



DISABILITIES LAW PROGRAM

COMMUNITY LEGAL AID SOCIETY, INC.

100 W. 10th Street, Suite 801
Wilmington, Delaware 19801
(302) 575-0660 TTY (302) 575-0696 Fax (302) 575-0840
www.declasi.org

MEMORANDUM

To: SCPD Policy & Law Committee
From: Brian J. Hartman
Re: Recent Legislative & Regulatory Initiatives
Date: April 8, 2013

I am providing my analysis of seven (7) regulatory and six (6) legislative initiatives in anticipation of the April 11 meeting. Given time constraints, the commentary should be considered preliminary and non-exhaustive.

1. DOJ Final VCAP Funeral & Burial Award Cap Regulation [16 DE Reg. 1079 (4/1/13)]

The SCPD commented on the proposed version of this regulation in January, 2013.

In a nutshell, the Council endorsed a proposed reduction from \$8,500 to \$5000 for funeral/burial expenses. The change was motivated by the recognition that the \$8,500 standard was among the highest in the Nation and that VCAP income was not "keeping pace" with expenditures. The Delaware State Funeral Directors Association opposed the initiative. The City of Wilmington recommended that the VCAP seek an increase in revenue through legislation.

The VCAP Advisory Council has now acknowledged the SCPD's endorsement and adopted a final regulation with no further changes.

I recommend no further action.

2. DMMA Final LTC Medicaid Resource Regulation [16 DE Reg. 1077 (4/1/13)]

The SCPD and GACEC commented on the proposed version of this regulation in February, 2013.

The Councils noted that the Division of Medicaid & Medical Assistance was deleting a resource “disregard” for federal income tax refunds based on the expiration of a federal authorization. The Councils did not identify any technical concerns with the proposal which conformed to federal law. The Division has now acknowledged the Councils’ commentary and adopted a final regulation with no further changes.

I recommend no further action.

3. DOE Final Driver Education Regulation [16 DE Reg. 1070 (4/1/13)]

The SCPD and GACEC commented on the proposed version of this regulation in January, 2013. A copy of the GACEC’s January 16, 2013 letter (minus attachments) is included for facilitated reference.

First, the Councils recommended the addition of the term “and related services” after the words “specialized instruction”. The Department of Education agreed and inserted the term.

Second, the Councils recommended deletion of a cap which limited enrollment in driver’s education to only “one” additional time. The DOE agreed and modified the authorization to allow a student to take the course “additional times”.

Since the regulation is final, and the DOE adopted amendments conforming to both Council recommendations, I recommend sharing a “thank you” communication.

4. DOE Final Special Education Director Regulation [16 DE Reg. 1073 (4/1/13)]

The SCPD and GACEC commented on the proposed version of this regulation in November, 2012. A copy of the GACEC’s November 14, 2012 letter is attached for facilitated reference.

First, the Councils questioned the deletion of a reference to “administrative experience”. In response, the Department of Education added a specific reference to administrative experience in §4.2.1.3.

Second, the Councils questioned deletion of a reference “counting” work experience by certified school psychologists, speech pathologists, and audiologists. In response, the DOE added a clarifying reference to “school psychologist, speech pathologist, or audiologist” in §4.2.1.3.

Since the regulation is final, and the DOE adopted amendments conforming to both Council recommendations, I recommend sharing a “thank you” communication.

5. DSS Prop. Child Care Subsidy Program Definitions Regulation [16 DE Reg. 1043 (4/1/13)]

The Division of Social Services proposes to amend a single definition in its Child Care Subsidy Program regulation. The rationale for the change includes the desire to conform to Office of Child Care Licensing (OCCL) standards.

I have two observations.

First, DSS recites as follows in the Summary of Proposed Changes:

1) This regulatory action changes the number of children in "Child Care Centers" from 12 or more to 13 or more; ...

However, the actual text of the proposed revision is omitted from both the "paper" and electronic version of the regulation. The current regulatory definition of "Child Care Centers" from 16 DE Admin Code 11000, §11002.9 is attached for facilitated reference. This is the section DSS intended to amend by substituting "13" for "12".

Second, DSS is amending the definition of "large family child care home" to cover non-residential centers and change the qualifications from caring for 6-12 children to 7-12 children:

~~A private residence other than the child's residence, where licensed care is provided for more than six but less than twelve children who are not related to the caregiver. A private residence other than the child's residence or a non-residential site where licensed care is provided for seven to twelve children who are not related to the caregiver....~~

At 1044. Unfortunately, this definition is at odds with the attached OCCL definition published at 9 DE Reg. 104, §3.0. The OCCL definition, in pertinent part, reads as follows:

The person or entity has in custody or control seven (7) to a maximum of twelve (12) children preschool age or older who live at and/or are present at the Large Family Child Care Home. In addition to the children preschool-age or younger, this person or entity may also have custody or control of one (1) to a maximum of two (2) school-age children who do not live at the Large Family Child Care Home but are present only for before and after school, and/or during school holidays, and/or during the summer....¹

The DSS definition is not co-terminous with the OCCL definition since: 1) it omits the OCCL age criteria; and 2) it would not permit the presence of 1-2 school-age children in addition to the complement of 7-12 children.

¹I suspect the OCCL regulation contains an erroneous reference, i.e., the word "older" should be "younger".

Given the above observations, DSS may wish to consider republication of a corrected proposed regulation.

I recommend sharing the above commentary with the Division.

6. DMMA Proposed Medicaid Prescription Drug Regulation [16 DE Reg. 1028 (4/1/13)]

The Division of Medicaid and Medical Assistance proposes to adopt some discrete amendments to its drug coverage standards.

First, for dual eligible (Medicare/Medicaid) individuals, Medicaid coverage for benzodiazepines ends AND Medicaid coverage for barbiturates ends unless prescribed for a condition other than epilepsy, cancer, or a chronic mental health disorder. This change is required by federal law. Effective January 1, 2013, Medicare D will cover benzodiazepines and barbiturates prescribed to treat epilepsy, cancer, or a chronic mental health disorder. Therefore, there is no “net” loss of coverage for dual eligibles, i.e., they will be eligible for these drugs under the Medicare-D program rather than Medicaid.

Second, the Division is changing quantity limits on opioid analgesics. At 1033. The current limit is “200 doses per 30 days” which is roughly equivalent to 2,400 doses per year. The new limit will be “720 immediate release doses per 365 days”. Lowering the quantity limit from 2,400 to 720 doses annually represents a 70% reduction. The Division indicates that the “720 immediate release doses per 365 days” reflects current practice. At 1030.

Overall, the Medicaid Plan changes are expected to result in \$101,000.00 in savings. At 1030.

I recommend endorsement of the change in benzodiazepines and barbiturates coverage for dual eligibles since required by federal law. I also recommend that the SCPD request clarification of the following: 1) the rationale for reducing the limits on opioid analgesics by 70%; and 2) the availability of an “override” based on compelling circumstances.

7. DPH Proposed Medical Facility Regulation [16 DE Reg. 1033 (4/1/13)]

The Division of Public Health proposes to adopt a regulation to implement H.B. No. 47 and H.B. No. 144 enacted in 2011. That legislation authorized the Department to issue regulations covering medical facilities where invasive medical procedures using anesthesia are performed. The regulation is comprehensive and prescriptive. I have the following observations.

First, the regulation contains inconsistent standards for adverse events. Compare §§1.4.2 and 2.1 (definition of “adverse event”). The latter definition is based on the statutory definition in H.B. No. 47. The inconsistency will lead to confusion and errors in reporting. For example, initiation of criminal investigation is covered by the latter definition but not mentioned in §1.4.2. It would be preferable to adopt a single standard.

Second, §3.3.7 lacks a verb.

Third, §6.1 contains the following requirement:

The medical facility must post written notice of patient rights in a place or places within the facility likely to be noticed by patients (or their representatives, if applicable) waiting for treatment.

This posting standard could be improved. For example, the notice could be small (not prominent) and the text could be in 8 point type without violating the regulation. In contrast, §8.1.4 contains a more robust posting standard:

The accreditation certificate shall be posted in a conspicuous place on the Level II or III medical facility premises at or near the entrance in a manner which is plainly visible and easily read by the public.

Consider the following substitute standard in §6.1:

The medical facility must post written notice of patient rights near the entrance and places within the facility likely to be noticed by patients (or their representatives, if applicable) waiting for treatment. Such notices shall be plainly visible, at least 8 ½ X 11 inches in size, and easily read by the public.

Fourth, §6.2.9 confers a patient right to “be free from all forms of abuse, mistreatment or harassment.” Section 1.4.2 requires the reporting of “abuse, neglect or mistreatment”. The Division could consider adding a reference to “neglect” to §6.2.9. “Neglect” is a distinct from “mistreatment”. Compare Title 16 Del.C. §1131.

Fifth, §7.2.1.1.1 categorically caps the duration of an order of closure to 60 days in the absence of a request for continuance of the date of a Departmental hearing. This is problematic.

A. Under §§7.3.3.3.1.1 and 7.3.3.3.1.3 a hearing could be convened on the 60th day and a hearing decision issued on the 90th day. Literally, since the closure order is “capped” at 60 days, the facility could reopen during days 61-89.

B. Under §7.3.3.1, if the facility takes no action on an order of closure, the order of closure remains in effect. It is not “capped” at 60 days per §7.2.1.1.1.

Sixth, in §9.0, the reference to “clause or section” is unduly narrow. The more common term for a severability section is “provisions or application”. Compare H.B. No. 35 in 147th General Assembly.

I recommend sharing the above observations with the Division.

8. S.B. No. 13 (Long Term Care Ombudsman)

This legislation was introduced on March 12, 2013. It was released from the Senate Health & Social Services Committee on March 27. There are two amendments placed with the bill. S.A. No. 1 contained a minor error and S.A. 2 is ostensibly the operative amendment which will be presented for a vote.

As background, Delaware's statutory advance health care directive law requires execution of an AHCD by a resident of a long-term care facility to be witnessed by a representative of the Division of Aging & Physical Disabilities (DSAAPD) or the Public Guardian. Historically, representatives of the Long-term Care Ombudsman's Office (part of DSAAPD) generally witnessed the execution of AHCDs by covered residents. However, the Office of the Long-Term Care Ombudsman was transferred from the Division of Aging & Adults with Disabilities to the DHSS Secretary's Office in 2011 through enactment of S.B. No. 102. As a result, the references to "DSAAPD" in the AHCD law need to be changed since DSAAPD is not involved in witnessing execution of AHCDs. Unfortunately, the current version of S.B. No. 13, as amended by S.A. No. 2, is problematic.

First, in the amendment, the reference to "Delaware Health and Social Services" should be "Delaware Department of Health and Social Services". Compare Title 16 Del.C. §1150.

Second, the amendment contemplates either DHSS or the Public Guardian designating a "patient advocate or ombudsman". I am not aware of the Public Guardian designating a "patient advocate or ombudsman". I checked with the Public Guardian by phone on April 8 and confirmed that my impression is correct - the Public Guardian does not designate patient advocates or ombudsmen. The word "either" should therefore be stricken from the amendment.

Third, another statute [Title 16 Del.C. §1121(15)] still refers to "DSAAPD" in the context of traditional Ombudsman duties. The term "Department of Health and Social Services" should be substituted through this bill or prospective legislation.

I recommend sharing the above observations with at least the prime sponsors, DHSS, and the Public Guardian.

9. H.B. No. 42 (Health Care Decisions)

This bill was introduced on March 13, 2013. As of April 8 it remained in the House Health & Human Development Committee.

As background, Delaware law authorizes a mentally competent individual to designate a surrogate to make health care decisions on the individual's behalf. See Title 16 Del.C. §2507. In the absence of such a designation, or if the designee is not reasonably available, the following relatives may act as a surrogate in descending order or priority:

- a. The spouse, unless a petition for divorce has been filed;
- b. An adult child;
- c. A parent;
- d. An adult sibling;
- e. An adult grandchild;
- f. An adult niece or nephew.

The legislation would add a Par. "g" to read "(a)n adult aunt or uncle.

On its face, the addition of "adult aunt or uncle" would be advantageous since identification of "close" relatives to make health care decisions is sometimes difficult. However, the Delaware Code currently has conflicting authorizations in this context which merit correction through more definitive legislation.

For example, a "competing" statute [16 Del.C. §5530] authorizes the following relatives of residential DDDS clients to consent to elective surgery in the following descending order of priority:

- a. spouse;
- b. an adult child;
- c. a parent;
- d. an adult brother or sister;
- e. an adult grandchild;
- f. an adult aunt or uncle;
- g. an adult niece or nephew;
- h. a grandparent.

Obviously, this order conflicts with the order in Title 16 Del.C. §2507 and the order created by H.B. No. 42. Consider the following:

1) The DDDS statute disallows any relative acting as a surrogate if there is a PFA or no-contact order issued against the relative [16 Del.C. §5530(e)]. There is no such bar in the "Surrogacy" statute.

2) The Surrogacy statute bars a spouse from serving as a surrogate if a petition of divorce has been filed [16 Del.C. §2507(b)(2)a. The DDDS statute has no such bar.

3) The DDDS statute and H.B. No. 42 conflict in the order of precedence between uncles/aunts and nieces/nephews.

4) The DDDS statute adds a grandparent to the list of authorized surrogates.

Moreover, other statutes also conflict with both Title 16 Del.C. §§2507 and 5530. Specifically, Title 16 Del.C. §§1121(34) and 1122 authorize the “next of kin” to make health care decisions for individuals lacking competency in long-term care facilities in the absence of a guardian or representative. There is no definition of “next of kin”. However, consistent with Title 1 Del.C. §302(9) and the attached Wikipedia article on “next of kin”, the sequence of relatives is ostensibly as follows:

- a. children;
- b. parents;
- c. grandchildren;
- d. siblings;
- e. grandparents;
- f. great-grandchildren;
- g. nieces/nephews;
- h. aunts/uncles.

Given the conflict among the overlapping statutes, the Councils should recommend that more comprehensive legislation be prepared to create a uniform standard. Otherwise, health care providers and families are faced with conflicting laws. Such legislation could clearly identify a lengthy sequence of relatives (rather than a technical reference to “next of kin”), address both the effect of a divorce petition and PFA, and clarify whether “step-relatives” are covered. “Step-relatives” are generally not included as “kin”. Cf. Title 12 Del.C. §101(1)(4).

10. S.B. No. 20 (Department of Correction Education Program)

This bill was introduced on March 20, 2013. As of April 8, it remained in the Senate Adult & Juvenile Corrections Committee. The legislation is similar to H.S.No. 1 for H.B. No. 183 which was introduced on April 26, 2012. The Councils issued a critique of that legislation in May, 2012. Some of the same concerns identified in connection with the prior bill also apply to S.B. No. 20.

I have the following observations.

First, the text at lines 8-10 is grammatically infirm and makes no sense. It reads as follows:

Department of Correction's Educational Services shall be provided by utilizing FTEs of which up to 4.0 shall be authorized as teachers/ supervisors, authorized as teachers, minimum of 10.0 authorized teachers will be Career and Technical Education Teacher, 3.0 authorized as secretaries for the Department of Education.

I suspect the intention is to replicate some variation on the following Section 302 from the Governor's proposed budget (H.B.. No. 30):

Section 302. Section 1 of this Act appropriates 39.7 FTEs, of which up to 4.0 shall be authorized as teachers/supervisors, 31.7 authorized as teachers, 3.0 authorized as secretaries for the Department of Education and 1.0 Education Associate to operate the Prison Education Program...

Second, the text at lines 10-13 is likewise grammatically deficient and makes no sense. It reads as follows:

Prison Educational Program, 2.0 of these authorized secretaries will be located within a correctional facilities served. 2.0 authorized as Educational Diagnostic for all correctional facility locations and 1.0 Education Associate dedicated directly to operating the Prison Education Program.

Third, lines 22-30 merit revision. In line 22, delete the comma. In lines 23, 26, 28, and 30, correct the form of references to the Delaware Code. In line 25, substitute "qualifying" for "are qualified". Compare Section 302 of H.B. No. 30, p. 200, lines 12-21.

Fourth, in line 33, substitute "with" for "within". Compare Section 302 of H.B. No. 30, page 200, line 23.

Fifth, in line 36, correct the form of reference to the Delaware Code.

Sixth, the text in lines 38-39 is grammatically incorrect and redundant since it essentially repeats the text in lines 36-37. I am confident that the intent was to include the following from Section 302 from H.B. No. 30 (subject to deletion of the incorrect comma after the word "event"):

In the event, the Director of the Office of Management and Budget proposes or implements a position attrition or complement reduction initiative, the Director shall clearly indicate to the Co-Chairs of the Joint Finance Committee when positions outlined in this section are included in said initiative(s).

Seventh, in line 51, substitute “to” for “for” and delete the redundant “of the”.

Eighth, in line 54, insert “and” between “data” and “information”.

Ninth, in line 61, substitute “be referred” for “move forward”.

Tenth, in line 68, delete the comma.

Eleventh, in line 69, delete “a”.

Twelfth, in line 70, capitalize “technical”.

Thirteenth, in line 71, substitute “provided” for “provide”.

I recommend sharing the above observations with policymakers. The Councils may also wish to suggest that the sponsors request review by a Senate attorney. Finally, I have not addressed whether the GACEC can fulfill the expected functions within the bill with existing resources. If it cannot, that could form the basis for an additional comment.

11. H.S. No. 1 for H.B. No. 46 (Gifted & Talented Start-up Grants)

The original H.B. No. 46 was introduced on March 14, 2013. I shared the attached March 19 critique with the Councils. Based on the critique, the GACEC prompted some revisions to the legislation resulting in H.S. No. 1 for H.B. No. 46. The bill is currently tabled in committee so its viability is not clear. A similar bill, S.B. No. 27, was introduced on March 22 and released from Committee on March 27. It is analyzed later in this memo.

I have the following observations on H.S. No. 1 for H.B. No. 46.

Background on the legislation is provided in the attached March 16, 2013 News Journal article. The Lt. Governor and other policymakers have been impressed with a full-time gifted program in the Brandywine School District. The program enrolls children of all ability levels, including special education students.

H.S. No. 1 for H.B. No. 46 would authorize competitive start-up grants for public schools. The number of grantees and amount of the grants would vary based on availability of funding. The Department of Education would issue regulations with an explicit formula for evaluation of proposals based on criteria listed in lines 19-31 of the bill. Unlike the original bill, the substitute bill integrates the existing statutory criteria for gifted and talented students [14 Del.C. §3101(6)] so the focus is not simply on a few academic areas. See lines 20-21 and 34-46.

I recommend endorsement subject to one (1) amendment.

The model contemplated in the original bill encouraged participation by students from “diverse backgrounds”. The substitute bill deletes that reference in favor of encouraging “participation by students from ‘traditionally underserved’ populations” (lines 26-27). Both references could be interpreted as only focusing on the socioeconomic, cultural, and racial status of students. Indeed, since special education students have been eligible for specialized services under the federal IDEA and Section 504 since approximately 1975, one could argue that they are not “traditionally underserved”. Consistent with my March 19 critique, I recommend the renumbering of Subsections (b)(5) and (6) as (6) and (7) respectively and insertion of the following new Subsection (5) to read as follows: “(5) Preference shall be given to programs that explicitly provide for the participation of students with disabilities who are capable of high performance with accommodations or related services.” This approach would maintain the preference for “underserved” populations while adding a separate “preference” for programs including students with disabilities. The term “high performance” is based on text in lines 36 and 39. Consistent with the attached articles, public schools often overlook eligibility of students with disabilities for gifted programs. Both federal policy letters and case law confirm that students identified under both the IDEA and §504 may qualify for gifted programs.

The commentary should be shared with policymakers, including the Lt. Governor.

12. S.B. No. 27 ((Gifted & Talented Start-up Grants))

This bill was introduced on March 22, 2013. It was released from the Senate Education Committee on March 27. It is similar to H.S. No. 1 for H.B. No. 46 but differs in several respects.

Background on the legislation is provided in the attached March 16, 2013 News Journal article. The Lt. Governor and other policymakers have been impressed with a full-time gifted program in the Brandywine School District. The program enrolls children of all ability levels, including special education students.

S.B. No. 27 would authorize competitive start-up grants for public schools. The number of grantees and amount of the grants would vary based on availability of funding. The Department of Education would issue regulations with an explicit formula for evaluation of proposals based on criteria listed in lines 20-36 of the bill.

I have the following observations.

First, the legislation creates a new §3113 in Title 14 of the Delaware Code. It would be more logical to create a new §3127 in Title 14 since it would then “fit” under Subchapter IV entitled “Gifted or Talented Children”. The analogous H.S. No. 1 for H.B. No. 46 envisioned creation of a new §3127.

Second, there is some “tension” between the inclusion of “visual and performing arts” (line 27) which conforms to Title 14 Del.C. §3101(6) and the somewhat narrow academic achievement focus in lines 22, 34, and 39-41. It may be difficult to link dance or painting to “writing, reading, science, math or engineering”. Moreover, the reference to “accelerated academic work” (line 22) would ostensibly exclude a student who is slow and meticulous who eventually arrives at a high quality outcome (e.g. an engineering student may not be the quickest to design an engine but he might design the best engine). By analogy to H.S. No. 1 for H.B. No. 46, lines 36 and 39), consider the following:

A. In line 22, substitute “high performance in an identified field” for “performing accelerated academic work”.

B. In line 34, substitute “educational” for “academic”.

C. In 39, substitute “Performance in an identified field” for “Academic work”.

Third, the bill establishes a preference for applications which encourage “participation by students from diverse backgrounds” (lines 31-32). However, the bill does not explicitly mention students with disabilities. The reference to “diverse backgrounds” could be interpreted as only referring to socioeconomic, cultural, and racial diversity. Consistent with the attached articles, public schools often overlook eligibility of students with disabilities for gifted programs. Both federal policy letters and case law confirm that students identified under both the IDEA and §504 may qualify for gifted programs. I therefore recommend the renumbering of Subsections (b)(6) and (7) as (7) and (8) respectively and insertion of the following new Subsection (6) to read as follows: “(6) Preference shall be given to programs that explicitly provide for the participation of students with disabilities who are capable of high performance in an identified field with accommodations or related services.” This approach would maintain the preference for “diverse” populations while adding a separate “preference” for programs which include students with disabilities.

I recommend promptly sharing the above observations with policymakers.

13. H.B. No. 18 (Election: Board of Canvass)

This bill was introduced on January 16, 2013. It passed the House on March 19. As of April 8, it remained in the Senate Administrative Services/Elections Committee.

As background, the Delaware Constitution requires election results, including absentee ballots, to be filed with the Prothonotary which serves as the clerk for the Superior Court. The Constitution then authorizes the Superior Court to serve as a board of canvass to certify the election results. Two judges per county are charged with performing this certification:

For purposes of this section the Superior Court shall consist in New Castle County of the President Judge and resident Judge; in Kent County of the resident Judge and an (sic "a") Judge designated by the President Judge; and in Sussex County of the resident Judge and a Judge designated by the President Judge.

Delaware Constitution, Article V, §6.

Unfortunately, a State statute conflicts with this designation of judges. It reads as follows:

For purposes of this chapter, the Superior Court shall consist in New Castle County of the President Judge and the Resident Judge; in Kent County of the Chancellor and the Resident Judge; and in Sussex County of the Resident Judge and one of the remaining judges.

Title 15 Del.C. 5701(b).

H.B. No. 18 is a "housekeeping" measure which conforms the statute to the Constitution. Given the Councils' interest in promoting effective election procedures, including the availability of a judicial review process for absentee ballots, I recommend endorsement.

Attachments

8g:legis/4113bils
F:pub/bjh/legis/2013p&l/413bils



GOVERNOR'S ADVISORY COUNCIL FOR EXCEPTIONAL CITIZENS

GEORGE V. MASSEY STATION
516 WEST LOOCKERMAN STREET
DOVER, DELAWARE 19904
TELEPHONE: (302) 739-4553
FAX: (302) 739-6126

January 16, 2013

Susan Haberstroh, Regulation Review
Department of Education
35 Commerce Way, Suite 1
Dover, Delaware

RE: DOE Proposed Driver Education Regulation [16 DE Reg. 691 (January 1, 2013)]

Dear Ms. Haberstroh:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Department of Education proposal to revise its driver education regulation to conform to House Bill No. 264 which was enacted in April, 2012. A copy of the legislation is attached for facilitated reference. In summary, the legislation is designed to provide flexibility for Individuals with Disabilities Education Act (IDEA)-classified students in enrollment in driver education courses. The material authorization is as follows:

(b) A student who is receiving special education services under an active student's individualized education plan (IEP) will be authorized until age 21 to complete their driver education certification through a State-approved driver education course. Pursuant to Department of Education regulation, the student may be authorized to subsequently enroll in another driver education course if the student fails the driver education course during the regular school year.

Council would like to share the following observations on the proposed regulation.

First, in §1.1, Council recommends inserting "and related services" after the term "specialized instruction". For example, a student may need special hand controls or vehicle modifications in order to be successful. Such assistive technology could be considered either specialized instruction or a related service. Moreover, a student may need Occupational Therapy (OT) services in order to address seating, gripping, and access to controls in a vehicle.

Second, in §1.1.3, Council recommends deletion of the term "for taking the course one additional time". Our rationale is as follows:

A. The relevant IDEA regulation requires that special education and related services be provided "at public expense" and "without charge". See 34 C.F.R. §300.17. The State statute and regulation specifically envision IEP team involvement in students' participation in driver education course work. IEP-included education must be free.

B. The statute does not literally limit an IDEA-identified student to retaking driver education only once. The student is simply authorized to enroll in another course. See also §1.1, referring to "multiple opportunities to take the driver education course". Interpreting the statute as limiting an IDEA-classified student to only two attempts to pass a driver education course is precluded by federal law. Special education must be individualized and enrollment in courses which are part of "FAPE" cannot be "capped".

C. OSEP interpretations support enrollment in a third or fourth driver education class with IEP team approval at no charge. The Office of Special Education Programs (OSEP) allows parents to be charged minor incidental or "maintenance fees" (e.g. for art, chemistry, or lab supplies). See attached OSEP Policy Letter to Anonymous, 20 IDELR 1155 (October 8, 1993). OSEP does not permit parental liability for tuition costs. See attached OSEP Policy Letter to Neveldine, 22 IDELR 630 (January 25, 1995). The cost of a driver education course is conceptually a tuition charge, not an incidental fee.

Thank you in advance for your consideration of our comments and observations. Please feel free to contact me or Wendy Strauss should you have any questions.

Sincerely,



Dafne A. Carnright
Vice Chairperson

DAC:kpc

CC: The Honorable Mark Murphy, Secretary of Education
Dr. Teri Quinn Gray, State Board of Education
Charles Michels, Professional Standards Board
Mary Ann Mieczkowski, DOE
John Hindman, Esq., DOE
Terry Hickey, Esq., DOE
Paula Fontello, Esq., DOE
Andrea Guest, Division of Vocational Rehabilitation (DVR)
Ed Tos, DVR
Terri A. Hancharick, Co-chair, State Transition Task Force for Emerging Adults with Special Health Care Needs
Wendy S. Strauss, Co-chair, State Transition Task Force for Emerging Adults with Special Health Care Needs

Enclosures

**GOVERNOR'S ADVISORY COUNCIL FOR EXCEPTIONAL CITIZENS**

GEORGE V. MASSEY STATION
516 WEST LOOCKERMAN STREET
DOVER, DELAWARE 19904
TELEPHONE: (302) 739-4553
FAX: (302) 739-6126

November 14, 2012

Charles Michels, Executive Director
Delaware Professional Standards Board
John G. Townsend Building
401 Federal Street
Dover, DE 19901

**RE: DOE Proposed Special Education Director Certification Regulation [16 DE Reg. 506
(November 1, 2012)]**

Dear Mr. Michels:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Professional Standards Board and DOE proposal to revise the qualifications for the Special Education Director certification. Council would like to share the following observations and recommendations on the proposed revisions.

First, the current regulation "counts" three (3) years of "administrative experience with children with disabilities". This is omitted from the current regulation. It is unclear if this represents an intentional restriction or if DOE views administrative experience to be generally included under "working with exceptional children." The change does create some ambiguity.

Second, the current regulation (§3.2) specifically "counts" work experience by certified school psychologists, speech pathologists, and audiologists. The proposed regulation deletes the references.

The APA envisions identification of the substance and issues presented by proposed regulations. See Title 29 Del.C. §10115(a)(1). This regulation contains only the following vague statement: "It is necessary to amend this regulation in order to upgrade the requirements' rigor and to build upon the other amended administrator regulations." This imparts little context to explain the intent of the DOE in proposing the changes; therefore, Council would recommend that future proposed regulations include more specific information on the rationale for proposed changes.

Thank you in advance for your consideration of our comments and observations. Please feel free to contact me or Wendy Strauss should you have any questions.

Sincerely,



Terri A Hancharick
Chairperson

TAH:kpc

CC: The Honorable Mark Murphy, Secretary of Education
Dr. Teri Quinn Gray, State Board of Education
Mary Ann Mieczkowski, DOE
Susan Haberstroh, DOE
John Hindman, Esq., DOE
Terry Hickey, Esq., DOE
Paula Fontello, Esq., DOE

11002.9 Definitions and Explanation of Terms

The following words and terms, when used in the context of these policies will, unless clearly indicated otherwise, have the following meanings.

Authorization	Form 618d or 626 is the parents/caretakers authority to receive subsidized child care services and is the provider's authority to provide subsidized child care services to eligible parents/caretakers. The authorization informs providers how much care a parent is authorized to receive, what DSS will pay the provider, and what parents/caretakers must pay as part of their fee.
Caregiver/Provider	The person(s), other than the parent/caretaker, whom DSS approves to provide child care services or the approved place where care is provided.
Caretaker	The adult responsible for the primary support and guardianship of the child. As used here, this adult is someone other than the child's parent who acts in place of the parent. If a caretaker is unrelated to the child and has not been awarded custody by Family Court or guardianship, the caretaker is referred to the Division of Family Services to make a determination to either approve the non-relative placement or remove the child.
CCDBG	Child Care and Development Block Grant. 45 CFR Parts 98 and 99 created by the Omnibus Budget Reconciliation Act of 1990 to provide federal funds without state match to: <ol style="list-style-type: none"> 1. Provide child care to low income families 2. Enhance the quality and increase the supply of child care 3. Provide parents the ability to choose their provider 4. Increase the availability of early childhood programs and before and after school services. Under the Division's DCIS II Child Care Sub system, CCDBG is part of Categories 31 and 41
CFR	Code of Federal Regulations. These are the rules the Federal Government writes to implement federal legislation. Once written and approved, they have the force of law.
CCMIS	Child Care Management Information System, the name used to describe the Division's payment system for child care.
Child	A person under the age of 13, or children 13 through 18 years of age if they are physically or mentally incapable of caring for themselves or are in need of protective services.
Child Care Category	The DCIS II Child Care Sub system code for the child care funding source. Case Managers choose category codes based on the parents/caretaker's technical eligibility for service. The codes are: <ol style="list-style-type: none"> 11 - Participants receiving TANF and not working, but participating in TANF E&T

12 - Participants receiving TANF and working

21 - Participants receiving Food Stamps Benefits who are mandatory or voluntary participants in E&T and not receiving TANF

31 - SSBG, CCDBG, and State funds: Income eligible participants. Participants who receive FS and are not E&T mandatory or voluntary

41 - A participant who is a qualified alien or U.S. citizen is coded as a category 41 when his or her eligibility allows a non U.S. citizen or non-qualified alien to receive child care services. (Example: One child is a citizen and one is not. The citizen child is a 41.)

51 - A participant is coded category 51 when s/he is not a U.S. citizen or legal alien but receives Child Care services due to a family member in category 41



Child Care Centers

A place where licensed or license-exempt child care is provided on a regular basis for periods of less than 24 hours a day to 12 or more children, who are unattended by a parent or guardian.

104 Large Family Child Care Homes

INTRODUCTION

1.0 Legal Base


The legal base for these licensing Rules is in the Delaware Code, Title 31, Welfare, In General, Chapter 3, Child Welfare, Subchapter III, The Delaware Child Care Act, Subsections 341 – 345 and Title 29, State Government, Part VIII, Departments of Government, Chapter 90, Department of Services For Children, Youth And Their Families, Subsection 9003 (7).

2.0 Purpose

The overall purpose of these Rules is the protection and promotion of the health, safety, well-being, and positive development of children who receive licensed child care services in Large Family Child Care Homes.

PART I. GENERAL PROVISIONS

3.0 Definition of Regulated Service

 Large Family Child Care is a licensed child care service provided for part of a twenty-four (24) hour day, offered by any person or entity including but not limited to an owner, association, agency or organization that advertises or holds himself, herself or itself out as conducting such a service. This person or entity has in custody or control seven (7) to a maximum of twelve (12) children preschool-age or older who live at and/or are present at the Large Family Child Care Home. In addition to the children preschool-age or younger, this person or entity may also have custody or control of one (1) to a maximum of two (2) school-age children who do not live at the Large Family Child Care Home but are present only for before and after school, and/or during school holidays, and/or during the summer. All of these children are provided care, education, protection, supervision or guidance in a private home or non-residential setting. This does not include a child care service provided exclusively to relatives as defined by these Rules.

Next of kin

From Wikipedia, the free encyclopedia

Next-of-kin is a term used for many interpretations that depend on the jurisdiction being referred to. In some jurisdictions, such as the United States, it is used to describe a person's closest living blood relative or relatives. In others, next-of-kin may have no legal definition and may not necessarily refer to blood relatives at all, as in the United Kingdom.

In some legal systems, rights regarding inheritance serve a decision making capacity (for example, in a medical emergency) where no clear will or instructions have been given, and the person has no spouse, flow to their closest relative (regardless of the age with a representative appointed if a minor), usually a child, a parent or a sibling. However, there are people without any close adult relatives and, in such a case, decision making power often flows to a nephew, first cousin, aunt, uncle, or grandparent.

For example, if a person dies intestate, the laws of some jurisdictions require the estate to be distributed to the person's spouse and/or children. However, if there are none of these, the estate can often be distributed to the next closest group of living relatives, whether they be parents, grandparents, First cousins, aunts & uncles, or second cousins in extreme cases. If a person dies intestate with no identifiable next-of-kin, the person's estate generally escheats (i.e., legally reverts) to the government.

Contents

- 1 United States
 - 1.1 Order of precedence in the United States
- 2 United Kingdom
 - 2.1 Mental Health Act
- 3 References
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United States

Decisions about funeral arrangements for an unmarried person without children may be made by the next closest relative.

In cases of medical emergency, where a person is incapable (either legally because of age or mental infirmity, or because they are unconscious) of making decisions for themselves and they have no spouse or children, medical decisions can be made by the next-of-kin in preference to the wishes of medical personnel.

The inability of persons who are not in a legal marriage to make decisions with respect to the care of a live-in partner has resulted in many jurisdictions giving live-in partners rights equivalent to a spouse in such situations, even though most jurisdictions still do not require non-spouses to be made beneficiaries of estates (it is improper in most jurisdictions to disinherit a spouse). The inability of same-sex partners to have rights with respect to a partner's medical care or funeral arrangements over and above those of the next-of-kin is one of the main reasons behind litigation to require same-sex marriage or its equivalent.

For the purposes of next-of-kin, adopted children are treated as blood relatives. However, relatives by marriage are never considered next-of-kin.

Order of precedence in the United States

"American statutes typically provide that, *in absence of issue and subject to the share of a surviving spouse*, intestate property passes to the parents or to the surviving parent of the decedent."^[1] Under the civil law system of computation and its various modified forms that are widely adopted by statute in the United States, "a claimant's degree of kinship is the total of (1) the number of the steps, counting one from each generation, from the decedent up to the nearest common ancestor of the decedent and the claimant, and (2) the number of steps from the common ancestor down to the claimant."^[1] "The claimant having the lowest degree count (i.e., the nearest or next of kin) is entitled to the property."^[1] "If there are two or more claimants who stand in equal degree of kinship to the decedent, they share per capita."^[1]

Thus, the following conditions determine the usual order of precedence:

- *In the absence of issue* (i.e., children, grandchildren, and on down the line) and in absence of your parents and their issue and grandparents and of their issue (termed "inner circle" and are usually specifically mentioned in a statute), relatives who are closer in "degree" to the person in question always take precedence. For the purposes of this point, "To determine any person's degree of relation to the decedent, begin with the decedent and follow the line that connects the decedent with the other person. Each person that must be passed through before reaching the final person adds one degree to the total, including the final person."^[2]
- "Of multiple relations with the same degree, those connecting through a nearer ancestor are more closely related to the decedent."^[2]

Under these rules, an order of precedence is established. Here are the first few in the order

(specifically, those up to degree 6):

- Note that although, a decedent's children and parents, grandchildren and siblings, great-grandchildren and nephews, respectively, are the same number of relationships away, children, grandchildren, great-grandchildren, and so forth, will inherit property before anyone else. Thus, a great-grandchild, for instance, will take before a decedent's parent. Furthermore, all of the living descendants of the decedent's parent (if one had no issue of one's own) will take first, before the living descendants of grandparents take. For example, a nephew will take before an uncle.

1. Children
2. Parents
3. Grandchildren
4. Siblings
5. Grandparent
6. Great-Grandchild
7. Niece/Nephew
8. Aunt/Uncle
9. Great Grandparent
10. Great Niece/Great Nephew
11. Great-Great Grandchild
12. First Cousin
13. Great Aunt/Great Uncle
14. Great-Great Grandparent
15. Great-Great Grandchild
16. Great-Grandnephews/nieces
17. First Cousins Once Removed (the children of first cousins and descendants of Grandparents)
18. First Cousins Once Removed (the descendants of Great-Grandparents)
19. Great-Grand Uncles/Aunts
20. Great-Great-Great Grandchild
21. Great-Great-Great Grandparent
22. First Cousin Twice Removed (the descendants of Grandparents)
23. Second Cousin
24. First Cousin Twice Removed (the descendant of Great-Great Grandparent)^[1]

United Kingdom

The term has no legal definition in the United Kingdom. An individual can nominate any other individual as their next-of-kin. There is no requirement for the nominated person to be a blood relative, although it is common. The nominated person must agree to the nomination, otherwise it is invalid. The status of next-of-kin confers no legal rights and has no special responsibilities, except as referred to below in the specific context of the Mental Health Act.

The status of next-of-kin does not in any way imply that they stand to inherit any of the individual's estate in the event of their death.

In the context of health care, patients are often asked to nominate a next-of-kin when registering with their general practitioner, or alternatively on admission to hospital. Hospitals will then notify the next-of-kin that the patient has been admitted or if there is any change in their condition. If the patient is unconscious or otherwise unable to state their next-of-kin, hospitals will usually list their nearest blood relative, though there are no specific rules. Doctors attempt to seek the views of the next-of-kin when considering decision making for unconscious patients or those who lack capacity. The next-of-kin has no power to make any decisions regarding medical care, only to advise, and can neither override the previously stated wishes of the patient nor prevent the medical team acting in what they consider to be the best interests of the patient.

Powers similar to next-of-kin as defined in other jurisdictions can be explicitly delegated to another person using lasting power of attorney,^[3] under the provisions of the Mental Capacity Act 2005^[4] (note that this Act does not relate specifically to mental health and is largely unrelated to the Mental Health Act).

Mental Health Act

The Mental Health Act 1983, Section 26^[5] confers a specific set of rights and responsibilities in the context of the treatment of mental illness. This section replaces the traditional term next-of-kin with "nearest relative" (with no change in meaning) and states that the recognised order of precedence (provided the relevant person is over 18 years of age) is:

1. Husband or wife;
2. Son or daughter;
3. Father or mother;
4. Brother or sister;
5. Grandparent;
6. Grandchild;
7. Uncle or aunt;
8. Nephew or niece.

All half-blood relatives will be treated as full-blood relatives.

This was amended in the Mental Health Act 2007^[6] in which civil partners were officially recognised as equal with husband or wife in the original act.

References

- [^] ^{*a b c d e*} *Problems and Materials on Decedents' Estates and Trusts*. Scoles, Halbach, Roberts, Begleiter. Seventh Ed. Aspen Publishers. 2006. ISBN 0-7355-4076-4.
- [^] ^{*a b*} Degrees of Kinship Chart - Kurt R. Nilson, Esq. : MyStateWill.com (http://mystatewill.com/degrees_of_kinship.htm)
- [^] Making decisions for someone else, Office of the Public Guardian (<http://www.publicguardian.gov.uk/decisions/decisions.htm>)
- [^] Mental Capacity Act 2005 (<http://www.opsi.gov.uk/acts/acts2005/20050009.htm>)
- [^] Mental Health Act 1983 (http://www.cqc.org.uk/_db/_documents/Mental_Health_Act_1983_200909034816.pdf)
- [^] Mental Health Act 2007 (c. 12) (http://www.opsi.gov.uk/acts/acts2007/ukpga_20070012_en_3)

External links

- American National Next of Kin Registry (<http://www.nokr.org>)
- 1983 Mental Health Act with amendments (http://www.cqc.org.uk/_db/_documents/Mental_Health_Act_1983_200909034816.pdf)
- 2007 Amendments to the 1983 Mental Health Act (http://www.opsi.gov.uk/acts/acts2007/ukpga_20070012_en_3)
- UK Office of the Public Guardian (<http://www.publicguardian.gov.uk>)

Retrieved from "http://en.wikipedia.org/w/index.php?title=Next_of_kin&oldid=543975944"

Categories: American legal terms

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COMMUNITY LEGAL AID SOCIETY, INC.

100 W. 10th Street, Suite 801
Wilmington, Delaware 19801
(302) 575-0660 Fax (302) 575-0840
www.declasi.org

MEMORANDUM

To: GACEC
From: Brian Hartman
Re: H.B. No. 46
Date: March 19, 2013

Consistent with Wendy's March 15 referral, I am providing the following critique of H.B. No. 46.

H.B. No. 46 (Gifted & Talented Start-up Grants)

This legislation was introduced on March 14, 2013. As of March 18, it awaited action by the House Education Committee.

Background on the legislation is provided in the attached March 16, 2013 News Journal article. The Lt. Governor and other policymakers have been impressed with a full-time gifted program in the Brandywine School District. The program enrolls children of all ability levels, including special education students.

H.B. No. 46 would authorize competitive start-up grants for public schools. The number of grantees and amount of the grants would vary based on availability of funding. The Department of Education would issue regulations with an explicit formula for evaluation of proposals based on criteria listed in lines 20-29 of the bill.

I have the following observations.

First, the proposed model does "encourage participation by students from diverse backgrounds" (lines 26-27). However, it does not explicitly mention students with disabilities. The reference to "diverse backgrounds" could be interpreted to only refer to socioeconomic, cultural, and racial diversity. Consistent with the attached articles, public schools often overlook eligibility of students with disabilities for gifted programs. Both federal policy letters and case law confirm that students identified under both the IDEA and §504 may qualify for gifted programs.



NEW CASTLE CO. Main Office, 100 W. 10th Street, Suite 801, Wilmington, DE
KENT COUNTY 840 Walker Road, Dover, DE
SUSSEX COUNTY 20151 Office Circle, Georgetown, DE

(302) 575-0660
(302) 674-8500
(302) 856-0038



Second, there is a “disconnect” between the statutory definition of a “gifted or talented child” [Title 14 Del.C. §3101(6)] and the more limited eligibility standard in the legislation which exclusively focuses on a few academic contexts. See lines 20-21 and 34-35. The statutory definition covers students with “visual and performing arts ability”, “psychomotor ability”, and “creative or productive thinking”. The bill limits grants to those targeting writing, reading, science, math, or engineering. A public school could not apply for funding to further the education of very talented artists, musicians, actors, dancers, etc. Nor could a public school apply for funding to further the education of students pursuing careers in history or social studies. A Vo-Tech school could not ostensibly apply for a grant to further the education of students “gifted” in various trades (e.g. electrician; HVAC; carpentry). Query whether the intent of encouraging “participation by students from diverse backgrounds” is served by narrowly defining grant eligibility to 5 subjects.

I recommend endorsement of the concept of the bill while sharing the following suggestions.

A. Either clarify in the House and Senate Committee reports that “diverse backgrounds” is intended to include students with disabilities or renumber Subsections (b)(5) and (6) as (6) and (7) respectively and insert the following new Subsection (5) to read as follows: “(5) Preference shall be given to programs that explicitly provide for the participation of students with disabilities who are capable of performing accelerated academic work with accommodations or related services.”

B. Clarify in the House and Senate Committee reports that the reference to “work in other areas ...fields” in line 35 is intended to be liberally construed (e.g. a Vo-tech school could include students studying to be electricians or carpenters since both require considerable math skills).

Attachments

cc: Kyle Hodges, SCPD
Pat Maichle, DDC

8g:leg/hb46critique
F:pub/bjh/legis/2013p&l/hb46critique

Lawmakers want to clone gifted school program

By Nichole Dobo
The News Journal

At Mt. Pleasant Elementary School, a third-grade classroom is home to a papier-mâché elephant standing taller than a teacher, a framed pair of improbably large underpants and a couple of hamburgers in various states of decomposition.

It's the full-time home for gifted students there.

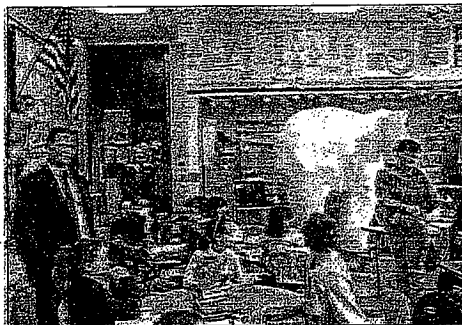
The underpants are signed by the author of a popular children's

book, the meat patties were part of a science project and the elephant was destined for a school play.

The school, in the Brandywine School District, enrolls children of all ability levels, including special education students. What makes it different from most others is a full-time program for those identified as gifted.

Some state lawmakers, including Lt. Gov. Matt Denn, say this

See PROGRAM, Page B2



Lt. Gov. Matt Denn has become a bigger advocate for full-time gifted programs after visiting Mt. Pleasant grade school in February. NICHOLE DOBO/THE NEWS JOURNAL

Program: Securing funding may be difficult

Continued from Page B1

full-time gifted program has promise, and it should be replicated.

In an announcement this week at Mt. Pleasant Elementary, lawmakers said they hoped to gain traction with an initiative by awarding grants to schools that would pay for gifted program startup costs for two years.

The school's principal, Joyce Skrobot, said the full-time gifted program has been popular with parents. During a visit to the school on Feb. 19, Denn said he liked the results and approach the program took.

Beyond some startup costs, it does not require additional resources to maintain, Skrobot said.

A bill in the Legislature that would create grants for public schools to launch gifted programs has the support of several lawmakers, including the

chairs of the Senate and House education committees, Sen. David Sokola, D-Newark, and Rep. Darryl Scott, D-Dover.

The bill's prime cosponsors are Sen. Karen Peterson, D-Stanton, and Rep. Debra Hefferman, D-Edgemoor.

Even so, securing money for a new program this year might be a challenge. The proposed state budget does not include money for the gifted initiative.

"This bill does not have a fiscal note, because we don't want to presume to spend money that—as of right now—the state does not have," Denn said in a statement. "What it does is set up a thoughtful process for spending money that is allocated."

Contact Nichole Dobo at 324-2281 or ndobo@delawareonline.com. On Twitter @NicholeDobo.

SmartStart: Eligibility -- Intellectually Gifted

[Overview](#) | [Key Points](#) | [Links](#) | [Additional Resources](#)

This SmartStart is updated with references to the IDEA 2004 statute, the 2006 IDEA Part B regulations, and the 2008 amendments to the Part B regulations.

Overview

Giftedness is not an IDEA disabling condition and students are not IDEA-eligible on that basis alone. However, gifted students may be IDEA eligible notwithstanding their classification as a gifted student. 34 CFR 300.8; and *Letter to Anonymous*, 55 IDELR 172 (OSEP 2010).

Key Points

These key-point summaries cannot reflect every fact or point of law contained within a source document. For the full text, follow the link to the cited source.

GIFTEDNESS & ELIGIBILITY

- In order to qualify for special education and related services, a student must be between the ages of 3 and 21 and must satisfy both parts of a two-part test:
 - The student must meet the definition of one or more of the categories of disabilities which include: mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities; and
 - The student must be shown to be in need of special education and related services as a result of his disability or disabilities.

34 CFR 300.8(a)(1).

- Giftedness is not a disabling condition that meets the IDEA two-part test for eligibility. *Letter to Anonymous*, 55 IDELR 172 (OSEP 2010).
- Generally, a student is in need of special education services when the student's disability impacts the student's educational performance. Special education services are not required where the disability does not have an adverse effect on the student's educational performance. *J.D. v. Pawlet Sch. Dist.*, 33 IDELR 34 (2d Cir. 2000); *Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 47 IDELR 121 (1st Cir. 2007); and *Marshall Joint Sch. Dist. No. 2 v. C.D.*, 54 IDELR 307 (7th Cir. 2010).

ELIGIBILITY INDEPENDENT OF GIFTEDNESS

- The mere fact that a student is gifted does not disqualify him from eligibility for special education and related services under the IDEA. A student who needs special education because of a qualifying disabling condition retains his rights under the IDEA, even if the student is intellectually gifted. *Letter to Anonymous*, 55 IDELR 172 (OSEP 2010) (holding that a gifted student with Asperger syndrome could be eligible under the autism classification and require services to address behavioral or social challenges). See *Board of Educ. of the City of New York*, 28 IDELR 1093 (SEA NY 1998).
- A student that is eligible as a "student with a disability" is eligible regardless of the student's academic success. The student's academic achievement is irrelevant when the student otherwise meets the eligibility criteria. *Williamson County Bd. of Educ. v. C.K.*, 52 IDELR 40 (M.D. Tenn. 2009) (holding that despite a 143 IQ and passing grades, the student's ADHD adversely affected his educational performance, qualifying the student for special education).

- A categorical exclusion from SLD eligibility based on identification as gifted under state law violates the IDEA. A student classified as mentally gifted may nonetheless meet IDEA eligibility criteria. *Letter to Ulissi*, 18 IDELR 683 (OSEP 1992). See also *District of Columbia Pub. Schs.*, 49 IDELR 82 (SEA DC 2007).

IDENTIFYING GIFTED CHILDREN WITH SLD

- The IDEA shift away from the use of discrepancy models may result in problems when it comes to the ability to identify gifted children with SLD. However, the U.S. Department of Education noted that: "Discrepancy models are not essential for identifying children with SLD who are gifted. However, the regulations clearly allow discrepancies in achievement domains, typical of children with SLD who are gifted, to be used to identify children with SLD." 71 Fed. Reg. 46,647 (2006). SmartStart: Response to Intervention -- IDEA Requirements.

SECTION 504 ELIGIBILITY

- Because intellectual giftedness is not a disabling condition, intellectually gifted students are not eligible under the IDEA or Section 504 solely on that basis. See *Roane County Sch. Sys. v. Ned A.*, 22 IDELR 574 (E.D. Tenn. 1995).
- Section 504 requires districts making placement decisions to draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior. As a result, gifted students may independently qualify under Section 504. *Ferguson-Florissant R-II (MO) Sch. Dist.*, 56 IDELR 56 (OCR 2010).

Links

- SmartStart: Eligibility Determinations Under IDEA
- SmartStart: Eligibility Under Section 504 and/or the ADA
- SmartStart: Evaluation of Specific Learning Disabilities
- SmartStart: Response to Intervention -- IDEA Requirements

Additional Resources

Additional resources on this topic are available for purchase from LRP Publications:

- IDEA Eligibility Case Law: A Desktop Reference to Key Decisions by Amy E. Slater, Esq.
- What Do I Do When ...@ The Answer Book on Section 504 - Fourth Edition by John W. Norlin, Esq.

Please share your experience and expertise. Forward any suggested additions or changes to this or other Smart Starts to SmartStarteditor@lrp.com.

Last updated: November 26, 2012

Key points:

- Do not preclude gifted students from special education
- Discuss school difficulty, need for specially designed instruction
- Base eligibility decision on full, individual evaluation

Don't rule out eligibility based on student's high IQ, giftedness

By Jim Walsh, Esq.*

It's a good thing "Anonymous" writes all of these letters to OSEP.

Anonymous often asks good questions, thus eliciting helpful responses from the department. Take, for example, the letter to Anonymous reported at [55 IDELR 172](#) regarding the eligibility of students.

Anonymous posed a question that often comes up in IEP team meetings: Can a student who is gifted and talented be eligible for special education? Can a student with high cognitive ability be eligible under the IDEA?

OSEP informs Anonymous that there is nothing in the law or regulations that would automatically preclude a gifted student from being eligible for special education services. The key is simply whether the student meets the definition of a child with a disability.

It is important that your IEP team doesn't automatically rule out eligibility based on the student's high IQ or giftedness in other areas.

The student must have one of the impairments specified in the law and must, as a result of that impairment, need special education and related services. OSEP offers an example of a student with ADHD and high cognitive ability who has a need for "special education and related services to address the lack of organizational skills, homework completion and classroom behavior." Such a student might be classified as OHI.

Similarly, OSEP advised that a student with Asperger syndrome might be eligible because of "needs in the affective areas, social skills and classroom behavior, as appropriate."

Discuss school difficulty

For a recent case that demonstrates this principle, take a look at *Klein Independent School District v. Hovem*, [55 IDELR 92](#) (S.D. Tex. 2010).

This case dealt with a student who scored higher than 600 on the verbal and math portions of the SAT and yet was eligible for special education services because of an LD that affected written expression. Being strong in one area does not mean the student will not be eligible for IDEA services.

On the other hand, it's safe to say that the student must experience difficulty in school. That is, the student's impairment must adversely affect his educational performance to the point that the student *needs* special education services.

There is much controversy about this point, particularly with regard to students with LDs. But the definition of an LD in federal regulations specifically requires that the student does not achieve adequately as compared to the student's age or to grade-level standards. So, the student has to have some difficulty in school.

Moreover, the "need" that the student demonstrates must be a need for specially designed instruction.

Address individuals, not 'automatics'

In another recent case example, a federal court ruled that a student with an orthopedic impairment was not eligible for special education services because her disability, serious though it was, did not result in a need for any special type of instruction. She just needed some physical accommodations to get around school. Sounds like Section 504 to me. See *D.R. v. Antelope Valley Union High School District*, 55 IDELR 163 (C.D. Cal. 2010).

So when you put all that together, it should sound familiar. Eligibility of students is based on an evaluation that demonstrates that the student meets the standards in the law. This must be based on a full, individual evaluation.

The student must: 1) have an impairment that 2) adversely affects educational performance 3) to the point that the student needs specially designed instruction. There are no automatics. Every child must be considered individually, taking all factors into account.

Keep applying those standards in an individualized fashion, and you will make good decisions. Also, you won't have to send off any anonymous letters to federal agencies.

Special Ed Connection® *related stories and resource:*

- OSEP File: IDEA protects gifted students with qualifying disabilities (Oct. 12)
- Know when intellectually gifted students qualify for IDEA, Section 504 (Feb. 12)
- Fact sheet: Common Misconceptions about Differentiated Instruction
- Checklist: Examples of Accommodations for Students (July 21)

Click [here](#) to read more of Jim Walsh's columns.

Learn more about the audio CD Evaluation and Eligibility: Evolving Legal Trends and Best Practices for Compliance.

**Jim Walsh is a founding shareholder of Walsh, Anderson, Brown, Gallegos & Green PC in Austin, Texas. He has conducted training for hundreds of school districts and is a highly sought-after speaker in Texas and throughout the country.*

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January 13, 2010

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Key points:

- 2 percent to 5 percent of gifted students also have learning challenges
- Consider reports from parents, teachers about children's needs
- Conduct expedited evaluation if observations uncover problems

Don't assume gifted children will be ineligible for special ed

A young student tests as gifted, so his school district places him in a general education classroom. The parents file for due process, arguing the school system ignored past reports showing their child requires a small class size and individualized attention because of his severe ADHD and learning disabilities.

Such was the case in *District of Columbia Pub. Schs.*, 49 IDELR 82 (SEA DC 2007), where an impartial hearing officer ordered the District of Columbia to reimburse the parents of a gifted child with ADHD and LD for their child's private day school tuition because it failed to evaluate the student for special needs.

Just because a child rates as gifted does not guarantee he can function appropriately in a classroom for top-level students. Several studies have found 2 percent to 5 percent of gifted children also have learning challenges.

Gifted students sometimes test so well in intelligence assessments that their other special needs sink under the radar, said Patricia J. Whitten, an attorney at Franczek Sullivan PC in Chicago. Districts are especially likely to miss a child's learning difficulties if his parents and past teachers don't report anything.

"If a student does well enough on the gifted testing," Whitten said, "I don't think a school district would necessarily think to evaluate him for special education unless other information were provided by his parents or teachers."

Investigate a child's educational history

If parents or past teachers do share concerns about a gifted child's behavior, you should investigate a child's educational history and decide if an evaluation is needed, Whitten said.

In *District of Columbia*, ignoring parent and teacher reports translated to a denial of FAPE for the school system. The district based its placement decision solely on the student's gifted status, even though teachers from the boy's private kindergarten program said he needed small class sizes and individualized support to overcome his inattention and disruptive behavior.

These concerns should have triggered an evaluation for special education, said Jason Ballum, an attorney at Reed Smith LLP in Richmond, Va.

"Students with high IQs cannot be excluded automatically from the special education and eligibility process," Ballum said. "Any automatic exclusion would violate the IDEA."

To avoid denying a gifted child FAPE, consider the student's educational history to uncover whether he needs to be evaluated for special education.

"In order to make a correct eligibility decision," Ballum said, "school divisions should conduct their own evaluations and observations of the student, particularly if the student had not previously been enrolled or served by the school district."

Special Ed Connection® *related stories:*

- Not ready to evaluate? Document emerging behaviors (April 28)
- Board mulls ways to recognize focus on gifted students in special ed (April 21)

Contact Jason Ballum and Patricia J. Whitten . Also learn more about the guide What Do I Do When ... The Answer Book on Special Education Practice and Procedure .

Cara Nissman Kraft covers school psychology and early childhood education issues for LRP Publications.

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55 IDELR 172
110 LRP 52277

Letter to Anonymous

Office of Special Education Programs

N/A

January 13, 2010

Related Index Numbers

175.002 Attention Deficit Disorders

175.011 Gifted and Talented

215. GIFTED AND TALENTED

Case Summary

The mere fact that a student is "gifted" does not disqualify him from eligibility for special education and related services under the IDEA. OSEP explained to an interested individual that students with high cognition may also have disabilities, such as ADHD, Asperger syndrome, or a specific learning disability, that require IDEA services. OSEP observed that the IDEA does not address the topic of gifted students. However, "It remains the Department's position that students who have high cognition, have disabilities, and require special education and related services are protected under the IDEA and its implementing regulations," OSEP Acting Director Alexa Posny wrote. OSEP pointed out that a student with high cognition and ADHD could be considered to have an other health impairment, and could need special education and related services to address lack of organization skills and difficulty completing homework. Likewise, a gifted student with Asperger syndrome could be eligible under the autism classification and require services to address behavioral or social challenges.

Judge / Administrative Officer

Alexa Posny, Acting Director

Full Text

Dear []:

This is in response to your letters dated October 8, 2009 and October 10, 2009 to U.S. Department of Education (Department) Secretary Arne Duncan. Both letters were forwarded to the Office of Special Education and Rehabilitative Services (OSERS) for response. Your letters ask for clarification of the Individuals with Disabilities Education Act (IDEA) as it applies to children with disabilities requiring special education and related services who have high

cognition (what you term, "twice exceptional students," "students who are gifted" and "students who have high cognition and have disabilities") as well as how other laws apply to this population, including the Elementary and Secondary Education Act (ESEA), section 504 of the Rehabilitation Act of 1973 (Section 504), and the Americans with Disabilities Act (ADA).

As you are aware, the ESEA was amended in 2002. Laurel Nishi of my staff in the OSERS informed you during a phone call on November 12, 2009, the Department is currently conducting a "Listening and Learning" tour to seek public input about changes to the ESEA. By the end of the year, the Secretary or a senior staff member had led "Listening and Learning" events in all 50 states. During the phone call, you stated that you would take advantage of this public hearing opportunity to share the concerns you raise in your letters as they relate to the ESEA. It is also my understanding that the Department's Office for Civil Rights (OCR) sent an electronic mail (e-mail) response to you on December 8, 2008, regarding concerns you raised with that office about protections and services under Section 504 and the ADA for students who have disabilities and high cognition. Therefore, this letter will not address either of those concerns. This letter addresses your concerns as they relate to the IDEA.

In your letter dated October 8, 2009, you specifically referenced students with high cognition and disabilities such as Attention Deficit Hyperactivity Disorder (ADHD), Asperger's Syndrome, and specific learning disabilities related to reading, writing, and mathematics who struggle to timely complete grade-level work and have difficulties with organizational skills, homework completion, affective areas, social skills, classroom behavior, reading and math fluency, writing and math operations.

The IDEA is silent regarding "twice exceptional" or "gifted" students. It remains the Department's position that students who have high cognition, have disabilities and require special education and related services are protected under the IDEA and its implementing regulations. Under 34 C.F.R. §300.8, a child must meet a two-prong test to be considered an eligible child with a disability: (1) have one of the specified impairments (disabilities); and (2) because of the impairment, need special education and related services. For example, a child with high cognition and ADHD could be considered to have an 'other health impairment,' and could need special education and related services to address the lack of organizational skills, homework completion and classroom behavior, if appropriate. Likewise, a child with Asperger's Syndrome could be considered under the disability category of autism and the individualized evaluation would address the special education and related services needs in the affective areas, social skills and classroom behavior, as appropriate.

With regard to students with specific learning disabilities (SLD), the Analysis of Comments and Changes in the regulations implementing Part B of the IDEA (71 Fed. Reg. 46540, at 46647 and 46652, August 14, 2006) contemplates that there will be some students with high cognition who need special education and related services:

Discrepancy models are not essential for identifying children with SLD who are gifted. However, the regulations clearly allow discrepancies in achievement domains, typical of

children with SLD who are gifted, to be used to identify children with SLD ...;

No assessment, in isolation, is sufficient to indicate that a child has an SLD. Including reading fluency in the list of areas to be considered when determining whether a child has an SLD makes it more likely that a child who is gifted and has an SLD would be identified.

Moreover, it has been the Department's long-standing position that, in general, it would be appropriate for the evaluation team to consider information about outside or extra learning support provided to the child to determine whether the child's current academic achievement reflects the service augmentation, and not what the child's achievement would be without such help.

Based on this analysis, we believe that the IDEA and its regulations do provide protections for students with high cognition and disabilities who require special education and related services to address their individual needs.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

I hope this information is helpful. If you have further questions, please do not hesitate to contact Dr. Deborah Morrow, of my staff, at 202-245-7456.

Regulations Cited

34 CFR 300.8

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