



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

August 30, 2024

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

**RE: 28 DE Reg. 12 DE Admin. Code 923 DDOE Proposed Children with Disabilities Subpart B, General Duties and Eligibility of Agencies regulation (July 1, 2024)**

Dear Secretary Holodick:

The Governor's Advisory Council for Exceptional Citizens (GACEC) reviewed the Delaware Department of Education (DDOE) proposal to amend sections of 14 Del. Admin Code § 923, general duties and eligibility in January of 2024. Council submitted comments and **opposed** the proposed regulations at that time since they would allow schools to ignore Individuals with Disabilities Education Act (IDEA) regulations and the rights of students with disabilities. Council noted that 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 (LRE) and provide them a free appropriate public education (FAPE). Council **strongly opposes** the regulations re-published in July of 2024 and would like to share the following observations.

**16.0 Placements.**

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 and strike-throughs are the proposed removals from the current regulations regarding educational placement and least restrictive environment. Changes from January to July are noted in highlight. This section reads, with proposed changes noted, beginning with section 16.5:

*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 to homebound or hospital 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 ~~homebound or hospital placement~~ ~~supportive instruction and related services~~, the following criteria shall be met:

16.6.3.1 The child shall be identified as ~~a child with a disability~~ ~~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 ~~placement absence~~ is due to a medical condition, it shall be documented by a physician's statement where the absence will be for 2 weeks or longer; or

16.6.3.3 If the ~~placement absence~~ is due to severe ~~behavior concerns~~ ~~adjustment problem~~, it shall 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

16.6.3.4 If for a ~~transitional in school program~~, it shall be documented by the IEP Team that it is necessary for an ~~appropriate orderly~~ return to the educational program.

16.6.4 IEPs specifying ~~homebound or hospital placement~~ ~~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 ~~within 10 school 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 ~~that~~ 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 IEP team. (34 C.F.R. §116). Emergency procedures to hold an IEP meeting before a change of placement are already explicitly in federal law and regulation (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 possesses or 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)). To the extent DDOE's proposed regulations conflict with the IDEA and its implementing regulations, preemption would apply and the DDOE regulations would be invalid and unenforceable.

These regulations, as written, would 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 then 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. 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 language gives schools the ability to remove students with behavioral needs without having to provide them the services and protections required by the IDEA.

Council is aware and understands the challenges schools are facing with increased behavioral needs post COVID, but the GACEC still strongly opposes any infringement upon the rights of students with disabilities. Instead, we encourage the DDOE to put time and energy instead to explore ways to provide additional supports to students in their current schools.

Thank you for this opportunity to share our observations and recommendations on these proposed regulations again. 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  
Caitlin Gleeson, Department of Education  
Linnea Bradshaw, Professional Standards Board  
Carla Jarosz, Esq.  
Alexander Corbin, Esq.