



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. 477 DE Admin. Code 925 DDOE Proposed Children with Disabilities Subpart D, Evaluations, Eligibility Determination, Individualized Education Programs 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 14 Del. Admin. C. § 925, which describes the requirements for conducting evaluations, determining eligibility and developing Individualized Education Programs (IEPs) for students with disabilities under Delaware's special education regulations. Council would like to share the following observations and recommendations as the state advisory panel for IDEA for Delaware.

First, Council supports the DDOE proposal to change references to a student's 21st birthday to the student's 22nd birthday throughout the regulation. This is consistent with Delaware House Bill 454 of the 151st General Assembly¹, which changed the special education eligibility cutoff age from the end of the school year in which a student turns 21 to the end of the school year in which a student turns 22.

Second, DDOE proposes to amend § 925.5.5 to add to this section a requirement that public agencies conduct an evaluation before changing the educational classification of a student otherwise eligible under IDEA. Council recommends that DDOE remove this proposed addition as unnecessary. Each of the classification sections includes a requirement that in determining whether a student continues to meet a particular educational classification, the IEP Team must follow the evaluation criteria. This necessarily applies to changing the educational classification of a student because the IEP Team is determining whether a student continues to meet the specific educational classification.

Third, DDOE proposes to amend § 925.5.5.2 to add a sentence stating that local education agencies (LEAs) may use the "summary of performance form provided by [DDOE]" when a student is being exited from services due to aging out. This sentence is unnecessary because it is already encompassed in current

¹ <https://legis.delaware.gov/BillDetail/109603>.

§ 924.1.2 (“[Each public agency providing services to children with disabilities shall use any forms or procedures as from time to time are specifically developed or promulgated by DOE in implementing the requirements of these regulations.”). Moreover, it is inconsistent with the language in § 924.1.2 because the proposed regulation uses the term LEA rather than public agency. Council recommends that DDOE remove this proposed language as unnecessary.

Fourth, DDOE proposes to amend the eligibility criteria for Autism (Section 6.6) by reorganizing Section 6.6.1 to make clear that current 6.6.1.2.5 (“The displayed impairments or patterns must result in a significant impairment in important areas of functioning and be persistent across multiple contexts, including a variety of people, tasks and settings[.]”) and 6.6.1.2.6 (“One (1) or more of the displayed impairments or patterns must have an adverse effect on the child’s educational performance[.]”) apply to both 6.6.1.1 (related to impairments in social communication and social interaction) and 6.6.1.2 (related to developmentally or age inappropriate patterns of behavior, characteristics, interests, or activities). The way the regulation is currently structured, the two provisions are under only 6.6.1.2 despite seemingly applying to both. Council supports this proposed change but recommends that DDOE further amend this regulation for grammatical clarity by moving “the child” from the end of 6.6.1 and adding those words to the beginning of both 6.6.1.1 and 6.6.1.2. This would ensure that the proposed amended structure is grammatically correct.

Fifth, although DDOE is not proposing any changes to the references of Multi-Tiered System of Support throughout § 925.9.6, **Council recommends that DDOE update the references to “proposed regulation 14 DE Admin. Code 508 Multi-Tiered System of Support (MTSS) (23 DE Reg. 613 (02/01/20))” in 925.6.3.1 to the adopted MTSS regulations at 14 Del. Admin. C. § 508.**

Sixth, DDOE is proposing to add an explanatory parenthetical to current 7.1.1 to add clarification to the requirement that IEPs include a statement of the child’s present levels of academic achievement and functional performance. The proposed language would clarify that this means “i.e. areas in which there is evidence that the disability causes an adverse effect on educational performance”. The abbreviation “i.e.” stands for the Latin phrase “*id est*” which means “that is” or “specifically”. By using “i.e.,” DDOE is saying that the present levels of academic achievement and functional performance means, *and only means*, areas where there is evidence that the student’s disability is causing an adverse effect on educational performance. This language makes this requirement *more* restrictive than that which is in IDEA. Moreover, it asks IEP Teams to consider and identify where the child struggles rather than also considering the student’s strengths.² Therefore, Council recommends that DDOE remove this parenthetical as overly restrictive, unnecessary, and problematic.

Seventh, DDOE proposes to add new 7.3.1, which would make clear that the IEP Team must complete the educational representative form prior to a student’s 18th birthday in order for the student to be able to appoint an educational representative or educational surrogate parent. This additional language poses two separate issues. One, the way it is written makes it so that if a student does not complete this form prior to their 18th birthday, they are prevented from appointing an educational representative or educational surrogate after that. Meaning, the student would be unable to appoint someone to act in this capacity after the student turns 18. Second, the way the language is written makes it so the responsibility is on the student with a disability to know and understand the requirements in order to exercise their right (rather than putting the onus on the public agency to affirmatively provide this information and inquire as to whether the student wishes to appoint such an individual). Council recommends that DDOE remove this language or otherwise revise the language to put the affirmative obligation on the public agency rather than the student.

Eighth, DDOE proposes to add a new subsection 8.5.2 which would prohibit the excusal of required IEP team members for purposes of eligibility determinations. Council supports this change since it will help to ensure that the individuals with the most pertinent knowledge will be in attendance for meetings where a student’s eligibility will be determined.

² Center for Parent Information & Resources provides a great explanation of Present Levels at <https://www.parentcenterhub.org/present-levels/#idea>.

Ninth, DDOE proposes to amend this section by adding a requirement that, where a student transfers from one Delaware public agency to another, the receiving agency must “[a]dopt the child’s Evaluation Summary Report from the previous public agency or conduct a new evaluation that meets the applicable eligibility requirements in 14 DE Admin. Code 925, Section 6.0.” This additional requirement may pose an undue burden upon receiving agencies with little to no benefit for students with disabilities. In adopting a student’s ESR, the receiving public agency would be making another eligibility determination, thus requiring specific individuals to attend the meeting where they otherwise would not be necessary. This may have the unintended consequence of delaying necessary meetings and taking District staff away from other important duties and responsibilities.

When a student transfers from one Delaware public agency to another, the receiving public agency must, within 60 days, either adopt the student’s previous IEP or develop and implement a new one. This review necessarily requires a review of a student’s ESR and puts the responsibility on the receiving public agency to determine whether updated evaluations are warranted. An additional requirement that the receiving agency adopt the student’s ESR is unnecessary and may lead to negative consequences. Council would therefore recommend that DDOE remove this proposed additional requirement.

Tenth, DDOE is proposing to change the language in 11.2.6, which concerns students who may need course materials in alternative formats. The current language is “In the case of a child who is blind, visually impaired, or has a physical or print disability, consider whether the child needs accessible instructional materials.” DDOE is proposing to replace this language with the following:

The IEP team shall consider intervention supports and strategies, including instructional materials in accessible formats, for students who have difficulty accessing or using grade-level textbooks and other core materials in standard print formats. This includes children who are blind, visually impaired, or have a physical or print disability (as defined in 14 DE Admin. Code 922, Section 3.0).

DDOE’s proposed change does not necessarily substantively change what the IEP Team is supposed to consider. The underlying requirement is still for the IEP Team to consider whether a student needs instructional materials in alternate formats due to the child’s disability. The proposed language provides IEP Teams with more information about what “instructional materials” are. Council supports this proposed change and requests that DDOE make clear that it is not only “grade-level textbooks and other core materials” that districts must consider and adapt – instead, it must be anything that the student would need to enable access to the general education curriculum.

Eleventh, DDOE proposes to add section 13.1.1 which states “Except as provided in 14 DE Admin Code 925, subsection 11.12 (regarding children with disabilities in adult prisons), each public agency shall meet the least restrictive environment requirements of 14 DE Admin. Code 923, Sections 14.0 through 20.0.” This is consistent with language found in IDEA at 34 C.F.R. § 300.114(a)(1). However, Council recommends that DDOE replace the reference to subsection 11.12, which concerns students in adult prisons participating in general assessments and transition services, with subsection 11.13, which concerns a public agency’s ability to modify the IEP of an incarcerated student (including LRE) where there is a bona fide security or compelling correctional interest which cannot otherwise be accommodated.

Twelfth, DDOE proposes to add section 13.2, which concerns students aged 3-5 who are not yet in kindergarten. Part B of the IDEA applies to all students aged 3-22 (inclusive) identified as eligible under this Part. There is no carve-out in Part B of the IDEA for students who are not yet in kindergarten or who are not in a regular school program. Therefore, the LRE requirements of Part B of the IDEA apply to all IDEA-eligible students aged 3-5, regardless of where they are currently being served. The DDOE’s proposed LRE placements for students aged 3-5 does not comply with the LRE requirements of IDEA. Council recommends the DDOE remove this separate LRE section for this population and queries why DDOE felt it necessary to impose different requirements with respect to this particular population of students even though they are covered under the same requirements and obligations under Part B of the IDEA as eligible students aged 5-22, inclusive.

Thirteenth, proposed 13.3 (current 13.1) includes a description of the LRE options available “for school age children.” DDOE is proposing to add the quoted language to assist with its erroneous clarification that the LRE requirements for students aged 3-5 (who are not yet in kindergarten) are different than those for students aged 5-22. However, DDOE provides no language to define what it means by “school age children”. Throughout this section, DDOE proposes to remove the last sentence of current 13.1.1-13.1.3 (proposed 13.3.1-13.2.3), which provides examples for where the particular setting may be applicable. Council would like additional information on why DDOE is proposing to remove this language and whether guidance with examples of how the different settings could look will be provided to districts and parents to aid in IEP development.

Finally, DDOE is proposing to replace much of the description of the “Homebound and Hospital” setting (13.1.6 (proposed 13.3.6)) with a cite to the definition it is proposing to include in Section 922. Please see GACEC comments on Regulation 474 in reference to this proposed change to Section 922.

As stated in our comments on regulation 474, we hope that the DDOE will take our recommendations 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
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Emily Cunningham, Department of Education
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