



**STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES**

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The Honorable John Carney
Governor

John A. McNeal
Director

February 24, 2020

Ms. Emily Cunningham
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

RE: 23 DE Reg. 618 [DOE Proposed Regulation on Children with Disabilities
Subpart D, Evaluations, Eligibility Determination, Individualized
Education Programs (February 18, 2020)]

Dear Ms. Cunningham:

The State Council for Persons with Disabilities (SCPD) has reviewed the Delaware Department of Education's (DDOE's) proposal to amend 14 DE Admin. Code § 925, which describes the requirements governing evaluations, eligibility determinations, and individualized education programs. 14 Del. Admin. C. § 925 is Delaware's equivalent to the federal regulations implementing the Individuals with Disabilities Education Act (IDEA), found at 34 C.F.R. § 300.300, et seq. The DDOE is proposing to amend this regulation to revise eligibility determination criteria for Autism, Developmental Delay, Deaf-Blind, Emotional Disability, Hearing Impairment, Specific Learning Disability, Intellectual Disability, Orthopedic Impairment, Other Health Impairment, Speech/Language Impairment, Traumatic Brain injury, and Visual Impairment Including Blindness. The proposed regulation was published as 23 DE Reg. 618 in the February 1, 2020 issue of the Register of Regulations. SCPD has the following observations.

In addition to the proposed changes to the eligibility criteria, the DDOE proposes minor changes to the sections governing the general re-evaluation and evaluation procedures. Under re-evaluations, the DDOE proposes to include language requiring a public agency to initiate a re-evaluation when data sources show that the child has improved such that the child may no longer require special education and related services. Proposed 14 Del. Admin. C. § 925.3. Under the evaluation procedures, the DDOE proposes to include a general requirement that all evaluations shall¹ include an observation in the child's learning environment. Proposed 14 Del. Admin. C. § 925.4.2.1. Lastly, the DDOE

¹ As a note: when used, "shall" is equivalent to "must."

proposes to amend the language in 14 Del. Admin. C. § 925.6.1 to reflect that the child's IEP Team, and not just "a group of qualified professionals and the parent of the child," shall determine eligibility. Since the DDOE is inserting language to reflect that the IEP Team shall determine eligibility, it should remove the language "a group of qualified professionals and the parent of the child" and replace with "as defined in 14. Del. Admin. C. § 8.0." The first sentence would then read:

"General: upon completion of the administration of assessments and other evaluation measures, the child's IEP Team, as defined in 14. Del. Admin. C. § 8.0, shall determine whether the child is a child with a disability..."

The major proposed changes concern the eligibility criteria for special education services. Throughout the proposed regulation, the DDOE makes general changes to the regulation as a whole which include structural changes for more consistency across categories. In making these structural changes, the DDOE includes, under each category, the following: age of eligibility, additional criteria for eligibility, disability-specific evaluation procedures, re-evaluation procedures, documenter, and additional IEP members. The current eligibility criteria for all categories, excluding Visual Impairment Including Blindness, have not been altered in any meaningful way since its codification in August 2007. 11 Del. Reg 184 (August 1, 2007). Since then, amendments have been strictly related to grammatical changes and updates to language.

This proposed amendment represents the first major proposed overhaul to the eligibility criteria for special education and related services. SCPD has the following observations regarding each disability.

Eligibility Criteria for Autism (14 Del. Admin. C. § 925.6.6)

The DDOE is proposing to overhaul the eligibility criteria for autism to align with the definition of autism as found in the fifth edition of the American Psychiatric Association's Diagnostic and Statistical Manual (DSM V). The proposed language in 14 Del. Admin C. § 925.6.6.1.1-2.4 tracks nearly identically with the language found for autism spectrum disorder (ASD) 2.99 in the DSM-V.

The current DDOE language includes a requirement that the impairment cannot otherwise be attributable to an emotional disability. 14 Del. Admin C. 925.6.6.1.3.4. The new proposed regulation seeks to include intellectual disability, developmental delay, or other factors found under the special eligibility determination along with emotional disability. Proposed 14 Del. Admin. C. 925.6.6.3. The special rule for eligibility determination is unchanged in the proposed amendment, and continues to include lack of appropriate instruction in reading and math, limited English proficiency, and otherwise not meeting the eligibility criteria. 14 Del. Admin C. § 6.2.

The DDOE also proposes to modify the language that the evaluation be conducted by "individuals who have specific training in the assessment of students with ASD in general, and in the use of assessment procedures." 14 Del. Admin. C. § 925.6.6.2.2.

Instead, the proposed 14 Del. Admin. C. § 925.6.6.6. requires that the documentation of autism be provided by individuals with specific training in the assessment of students with the educational classification of autism and the assessment procedures, such as a licensed psychologist, certified school psychologist, or speech-language pathologist. The DDOE also proposes to amend the regulations to require that the school psychologist and certified speech-language pathologist be part of the IEP team for the purposes of eligibility determination.

The remainder of the proposed regulation concerning the eligibility criteria for autism is reworded to align with the new structure but remains otherwise consistent with the current language.

Eligibility Criteria for Developmental Delay (14 Del. Admin. C. § 925.6.7)

The proposed changes remove the eligibility requirement that the professional judgment of the IEP Team be based on multiple sources and can justify the presence of a “significant difference between the child’s chronological age and his or her current level of functioning.” 14 Del. Admin. C. § 925. 6.7.1.3. This requirement would be replaced by a justification by the IEP Team that the child is experiencing “atypical development” which is evidenced by a “significant atypical quality or pattern of development or behavior.” Proposed 14 Del. Admin. C. § 925. 6.7.1.2. SCPD recommends that DDOE include a definition for “atypical development” as the nebulousness of “atypical” is inherently subjective.

The proposed changes also include more detailed information concerning the where and what of behavioral observations, but removed the requirement that the assessment of a child suspected of a developmental delay shall be “culturally and linguistically sensitive.” SCPD suggests that DDOE not remove the requirement that assessments be culturally and linguistically sensitive.

Lastly, the DDOE proposes to include a requirement that the “Documenter” be a qualified professional such as a licensed psychologist or certified school psychologist and that the school psychologist must be a member of the IEP team for the purposes of eligibility determination.

Eligibility Criteria for Deaf-Blind (14 Del. Admin. C. § 925.6.8)

The DDOE proposes to amend the eligibility criteria for deaf blindness to align more closely with the federal IDEA definition. The proposed change tracks the IDEA definition nearly identically:

“A child with an educational classification of Deaf-Blind is a child who has concomitant hearing and visual impairments, the combination of which has an adverse effect on educational performance...and causes such severe communication and other developmental and educational needs that they cannot be accommodated in special education programs or related services solely for

children with deafness or children with blindness[.]” Proposed 14 Del. Admin. C. § 925.6.8.1.

“Deaf-blindness means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational needs that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.” 34 C.F.R. § 300.8(c)(2).

The DDOE proposes to include language that prohibits an educational classification of deaf-blind where the interference on educational performance can be explained by factors listed in the special rule for eligibility determination, explained above and found at 14 Del. Admin. C. § 925.6.2. The DDOE additionally proposes to include specific requirements related to the evaluation documentation and procedures. These requirements include:

- 6.8.4.1 Documentation of the visual and hearing impairments by a qualified medical professional as described in 14 DE Admin. Code 925 6.8.2.
- 6.8.4.2 An audiological evaluation that is no more than six (6) months old, unless otherwise specified by the audiologist; and
- 6.8.4.3 other information relevant to the student’s condition.

Regarding the above, the DDOE should make the following changes:

In 6.8.4.1, 14 Del. Admin. C. § 925 6.8.2 refers to the age of eligibility for children identified as deaf-blind and is therefore an incorrect reference. The DDOE should change the reference to 14 Del. Admin. C. § 925.6.8.6 which explains the requirements for the “Documenter.” In 6.8.4.2, the DDOE should include “licensed” before “audiologist” to reflect that the audiologist must be licensed to conduct the evaluation. This would then be consistent with the rest of the proposed changes.

The DDOE proposes to include specific requirements for the “Documenter” of both visual and hearing conditions under the deaf-blind eligibility category. The proposed amendment would require that a medical professional document and certify the impairment. The medical professionals listed include a licensed audiologist, ophthalmologist, optometrist, or neurologist. However, the DDOE also includes that, if visual acuity is unable to be determined by a licensed optometrist or ophthalmologist, that a functional vision evaluation can be completed by a teacher of the visually impaired or deaf-blind teacher. SCPD suggests that DDOE strike the reference allowing a functional visual evaluation to be completed by a teacher.

Lastly, the DDOE proposes to include a requirement that the following individuals must be members of the IEP team for the purpose of eligibility determination: a licensed audiologist or a teacher of students who are deaf or hard of hearing, the school psychologist, and a team member from the statewide programs for Deaf-Blind.

A small note concerning use of numbers in the proposed 14 Del. Admin C. § 925.6.8.1.1.1 and 6.8.1.1.2. The language in both is as follows:

- 6.8.1.1.1 A permanent conductive, sensorineural, or mixed hearing loss that is 20 dB HL or greater at two or more frequencies between 500-6000 Hz, either unilaterally or bilaterally; or
- 6.8.1.1.2 A fluctuating hearing loss of more than 20 dB HL or greater at 2 or more frequencies between 500-6000 Hz, either unilaterally or bilaterally, which adversely affects his or her educational performance and persists for more than 6 months; or

The first uses “two” while the latter uses “2.” For consistency, SCPD suggests that DDOE revise the language, so both would read: “...or greater at two (2) or more frequencies...”

Lastly, the reference in 6.8.7 to 14 Del. Admin. C. § 925.21 should be changed to reflect the proposed citation for IEP Team, which is 14 Del. Admin. C. § 925.8.

Eligibility Criteria for Emotional Disability (14 Del. Admin. C. § 925.6.9)

The proposed changes to the eligibility criteria for emotional disability are largely structural rather than substantive. Of note, the age of eligibility was lowered from the 4th birthdate (14 Del. Admin. C. § 925.6.9.3) to the third birthdate. Proposed 14 Del. Admin. C. § 925.6.9.2. In addition, the proposed amendments explicitly include language that “emotional disability” may include psychiatric disorders. Proposed 14 Del. Admin. C. § 925.6.9.1.3. This aligns with the federal IDEA regulations which explicitly state that “[e]motional disturbance includes schizophrenia.” 34 C.F.R. § 300.8(c)(4)(ii).

The DDOE also proposes to include a requirement that the “Documenter” be a licensed psychologist or certified school psychologist, or other qualified professional, as applicable and that the list of required IEP Team Members for purposes of eligibility determination include the school psychologist. Regarding the former, a licensed psychiatrist is not included in the proposed amendment, but is explicitly included in the current language. SCPD recommends that DDOE explicitly include licensed psychiatrist in the list of Documenters.

The major proposed change includes an expansion of the definition for “emotional disability” to include “a pattern of behavior of shorter duration that is severe, intense, or unsafe.” Proposed 14 Del. Admin. C. § 925.6.9.1. This change will likely catch additional students who are facing crisis and in need of additional interventions.

Eligibility Criteria for Hearing Impairment (14 Del. Admin. C. § 925.6.10)

The DDOE’s proposed changes to the eligibility criteria for hearing impairment include the same proposed changes as those described under the eligibility category of deaf-blind.

The only difference between the two is that the required members of the IEP team for purposes of eligibility determination do not include a team member from the statewide programs for Deaf-Blind.

Eligibility Criteria for Specific Learning Disability (14 Del. Admin. C. § 925.6.11)

The proposed changes to the eligibility criteria for specific learning disability are essentially structural rather than substantive. The DDOE proposes to incorporate the current 925.7-11 into the proposed 925.6.11. This change would ensure that all relevant regulations concerning the identification, evaluation, and eligibility criteria for children with specific learning disabilities are not spread throughout the entire regulation.

The single major substantive change is the revised definition for “specific learning disability,” found at 14 Del. Admin. C. § 925.6.11.1, which now aligns with the federal IDEA definition found at 34 C.F.R. § 300.8(c)(10)(i).

SCPD has the following recommendations regarding minor discrepancies:

- The proposed 14 Del. Admin. C. § 925.6.11.1.2 references subsection 9.1.1. This is taken directly from the current 9.1.2, and is not updated to reflect the change. The reference should be made to subsection 6.11.1.1.
- 6.11.3.7.1.2 and 6.11.4.1 have the exact same language. The DDOE should remove 6.11.3.7.1.1 and then move sections 6.11.3.7.1-6.11.3.8 to under the disability-specific evaluation procedures, since that is the topic of those sections.
- 6.11.8.7.3 - 6.11.8.7.5 should be further indented since those sections list the documentation required to be provided to parents under 6.11.8.7.2. The sections should then be re-numbered to 6.11.8.7.2.1, 6.11.8.7.2.2, and 6.11.8.7.2.3.
- The DDOE should update the citation in 6.11.7 from the current 14 Del. Admin. C. § 925.21 to the proposed 14 Del. Admin. C. § 925.8.

Eligibility Criteria for Intellectual Disability (14 Del. Admin. C. § 925.6.12)

The proposed eligibility criteria for Intellectual Disability are largely structural rather than substantive. Of note, the proposed definition for intellectual disability was amended to align with the federal IDEA definition and the updated definition published by the American Association on Intellectual and Developmental Disabilities (AAIDD). The proposed definition tracks nearly identically with the federal definition and incorporates additional pieces from AAIDD’s definition. The proposed criteria for mild, moderate, and severe intellectual disability are largely unchanged; however, the DDOE proposes to include limitations in adaptive behavior to all three categories, and not just severe. In the proposed changes, the DDOE removes the explanation for what each adaptive behavior category is. SCPD recommends that DDOE include what is covered by conceptual skills, social adaptive skills, and practical adaptive skills. SCPD also recommends that the DDOE use the explanations provided by the AAIDD:

- Adaptive behavior is the collection of conceptual, social, and practical skills that are learned and performed by people in their everyday lives.
- Conceptual skills—language and literacy; money, time, and number concepts; and self-direction.
- Social skills—interpersonal skills, social responsibility, self-esteem, gullibility, naïveté (i.e., wariness), social problem solving, and the ability to follow rules/obey laws and to avoid being victimized.
- Practical skills—activities of daily living (personal care), occupational skills, healthcare, travel/transportation, schedules/routines, safety, use of money, use of the telephone.

(<https://www.aidd.org/intellectual-disability/definition>).

Lastly, the DDOE proposed amendments include lowering the age of eligibility from the 4th birthdate to the 3rd birthdate and requires that the school psychologist be a member of the IEP Team for purposes of eligibility determination.

Eligibility Criteria for Orthopedic Impairment (14 Del. Admin. C. § 925.6.13)

The proposed eligibility criteria for orthopedic impairment are reworded but remain substantively the same as the current language. The proposed changes include a requirement that the impairment cannot be explained by the factors under the special rule for eligibility determination. In addition, the proposed evaluation procedures include:

- 6.13.4.1 Documentation of the physical impairment by a qualified professional as described in 14 DE Admin Code 925.6.13.
- 6.13.14.2 Results from physical or occupational therapy evaluations using appropriate measures, which identify educational and related service needs, as well as environmental adjustments as necessary.

In regards to 6.13.4.1, 14 Del. Admin. C. § 925.6.13 is the citation to the full eligibility criteria for orthopedic impairment. The DDOE should replace that citation with 14 Del. Admin. C. § 925.6.13.6, which is the cite for “Documenter.” The Documenter is referred to as a “qualified medical professional who can certify the existence of an orthopedic impairment.”

The proposed regulations also require additional IEP Team members for the purpose of eligibility determination to include the school psychologist and at least one of the following: physical therapist, occupational therapist, or nurse.

Eligibility Criteria for Other Health Impairment (14 Del. Admin. C. § 925.6.14)

The proposed eligibility criteria for Other Health Impairment are largely structural rather than substantive. Of note, the proposed definition was amended to align with the federal IDEA definition by including a list of additional chronic or acute conditions such as

asthma, diabetes, epilepsy, and others. It was also amended to align with the DSM V criteria for ADHD.

The proposed change to 14 Del. Admin. C. § 925.6.14.1 includes “attention deficit hyperactivity disorder,” (ADHD) but, as previously shown in the proposed changes to 14 Del. Admin. C. 922, the DDOE does not consider attention deficit disorder (ADD) as its own impairment, but rather considers it to be the former name of ADHD. SCPD recommends that the DDOE change “attention deficit hyperactivity disorder” slightly to “attention deficit/hyperactivity disorder” to reflect that ADHD covers both ADD and ADHD.

The proposed changes to 6.14.1.2 bring the regulation in line with the DSM V definition to include, more specifically, the requirement that six or more symptoms of inattention and six or more symptoms of hyperactivity impulsivity are present for children up to age 16 years, or five or more for adolescents age 17 years and older and adults; and that symptoms of inattention have been present for at least 6 months, and they are inappropriate for developmental level.

The proposed changes under additional criteria for eligibility require that in the case of ADHD specifically, the interference cannot primarily be explained by another mental disorder (such as anxiety, depression, etc.) and the symptoms do not occur only during the course of schizophrenia or another psychotic disorder.

In addition, the proposed evaluation procedures include a requirement that documentation of the health impairment be provided by a qualified professional as described in 14 DE Admin Code 925.6.14. 14 Del. Admin. C. § 925.6.14 is the citation to the full eligibility criteria for other health impairment. The DDOE should replace that citation with 14 Del. Admin. C. § 925.6.14.6, which is the cite for “Documenter.” The Documenter is required to be a “qualified medical professional such as, but not limited to, a medical doctor, licensed nurse practitioner, or licensed physician’s assistant, and in the cases of ADHD, a certified school psychologist or licensed psychologist.” Lastly, for purposes of eligibility determination, the DDOE proposes that the school psychologist and school nurse are required members of the IEP Team.

Eligibility Criteria for Speech/Language Impairment (14 Del. Admin. C. § 925.6.15)

The DDOE proposes a complete overhaul of the eligibility criteria for Speech/Language Impairment (SLI). These proposed changes bring the general definition in line with the updated federal IDEA definition found at 34 C.F.R. § 300.8(c)(11). The DDOE proposes to include additional requirements to the eligibility criteria not found in the IDEA definition and expands on the current definition requiring a finding of an articulation disorder, language disorder, dysfluent speech, or a voice disorder. These include a finding of a moderate or severe impairment in at least one of the following areas:

- 6.15.1.1 Articulation or Connected speech intelligibility as defined by: impairment in the production of speech sounds (including substitutions,

- omissions, distortions or additions of speech sounds) that are considered to be developmentally appropriate for the child's age or cultural linguistic background;
or
- 6.15.1.2 Speech fluency/stuttering as defined by: atypical dysfluencies that are unusual in intensity, frequency and duration, such as prolongations, repetitions, or pauses, or avoidance behaviors, or reduced perception of naturalness or secondary concomitant behaviors, such as distracting sounds, facial grimaces or other body movements that are adversely affecting the speaker's ability to communicate effectively within academic and extracurricular settings; or
 - 6.15.1.3 Receptive or expressive language as defined by: impairment in the form of language (phonology, morphology, syntax), content of language (vocabulary, semantics), comprehension or functional use of language (pragmatics) of a spoken, written, or other symbol system that are adversely affecting the speaker's ability to communicate effectively within academic and extracurricular settings;
or
 - 6.15.1.4 Voice quality as defined by: voice impairment in one (1) or more processes of pitch, quality, intensity or resonance, that are adversely affecting the speaker's ability to communicate effectively within academic and extracurricular settings.

Proposed 14 Del. Admin. C. § 925.6.15.1.1-1.5. The proposed language does not raise any red flags and seems to generally align with the literature around SLIs. The same is true for the information found under additional criteria for eligibility, which includes a requirement that the interference in educational performance cannot be primarily explained by “[s]ociocultural dialect; [d]ifferences associated with acquisition of English as a second language; [a]nxiety disorders (e.g. selective mutism); [l]imited exposure to communication-building experiences; [d]ifferences related to medical issues not directly related to the vocal mechanism; or [o]ther factors listed under the special rule for eligibility determination consistent with 14 DE Admin. Code 925.6.2.

The DDOE also proposes to lower the age of eligibility from a child's fifth birthdate to the third birthdate.

For disability-specific evaluation procedures, the DDOE proposes to include an evaluation that includes data such as language samples, criterion referenced measures, and an oral peripheral examination. Under the proposed amendments, the evaluation would be required to be conducted by a licensed and certified speech-language pathologist and, for impairments in voice or swallowing, additional documentation by a qualified medical professional. Lastly, for purposes of eligibility determination, the DDOE proposes to require that a licensed and certified speech-language pathologist be a member of the IEP Team.

Eligibility Criteria for Traumatic Brain Injury (14 Del. Admin. C. § 925.6.16)

In general, the proposed changes to the eligibility criteria for traumatic brain injury are similar to the current criteria, although reworded to align with the new proposed structure

of the regulation as a whole. Substantive changes include a removal of the requirement that the TBI limit one or more major activities of daily living. The proposed changes also define TBI to include not only external causes, but internal medical conditions as well. Additional required members of the IEP Team for purposes of eligibility determination would, under the proposed changes, include the school psychologist and the school nurse.

Eligibility Criteria for Visual Impairment Including Blindness (14 Del. Admin. C. § 925.6.17)

The DDOE's proposed changes to the eligibility criteria for visual impairment including blindness include the same proposed changes as those described under the eligibility category of deaf-blind. The only difference between the two is that the required members of the IEP team, for purposes of eligibility determination, include an orientation and mobility specialist, teacher of students with visual impairments, and the school psychologist.

The proposed changes remain consistent with recommendations that SCPD had previously provided to the DDOE regarding the eligibility criteria for Visual Impairment Including Blindness. 11 Del. Register of Regulations 184 (August 1, 2007).

In summary, SCPD endorses the proposed regulation with the changes indicated above. In addition, SCPD recommends that the DDOE review the proposed amendment as a whole to identify and fix any errors related to internal citations and references.

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

Sincerely,

A handwritten signature in blue ink that reads "J. Todd Webb". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke at the end.

J. Todd Webb, Chairperson
State Council for Persons with Disabilities

cc: The Honorable Susan Bunting, Department of Education
Mary Ann Mieczkowski, Department of Education
Linnea Bradshaw - Executive Director of the PSB
Tracy Poitras - PSB
Kathleen Smith - Professional Standards Board
Laura Makransky, Esq. - Department of Justice
Valerie Dunkle, Esq. - Department of Justice
Whitney Sweeney, SBE
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Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

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