addition to the current regulations regarding educational placement and least restrictive environment. This section reads, with proposed changes noted:

16.5 A child with a disability shall not be removed from education in ~~age-appropriate~~ age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

16.6 If a child with a disability is a danger to himself or herself or is so disruptive that their behavior substantially interferes with the learning of other students in the class, the IEP team may provide the child with supportive instruction and related services at home in lieu of the child's present educational placement.

16.6.1 Services provided under these conditions shall be considered a change in placement on an emergency basis and shall require IEP team documentation that such placement is both necessary and temporary and is consistent with the requirements for the provision of a free, appropriate public education.

16.6.2 In instances of parental objection to such home instruction, parents may exercise any of the applicable procedural safeguards in these regulations. 14 DE Admin. Code 926.

16.6.3 To be eligible for supportive instruction and related services, the following criteria shall be met:

16.6.3.1 The child shall be identified as disabled and in need of special education and related services and enrolled in the LEA or other public educational program; and

16.6.3.2 If the absence is due to a medical condition, be documented by a physician's statement where the absence will be for 2 weeks or longer; or

16.6.3.3 If the absence is due to severe adjustment problem, be documented by an IEP team that includes a licensed or certified school psychologist or psychiatrist, and the such placement is both necessary and temporary; or if for transitional in school program, be documented by the IEP team that it is necessary for an orderly return to the educational program.

16.6.4 IEPs specifying supportive instruction services shall be reviewed at intervals determined by the IEP team, sufficient to ensure appropriateness of instruction and continued placement.

16.6.5 Supportive instruction, related services and necessary materials shall be made available as soon as possible, but in no case longer than 30 days following the IEP meeting. Such instruction and related services may continue upon return to school when it is determined by the IEP team the child needs a transitional program to facilitate their return to the school program.

These proposed changes enable schools to remove students with disabilities from their classroom setting and educate them at home instead. As DDOE is aware, federal law protects the rights of students with disabilities to be educated in their least restrictive environment (34 C.F.R. §114-19). Any change in least restrictive environment must be a determination made by the student's team. (34 C.F.R. §116). There are already explicit procedures in federal law and regulation for emergency procedures to hold an IEP meeting before a change of placement (34 C.F.R. §530). Any suspension or other removal that lasts more than 10 days (consecutive or cumulative through a school year) is considered a change in placement. (34 C.F.R. §530). The IDEA explicitly states that when a student has a suspension that constitutes a change in placement, the IEP team must meet to determine whether a student's violation of school code is a manifestation of the student behavior. (34 C.F.R. §530(e)). A school can only suspend a student for behavioral reasons without first holding an IEP meeting or manifestation determination under specific special circumstances (if: 1) the student carries a weapon, 2) the student knowingly possess uses illegal substances, or 3) has inflicted serious bodily injury (34 C.F.R. §530)). Even when those circumstances occur, the school may only remove the student for up to 45 days and must provide the student with services in alternative educational placement. (34 C.F.R. §530(g)).

These proposed regulations are much more restrictive and would allow schools to avoid their obligations to students with disabilities. The language of the proposed regulations would provide schools with broad discretion to remove students with disabilities from the classroom in violation of their rights under federal regulations. Behavior characterized as a "danger to himself or herself or is so disruptive that their behavior substantially interferes with the learning of other students in the class" could entail a wide range of behavior that could and should be addressed in the classroom. The school should provide the student with disabilities with supportive services to address these concerns, rather than remove the student from the classroom. This proposed regulation effectively gives staff a means to avoid providing the services the student is entitled to.

Furthermore, the proposed regulations do not appear to give a clear timeline as to when (or if) a student must receive services outside of their regular placement after a removal. The proposed regulations only appear to require instruction to be provided if the IEP team determines that a student needs supportive services. Further, this regulation indicates those services would not need to be in place until 30 days after the IEP team meeting, which would deprive a student of their free appropriate public education (FAPE).

There is no clear timeline when (or if) an IEP team meeting needs to take place after the student's removal. There is no clear guidance about the services owed to a student (if any) if the team feels the student does not meet the requirements for supportive services. There is no timeline for when the school must consider the student's return to their original placement.

In contrast, under federal regulations, even under the special circumstances that permit a school to remove a student without an IEP meeting or manifestation determination, the school is required to provide services in alternative interim placement during the length of the removal from the student's prior learning environment. The removal itself can only last up to 45 days. But under these proposed state regulations, it appears that schools would not even need to review what a student needs in an alternate placement until they have been removed for 30 days. There also is no proposed ending to this unilateral removal from the student's placement under the proposed regulations.

These regulations have the potential to incentivize schools to reframe disciplinary suspensions as behavioral removals. Almost any behavior that could merit a student suspension as a violation of school code, which could require the school to conduct a manifestation determination and/or provide services in alternate placement, could instead be characterized as behavior that presents "a danger to [the student]" or "substantially interferes with the learning of other students in the class. Instead of having to abide by the safeguards in place to protect student rights to education with their peers, schools could unilaterally remove disruptive students with disabilities from the classroom with ease and without any clear requirements to provide them with their IEP services. These proposed regulations would functionally circumvent all protections related to students with disabilities, discipline, and least restrictive environment. Under these proposed regulations, a student's behavior could result in an immediate removal from school with no services for an indeterminate amount of time, whereas under the IDEA, that same student behavior would require the school to hold a manifestation determination meeting before any removal could take place, or under the most extreme circumstances, remove a student only up to 45 days and require the school to provide the student with services throughout that time. This proposed amendment gives schools a free pass to remove students with behavioral needs without having to provide them the services and protections required by the IDEA.

We hope that the DDOE will take our recommendations and opposition to this proposed amendment in the spirit that they are being provided and respond in a manner that will benefit students with disabilities in Delaware. We look forward to being able to discuss our thoughts on collaboration and being a true 'thought partner' with the DDOE in the near future. As always, we thank you for this opportunity to share our observations 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
Kathleen Smith, State Board of Education
Dale Matusevich, Department of Education
Emily Cunningham, Department of Education
Caitlin Gleeson, Department of Education
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