

Memo

To: SCPD, GACEC and DDC

From: Disabilities Law Program

Date: 7/15/2024

Re: July 2024 Policy and Law Memo

Please find below, per your request, an analysis of pertinent proposed regulations identified by councils as being of interest.

I. PROPOSED STATE REGULATIONS

➤ **DDOE REGULATION ON 922 CHILDREN WITH DISABILITIES SUBPART A, PURPOSES AND DEFINITIONS, 28 DEL. REGISTER OF REGULATIONS 11 (JULY 1, 2024)**

The Delaware Department of Education (“DDOE”) proposes to amend 14 Del. Admin. C. § 922, which include the purposes and definitions for Delaware’s special education regulations (Delaware’s equivalent to the federal Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400, *et seq.*). DDOE is proposing to amend this regulation to add definitions which are intended to help clarify changes made to 14 Del. Admin. C. §§ 923 and 925. DDOE is also proposing to amend §§ 923 and 925 and a review of both is included in this memo. DDOE previously published proposed amendments to these regulations in the January 1, 2024 Register of Regulations. These are updated from those proposed. Therefore, this review will also include where Councils previously provided feedback and whether DDOE’s new proposed regulations seem to incorporate that feedback. DLP analysis and recommendations included in the January Policy and Law Memo are reprinted here where still appropriate (and identified in blue; “begin blue” and “end blue” are also be noted to ensure all can differentiate the text).

As before, because DDOE is also making additional changes to comply with the *Delaware Administrative Code Drafting and Style Manual*, this review will be focused only on those changes which are substantive.

First, DDOE seeks to add the term **“Homebound or hospital placement”** which it has defined as:

a special education setting where instruction is provided to a child with a disability in the home, hospital, or other non-school location as determined by the IEP Team. This placement could be the result of medical, disciplinary, or mental health needs.

This is only slightly different from its proposed definition published in the January 1, 2024 Register which included an additional sentence at the end stating “Note that this definition is distinct from supportive instruction provided to general education students as defined in 14 DE Admin. Code 930.” By removing the last sentence, DDOE has, hopefully, begun to differentiate

between supportive instruction and hospital instruction. However, most of the analysis from January remains the same.

[Begin blue] The addition of this definition is largely unnecessary and, more importantly, problematic. IDEA was enacted to combat the perception (and reality) that youth with disabilities were either completely excluded from schools or were languishing inside regular classrooms. IDEA mandates that students with disabilities be educated in the least restrictive environment. Students with disabilities must be educated with students who are not disabled, to the maximum extent appropriate; removal from this inclusive setting should only occur where the “nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 34 C.F.R. § 300.114(a)(2).

First, IDEA does not include “homebound” instruction as an LRE placement. Instead, IDEA uses the term “home instruction.” See 34 C.F.R. § 300.115(b)(1). Second, by explicitly including behavior as a possible reason for this placement, DDOE is condoning a practice that it should be prohibiting. This is one of, if not, the most restrictive placement options available and it should be reserved for those students whose physical or mental health prevents them from otherwise being in a classroom setting or environment. This setting should not be available for districts to use as a method to exclude students with behavioral challenges – a method districts already overuse for this specific purpose.

Therefore, **Councils may wish to recommend that DDOE remove this proposed addition (both term and definition).** Please see the analysis on the proposed 923 regulations (below) for additional information and recommendations on this issue. [end blue]

In January, DDOE proposed to amend the definition of Individualized Education Program to add the language “in a meeting” to explicitly state that this document is the result of a meeting. **This proposed amendment was not included in the July Register.**

In January, DDOE proposed to add the term “Individualized Family Service Plan.” **This proposed amendment was not included in the July Register.**

In January, DDOE proposed to add a definition for print disability which it defined as “a child who is identified with a disability and receiving special education services who requires instructional materials in accessible format. This is not a unique disability classification as referred to under 14 DE Admin. Code 925, subsections 6.6 through 6.17.” This same proposed added definition is included in the July Register. Therefore, [begin blue] **Councils again may wish to inquire as to why DDOE felt it necessary to include this definition. Councils may also wish to recommend that the defined word instead be “child with a print disability” defined using the criteria for the Accessible Instructional Material program, located at <https://www.aimdelaware.org/wp-content/uploads/2023/01/AIM-Student-Eligibility-Verification-Form-1-20-23.pdf> (Student who: 1) is blind; 2) has a visual impairment or perceptual or reading disability that cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or 3) is otherwise unable, through physical disability, to hold or**

manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading).

Recommendations: Councils may wish to recommend that DDOE

- 1) Remove the proposed term and definition “Homebound or hospital placement”.
- 2) With respect to the definition of “print disability”, Councils may wish to inquire as to why DDOE felt it necessary to include this definition. Councils may also wish to recommend that the defined word instead be “child with a print disability” defined using the criteria for the Accessible Instructional Material program, located at <https://www.aimdelaware.org/wp-content/uploads/2023/01/AIM-Student-Eligibility-Verification-Form-1-20-23.pdf> (Student who: 1) is blind; 2) has a visual impairment or perceptual or reading disability that cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or 3) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading). [end blue]

- **DDOE REGULATION ON 923 CHILDREN WITH DISABILITIES SUBPART A, GENERAL DUTIES AND ELIGIBILITY OF AGENCIES, 28 DEL. REGISTER OF REGULATIONS 12 (JULY 1, 2024)**

The Delaware Department of Education (“DDOE”) proposes to amend sections of 14 Del. Admin Code § 923, general duties and eligibility.

Of note, we first turn to **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:

16.1 In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency shall ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the LRE provisions of this regulation, including Sections 14.0 through 18.0.

16.2 The child's placement shall be determined at least annually; shall be based on the child's IEP; and shall be as close as possible to the child's home.

16.3 Unless the IEP of a child with a disability requires some other arrangement, the child shall be educated in the school that he or she would attend if nondisabled.

16.4 In selecting the LRE, consideration shall be given to any potential harmful effect on the child or on the quality of services that he or she needs.

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.

DLP's analysis and recommendations from January remain largely unchanged. [begin blue]
These proposed changes enable schools to remove students with disabilities from their classroom setting, and to instead educate them at home. As DDOE is aware, federal law protects the rights of students with disabilities to be educated in their least restrictive environment (34 C.F.R. §114-19). Any change in least restrictive environment must be a determination made by the student's team. (34 C.F.R. §116). 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 possess uses illegal substances, or 3) has inflicted serious bodily injury (34 C.F.R. §530)). Even when those circumstances occur, the school may only remove the student for up to 45 days and must provide the student with services in alternative educational placement. (34 C.F.R. §530(g)). [end blue]. To the extent DDOE's proposed regulations conflict with the IDEA and its implementing regulations, preemption would apply and DDOE's regulations would be invalid and unenforceable, and thus are ill-advised.

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

Additionally, the proposed regulations do not appear to give a clear timeline as to when (or if) a student must receive services outside of their regular placement after a removal. The proposed regulations only appear to require instruction to be provided if the IEP team determines that a student needs supportive services. [end blue] Further, the regulation indicates those services would need to be in place within 10 days after the IEP team meeting, which would deprive a student of their free appropriate public education (FAPE) and the parent's right to due process, by forcing the services before the parent is given their 10 school days of prior written notice before a change of placement. [begin blue]. There is no clear timeline when (or if) an IEP team meeting needs to take place after the student's removal. There is no clear guidance about the services owed to a student (if any) if the team feels the student doesn't meet the requirements for supportive services. There is no timeline for when the school must consider the student's return to their original placement.

In contrast, under federal regulations, even under the special circumstances that permit a school to remove a student without an IEP meeting or manifestation determination, the school is required to provide services in alternative interim placement during the length of the removal from the student's prior learning environment. The removal itself can only last up to 45 days. There also is no proposed ending to this unilateral removal from the student's placement under the proposed regulations.

These regulations 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 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 state regulations, a student behavior could result in an immediate removal from school with no services for an indeterminable amount of time, whereas under the IDEA, that same student behavior would require the school to hold a manifestation determination meeting before any removal could take place, or under the most extreme circumstances, remove a student only up to 45 days and require the school to provide the student with services throughout that time. It gives schools a free pass to remove students with behavioral needs without having to provide them the services and protections required by the IDEA.

Recommendation: in sum, Councils *strongly* oppose: these proposed regulations would allow schools to **violate IDEA law and regulations and the rights of students with disabilities. The proposed regulations would provide schools with incentives to reframe suspensions as a behavioral removal and avoid their obligation under federal statute and regulation to educate students with disabilities in their least restrictive environment, and to provide them a free appropriate public education. **We understand the challenges schools are facing with increased behavioral needs post COVID, but Councils strongly oppose any infringement upon the rights of students with disabilities. Instead, we encourage DDOE to put time and energy instead to explore ways to provide additional supports to Students in their current schools.** [end blue].**

➤ **DDOE Regulation on 925 Children with Disabilities Subpart D, Evaluations, Eligibility Determination, Individualized Education Programs, 28 Del. Register of Regulations 14 (July 1, 2024)**

The Delaware Department of Education (“DDOE”) proposes to amend 14 Del. Admin. C. § 925, which describe the requirements for conducting evaluations, determining eligibility, and developing Individualized Education Programs (“IEP”) for students with disabilities under Delaware’s special education regulations (Delaware’s equivalent to the federal Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400, *et seq.*). DDOE is proposing to amend this regulation to “ensure alignment with current practice” and have proposed revisions to several sections which are reviewed below. DDOE is also proposing to amend §§ 922 and 923, which are included in this memo above. Because DDOE is also making additional changes to comply with the *Delaware Administrative Code Drafting and Style Manual*, this review will be focused only on those changes which are substantive.

Throughout the regulation, DDOE proposes to change references to a student’s 21st birthday to the student’s 22nd birthday. This is consistent with Delaware House Bill 454 of the 151st General

Assembly¹, which changed the special education eligibility cutoff age from the end of the school year in which a student turns 21 to the end of the school year in which a student turns 22. Therefore, **Councils may wish to support this change.**

Additional Requirements for Evaluations and Re-Evaluations (Section 5.0)

In January, DDOE proposed to amend § 925.5.5 to add to this section a requirement that public agencies conduct an evaluation before changing the educational classification of a student otherwise eligible under IDEA. This proposed change appears in the July Register. Previously DLP noted that teams already must follow evaluation criteria when determining a classification.

In January, DDOE proposed to amend § 925.5.5.2 to add a sentence stating that local education agencies (“LEA”) may use the “summary of performance form provided by [DDOE]” when a student is being exited from services due to aging out. This proposed change does not appear in the July Register.

Determination of Eligibility (Section 6.0)

DDOE proposes to amend Section 6.3.2 to require that all eligibility determinations include a certified school psychologist as a member of the IEP Team. This proposed change could help ensure that the individuals attending the meeting are able to adequately interpret the information provided to the parents. **Councils may wish to generally provide support but also recommend that language be added to add a preference that the school psychologist who conducted the testing for the particular student is the one who attends the eligibility meeting.** Having the school psychologist who actually did the evaluations attend the meeting will help both school staff and parents get the full picture because they will be able to answer the more student-specific questions that may be posed.

In January, DDOE proposed to amend the age of eligibility section for each educational classification to clarify that a child is eligible for services under IDEA until receipt of a high school diploma or until August 31 of the school year in which the student turns 22. This proposed change is consistent with the current definition of “child” at 14 Del. Admin. C. § 922.3.0. However, DDOE proposed further revisions to this section in the July Register that could affect when students lose their eligibility for IDEA services. The following is the proposed change to Section 6.5.5.1, with strike-throughs showing deletions and underlines showing additions:

The child reaches their ~~21st~~22nd birthdate. A child with a disability who reaches their ~~21st~~22nd birthdate after August 31 the first pupil day as denoted in the LEA calendar where the child is enrolled may continue to receive special education and related services until the end of the school year, including appropriate summer services through August 31[.]

What this change does is make the Student’s eligibility depend on the calendar of the LEA in which the student is enrolled and introduces confusion over when a student will lose their

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

eligibility. This is especially true for students with unstable home lives or are considered under McKinney-Vento. This proposed change is also included throughout the eligibility criteria in Section 6 for each eligibility classification by adding a reference to 6.5.5.1 when defining the age of eligibility. **Therefore, Councils may wish to recommend that DDOE instead regulate to ensure consistency across the state by identifying the school year as running from September 1 through August 31. Councils may also wish to inquire as to why DDOE felt this change was necessary.**

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

DDOE proposes to amend Section 6.10 (related to the educational classification of hearing impairment) by removing subsection 6.10.1.2 in its entirety. Section 6.10.1.2 described the examples of adverse effects on educational performance for this particular educational classification. This may lead to IEP teams considering adverse impacts beyond those listed despite the existing language already clarifying that the list includes only examples and will bring this section of the regulation in line with the other sections describing the eligibility criteria for the different educational classifications. **Councils may wish to support the proposed change but inquire as to whether DDOE will provide guidance to LEAs on what may constitute an adverse impact.**

DDOE’s proposed change to 6.11.1.3 shows both “team” and “Team” as struck through. This may be a small error in which DDOE meant to underline “Team” rather than strike through. **Councils may wish to bring this to DDOE’s attention for editing.**

DDOE proposes to amend 6.17.7 (related to the required IEP team members for eligibility determinations for the educational classification of visual impairment) by removing the requirement that an orientation and mobility specialist be a member of the student’s IEP team for purposes of eligibility determination. A certified orientation and mobility specialist (“COMS”) “is a highly trained expert who specializes in working with individuals who are blind, low vision or who have functional visual limitations, and empowers them to achieve their life goals for education, employment, avocation and independence [and] address[es] nonvisual, visual, physical, cognitive, and psycho-social aspects related to mobility training for individuals of all

ages, as well as diverse needs and abilities.”² It does not appear as though a COMS would be necessary to determine whether a student meets the educational classification of Visual Impairment, but may prove to be a desired team member for IEP planning purposes. **Councils may wish to generally provide support for this change. However, Councils may wish to recommend that DDOE include clarification in the final regulation, or otherwise, that COMS involvement in IEPs generally are not modified by this change.**

In response to the January proposed regulations, Councils recommended that DDOE update the references to “proposed regulation 14 DE Admin. Code 508 Multi-Tiered System of Support (MTSS) (23 DE Reg. 613 (02/01/20))” in 925.6.3.1 to the adopted MTSS regulations at 14 Del. Admin. C. § 508. *DDOE made this change.*

Individualized Education Program (Section 7.0)

In January, DDOE proposed to add an overly restrictive explanatory parenthetical to current 7.1.1 to add clarification to the requirement that IEPs include a statement of the child’s present levels of academic achievement and functional performance. *Councils recommended that DDOE remove this parenthetical as overly restrictive, unnecessary, and problematic. The proposed language was removed.*

In January, DDOE proposed to add new 7.3.1, which would make clear that the IEP Team must complete the educational representative form prior to a student’s 18th birthday in order for the student to be able to appoint an educational representative or educational surrogate parent. *Councils recommended that DDOE remove this language or otherwise revise the language to put the affirmative obligation on the public agency. The proposed language was removed.*

DDOE proposes to amend Section 7.1 to remove the note that the term IEP refers to the “written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with Sections 7.0 through 11.0.” Removing the descriptor does not substantively impact the regulations.

IEP Team (Section 8.0)

In January, DDOE proposed to add new subsection 8.5.2 which would prohibit excusal of required IEP team members for purposes of eligibility determinations. This has remained the same; however, DDOE is now proposing to except from this requirement the CTE and / or Pathway teacher. **Councils may wish to again support the prohibition on excusals of required IEP team members for purposes of eligibility determinations because it would help to ensure that those individuals with the most pertinent knowledge will be in attendance for meetings at which a student’s eligibility will be determined.** Councils may also wish to inquire as to why DDOE excepted the CTE and / or Pathway teacher from this excusal prohibition.

When IEPs Shall Be In Effect (Section 10.0)

² <https://www.acvrep.org/certifications/coms>

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

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

The second proposed change to this section is to current 10.4.1.1 (which is proposed to be renumbered to 10.4.1.2). Specifically, DDOE seeks to make the following changes (noted in underline and strikethroughs): “Review and adopt the child’s IEP from the previous public agency at an IEP meeting convened for that purpose, or develop, and adopt, and implement a new IEP that meets the applicable requirements in Sections 7.0 through 11.0.” The second change, replacing the comma after the word “develop” with the word “and” makes the sentence grammatically confusing. Therefore, **Councils may wish to recommend that DDOE not replace the comma after the word “develop” with the word “and.”**

Development, Review, and Revision of IEP (Section 11.0)

DDOE is proposing a single change to this section related to the special factors that IEP Teams must consider in developing a student’s IEP. Specifically, it is proposing to change the language in 11.2.6, which concerns students who may need course materials in alternative formats. The current language is “In the case of a child who is blind, visually impaired, or has a physical or print disability, consider whether the child needs accessible instructional materials.” DDOE is proposing to replace this language with the following:

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

DDOE’s proposed change does not necessarily substantively change what the IEP Team is supposed to consider. The underlying requirement is still for the IEP Team to consider whether a student needs instructional materials in alternate formats due to the child’s disability. The

proposed language provides IEP Teams with more information about what “instructional materials” are. **Councils may wish to generally support this proposed change with a request that DDOE make clear that it is not just “grade-level textbooks and other core materials” that districts must consider and adapt – instead, it should be anything that the student would need to enable access to the general education curriculum.**

Educational Placement in the Least Restrictive Environment (Section 13.0)

In January, DDOE proposed several changes to Section 13.0 concerning education in a student’s LRE, including adding a separate section for students aged 3-5. The proposed language regarding LRE for students aged 3-5 was removed. However, DDOE removed or moved most of what was in this Section.

DDOE proposes to remove the entirety of Sections 13.1.1 through 13.1.8, which describes the different placement options – settings A (greater than 80% of the day inside classroom with nondisabled peers), B (between 40 and 79% of the day inside classroom with nondisabled peers), C (less than 40% of the day inside regular classroom with nondisabled peers), D (separate school), E (residential facility), F (homebound and hospital), G (correctional facilities), and H (parentally placed private school). These are being replaced with the same proposed section 13.1.1 from January: [begin blue] “Except as provided in 14 DE Admin Code 925, subsection 11.12 (regarding children with disabilities in adult prisons), each public agency shall meet the least restrictive environment requirements of 14 DE Admin. Code 923, Sections 14.0 through 20.0.” The language in 13.1.1 is consistent with language found in IDEA at 34 C.F.R. § 300.114(a)(1). However, **Councils may again wish to recommend that DDOE replace the reference to subsection 11.12, which concerns students in adult prisons participating in general assessments and transition services, with subsection 11.13, which concerns a public agency’s ability to modify the IEP of an incarcerated student (including LRE) where there is a bona fide security or compelling penological interest which cannot otherwise be accommodated.**³ [end blue] **Councils may also wish to inquire as to why DDOE is proposing to remove the language identifying the different placement options available and whether and how this is going to impact placement options currently available on student IEPs.**

[begin blue] DDOE is proposing to move current 13.3, concerning students with disabilities who the LEA considers to be a danger to themselves or whose disruptive behavior interferes with their learning or the learning of others, to Chapter 923. **Please see DLP’s legal analysis of this proposed change to Section 923, included above.** [end blue].

Recommendations:

1. **Councils may wish to thank DDOE for making some of their recommended changes following the January 2024 proposed regulations comment period.**
2. **Councils may wish to support as is:**
 - a. **the change of substituting 22 for 21 throughout the regulation, with respect to students’ age out.**

³ This proposed language also appears in proposed 923.14.1. Therefore Councils may also wish to recommend that reference be changed from 11.13 to 11.12 as well.

- b. The addition of COMS in 6.17.7.
 - c. Section 8.0 – IEP Team. Councils may also wish to inquire as to why DDOE excepted the CTE and / or Pathway teacher from this excusal prohibition.
3. Councils may wish to recommend changes as follows:
- a. Section 6.0
 - i. **6.3.3 - Councils may wish to generally provide support but also recommend that language be added to add a preference that the school psychologist who conducted the testing for the particular student is the one who attends the eligibility meeting.**
 - ii. Regarding 6.5.5.1, Councils may wish to recommend that DDOE instead regulate to ensure consistency across the state by identifying the school year as running from September 1 through August 31. Councils may also wish to inquire as to why DDOE felt this change was necessary.
 - iii. [begin blue] Councils may wish to provide support for the proposed changes to autism but recommend that DDOE further amend this regulation for grammatical clarity by moving “the child” from the end of 6.6.1 and adding those words to the beginning of both 6.6.1.1 and 6.6.1.2. [end blue]
 - iv. 6.11.1.3 shows both “team” and “Team” as struck through. This may be a small error in which DDOE meant to underline “Team” rather than strike through. Councils may wish to bring this to DDOE’s attention for editing.
 - b. Section 10.0
 - i. [begin blue] Councils may wish to recommend that DDOE remove the proposed additional requirement that, where a student transfers from one Delaware public agency to another, the receiving agency must adopt the child’s Evaluation Summary Report from the previous public agency or conduct a new evaluation as unnecessary and burdensome, as receiving public agencies already must either adopt the student’s previous IEP or develop and implement a new one.
 - ii. Councils may wish to recommend that DDOE not replace the comma after the word “develop” with the word “and.”
 - c. Development, Review, and Revision of IEP (Section 11.0) - Councils may wish to generally support this proposed change with a request that DDOE make clear that it is not just “grade-level textbooks and other core materials” that districts must consider and adapt – instead, it should be anything that the student would need to enable access to the general education curriculum.
 - d. Educational Placement in the Least Restrictive Environment (Section 13.0),
 - i. Councils may wish to recommend that DDOE replace the reference to subsection 11.12, which concerns students in adult prisons participating in general assessments and transition services, with subsection 11.13, which concerns a public agency’s ability to modify the IEP of an incarcerated student (including LRE) where there is a

bona fide security or compelling penological interest which cannot otherwise be accommodated. [end blue]

- ii. **Councils may wish to recommend that DDOE remove this separate LRE section for this population and inquire as to why it felt it necessary to impose different requirements with respect to this particular population of students even though they are covered under the same requirements and obligations under Part B of the IDEA as eligible students aged 5-22, inclusive.**
- iii. [begin blue] DDOE is proposing to move current 13.3, concerning students with disabilities who the LEA considers to be a danger to themselves or whose disruptive behavior interferes with their learning or the learning of others, to Chapter 923. Please see DLP's legal analysis of this proposed change to Section 923, included above. [end blue]

4. Councils may wish to inquire as to:

- a. **Whether DDOE will provide guidance to LEAs on what may constitute an adverse impact (section 6.10).**
- b. **Whether DDOE will consider providing guidance in the final regulation that, that COMS involvement in IEPs generally are not modified by this change (section 6.17.7).**
- c. **why DDOE is proposing to remove the language identifying the different placement options available, in sections 13.1.1-13.1.8, and whether and how this is going to impact placement options currently available on student IEPs.**

II. Final Regulations

None reviewed.

III. PROPOSED BILLS

Session has concluded.