



Governor's Advisory Council for Exceptional Citizens (GACEC)
516 West Loockerman St., Dover, DE 19904
302-739-4553 (voice) 302-739-6126 (fax) <http://www.gacec.delaware.gov>

May 28, 2024

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

RE: 27 DE Reg. 812 DE Admin. Code 1029 DDOE Proposed Delaware Interscholastic Athletic Association (DIAA) Board Student Athlete Eligibility: Transfers regulation (May 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 regulations related to eligibility for interscholastic athletics for students who transfer from one school to another. The amendment proposes to strike current section 2.4 of 1009 DIAA High School Interscholastic Athletics and add a new 1029 Student Athlete Eligibility: Transfers. Per the Impact Statement, the new regulation is a result of deliberations of the DIAA Task Force, which sought to address issues related to transfers driven by athletic motivations, inappropriate pressure on student athletes and unauthorized recruitment of athletes by other schools.

The new regulation imposes an immediate period of ineligibility for most students who transfer from one school to another who have participated in competitive sports within the previous 180 days. There is a one-time exemption from this rule if: "the student transfers prior to the start of the earliest allowable start date of the fall sport's season of the student's third year of eligibility and the student does not participate in a contest in the same sport for different schools during the same school year." (New 4.2) The ineligibility periods are listed in new 4.3, which are generally 30 days or half of the maximum number of regular season contests, whichever is less.

This regulation does not address the circumstance in which a student with disabilities transfers schools for educational reasons, pursuant to an IEP or because the school offers the needed educational services or supports.

However, Senate Bill 281 (SB 281), which is out of committee, reiterates most of the proposed regulation related to transfers, but also adds provisions related to the waiver process. The Synopsis to SB 281 indicates that the Task Force discussed the waiver process in its deliberations. The Task Force concluded that moving the waiver process out of regulation and into the Code would help streamline the process. The full DIAA Board will not have jurisdiction over transfer waiver requests. In the bill, the Executive Director of the DIAA Board makes the disposition on the waiver request, which is subject to review by a three-person panel made up of Board members. The Executive Director has 15 days to make a disposition. The appeal to the panel is on the record only (meaning it is restricted to reviewing whatever

documents or record that the Executive Director relied upon). The standard of review is whether the Executive Director's decision was supported by substantial evidence or is arbitrary or capricious.

The bill also indicates that students who meet one of the eight exceptions do not have to file for a waiver but must document how they meet the exception. It adds language that any student placed in a school by the Department of Services for Children, Youth and Families (DSCYF) has immediate eligibility. It also adds language that no exception applies "if the student transferred for athletic advantage." Council notes that this language is not in the draft regulation.

The statute places the burden of proof on the student and lists specific required documentation, including official transcripts, attendance records, a letter from the principal of the old school, among others, as well as a letter from the old school certifying that the student's transfer is not motivated by athletic advantage. If the student cannot obtain such a certification, then the student must explain why they cannot get the certification. This appears to place unnecessary and somewhat unusual obstacles in the way of a student athlete who has a legitimate need or desire to transfer schools. The documentation requirements are also burdensome for any family and particularly ones with financial or communication limitations.

So, taking SB 281 and the proposed regulation in tandem, there is no exception or consideration for a student who transfers for academic reasons and more importantly no exception for students with disabilities who transfer schools as a change in placement under an IEP or in order to obtain necessary services and supports.

The benefits of participation in athletics and sports for students with disabilities are well documented. "The benefits of sports participation are significant for people with disabilities. Physical activity improves academic success, builds self-esteem, and prevents health problems." The United States Department of Education has directed districts to ensure that students with disabilities have equal access to such programs. 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 Furthermore, inflexible eligibility criteria may have discriminatory impact against students whose reason for transfer is related to disability services or a placement through an IEP.

There is some interesting case law around this issue, some of it favorable. In Washington v. Indiana High School Athletic Association, 181 F. 3rd 840 (7th Cir. 1999) a student with disabilities had a disruption in his education due to his learning disabilities. When he returned to school, he was ineligible to play sports due to age. The court found a nexus between the application of the age out rule and the student's disability, and ordered the school district to allow him to play his sport. In another case with a wild procedural history, Crocker v. Tennessee Secondary School Athletic Assn, 735 F.Supp. 753 (M.D. Tenn. 1990), the court enjoined the TSSAA from applying a transfer rule to a student athlete with disabilities, as his transfer was found to be motivated by disability-related educational needs, which had been included in his IEP.

Logically, if a student transfers for disability-related reasons, then the transfer ineligibility rule should be waived so as not to allow DIAA to prevent the student's participation solely because of his disability. This argument is particularly compelling when the transfer rule has several other exceptions for students whose reason for transferring clearly is unrelated to athletic advantage, including being a crime victim, homeless, or in the custody of DCYF.

In light of the information above, Council would ask that an additional exception be enumerated in the regulation and in SB 281 for students with disabilities who transfer either under an IEP or to obtain educational or vocational services and supports.

Council also will have a discussion with the sponsors of SB 281 noting that language could be added to SB 281 clearly indicating that students who transfer under an IEP or to obtain educational services should be granted a waiver (expressly stating that a transfer for a disability-related reason can be the basis of a waiver).

Alternatively, Council notes that language in the regulation or the legislation could state that DIAA must consider and grant requests from students with disabilities for exceptions from eligibility rules as a reasonable accommodation.

Either of these changes in the language in the regulation and legislation would lead to a more equitable situation for students who are seeking transfers for disability-related reasons.

We look forward to being able to discuss our thoughts on collaboration 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
Linnea Bradshaw, Professional Standards Board
Carla Jarosz, Esq.
Alexander Corbin, Esq.