



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
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October 29, 2014

Ms. Mary Ann Mieczkowski, Director
Exceptional Children Resources
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

RE: Mechanical Restraint & Seclusion Waiver Application & Review Guidance
(1014)

Dear Ms. Mieczkowski:

The State Council for Persons with Disabilities (SCPD) has reviewed the following documents which have been published on the Department of Education's (DOE's) website: 1) "Request for Individual Student Waiver for Mechanical Restraint(s) or Seclusion"; and 2) "Considerations for Recommendations Related to Waiver Requests for Restraint and Seclusion". SCPD has the following observations on the documents.

Waiver Request Form

A. The form categorically assumes that all students for whom a waiver is requested will be IDEA-identified. There may be students who are not IDEA-identified who manifest extreme behaviors which could prompt a waiver request. Therefore, the form could be modified to ask if the student is IDEA-identified or §504-identified. The latter information may also assist with reporting data to OCR.

B. The "Student Health" section includes the following inquiry: "Does the student have any medical conditions that impact and/or contribute to their performance of problem behavior?" This is somewhat difficult to interpret. We assume the inquiry is intended to elicit information about conditions such as ADHD or TBI which could contribute to problematic behavior. The DOE could consider adding a clarifying example. Parenthetically, we also recommend substituting "the student's" for "their" to obviate use of a plural pronoun ("their") with a singular antecedent ("student").

C. The "Student Health" section should be embellished to include medical "contraindications" for use of mechanical restraint or seclusion. For example, if a

clearance should be required prior to authorizing use of a mechanical restraint. Similarly, if a child has been abused in the past by being locked in a closet, a psychiatrist may oppose use of seclusion for clinical reasons. Compare 14 Del.C. §4112F(b)(2)d (use of physical restraint may not exacerbate medical or physical condition of student).

D. The DOE regulation [14 DE Admin Code 610, §8.3.4] authorizes the DOE to approve a waiver for a period not to exceed one calendar year. An applicant may wish to only seek a waiver for a short period (e.g. 2-3 months) as a pilot or assessment to determine the efficacy of the intervention. The form could be amended by including a field for requested time period for the waiver.

E. In the “Problem Behavior” section, it may be clearer to substitute “”for which the waiver is being requested” for “for which the action is being requested”.

F. In “Description of Behavior Plan”, Par. 6 recites as follows: “Is there an intervention that describes how others will respond after the problem behavior so that it no longer provides reinforcement/functional outcome?” The reference to “functional” is counterintuitive. The intervention should be designed to no longer provide a disfavored, “dysfunctional” outcome, not a “functional” outcome.

G. In the “Data” section, the following reference makes no sense: “1. Was implementation fidelity collected?” Perhaps DOE intended to say “(w)as data/information related to implementation fidelity collected?”

H. SCPD recommends changing the “Restraint/Seclusion” section heading to “Mechanical Restraint/Seclusion”. In the same section, requesting data from “the most recent school year” may be uninformative if the waiver request is filed near the beginning of the school year. Consider requiring data for the current school year or past 9 months, whichever is longer.

I. The “Restraint/Seclusion” section is odd because it requests information on frequency of usage of mechanical restraint or seclusion when such interventions are banned in the absence of the waiver. The DOE may wish to consider two amendments. First, data on the use of physical restraint and time-out should be specifically solicited. The frequency and duration of use of physical restraint and time-out could be very helpful data informing the DOE’s review. If time-out is effective, or has not been attempted, there may be little need to approve seclusion. Second, if data on mechanical restraint/seclusion is requested, the heading should reflect that the inquiry applies to requests for waiver renewal. Otherwise, schools may be misled into believing they must have baseline data on mechanical restraint and seclusion as a precondition of requesting a waiver.

J. In the “documentation” section, SCPD recommends adding “§504 plan”.

Guidance: Waiver Review Considerations

- A. In the title, SCPD recommends inserting “Mechanical” prior to “Restraint”.
- B. The guidance should be amended to include consideration of any matters added to the form based on the above recommendations (e.g. medical contraindications; physical restraint and time-out data).
- C. “Consideration 2” envisions assessing data on use of mechanical restraint/seclusion prior to approval of the waiver. In general, there should be no such data since these interventions are banned in the absence of the waiver. The DOE could amend this section to clarify that it only applies to requests for waiver renewal.
- D. It would be preferable to address the time period for the approved waiver. The DOE should not simply grant a 1-year waiver in all cases.
- E. In “Consideration 5”, SCPD recommends deleting “naive person (to the plan)” and substituting “person unfamiliar with the plan”. This is the language used in the “Request” form, Description of Behavior Plan, Par. 6.
- F. The guidance document fails to prompt consideration of “specific conditions and safeguards...and reasons therefore” consistent with §8.3.2 of the regulations and 14 Del.C. §4112F(c)(4). For example, the DOE review committee could restrict seclusion to a certain duration or type of room. Without a “prompt”, the committee could overlook this part of the assessment.
- G. Section 8.3.4 of the regulations allows the DOE to make its waiver approval contingent upon the applicant’s collection of specific data. The guidance should include a “prompt” so the DOE review committee considers the types and frequency of data it will require.
- H. The guidance document would benefit from mentioning the overall statutory and regulatory standard for granting a waiver, i.e., “compelling justification”. The burden is on the applicant to produce very convincing documentation of need. The review is not intended to be “pro forma” or result in “routine” approval based on borderline justification.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations or recommendations on the proposed regulation.

Sincerely,



Daniese McMullin-Powell, Chairperson
State Council for Persons with Disabilities

cc: The Honorable Mark Murphy, Secretary of Education
Ms. Tina Shockley, Department of Education
Mr. Chris Kenton, Professional Standards Board
Dr. Teri Quinn Gray, State Board of Education
Ms. Paula Fontello, Esq., Department of Justice
Ms. Terry Hickey, Esq., Department of Justice
Ms. Ilona Kirshon, Esq., Department of Justice
Mr. Brian Hartman, Esq.
Developmental Disabilities Council
Governor's Advisory Council for Exceptional Citizens

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