



STATE OF DELAWARE  
**STATE COUNCIL FOR PERSONS WITH DISABILITIES**  
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410 Federal Street  
Dover, Delaware 19901  
302-739-3621

The Honorable John Carney  
Governor

John McNeal  
SCPD Director

November 4, 2020

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

RE: Proposed DOE Regulation on 1011 Interscholastic Athletics during the COVID-19 Pandemic, 24 Del. Register of Regulations 313 (October 1, 2020)

Dear Ms. Cunningham:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposal to add new regulations, 14 Del. Admin. C. § 1011, which govern interscholastic activities during the COVID-19 pandemic for Delaware Interscholastic Athletic Association (DIAA) member schools. DOE previously adopted an emergency regulation, 14 Del. Admin. C. § 1010 Interscholastic Athletics during the COVID-19 Pandemic, which was effective for 120 days beginning on July 1, 2020. The proposed regulation, § 1011, is intended to replace the emergency regulation. The proposed regulation includes pre-participation physical examination requirements, addresses when interscholastic athletic activities are suspended, provides four Return to Play Stages, specifies the dates for the fall, winter, and spring sport seasons during the 2020-2021 school year, and sets forth sport-specific requirements that are designed to protect the physical well-being of student athletes during the COVID-19

pandemic. The proposed regulation was published as 24 DE Reg. 313 in the October 1, 2020 issue of the Register of Regulations. SCPD has the following observations.

Although the regulation covers all students participating in interscholastic sports, DOE proposes specific requirements related to what it calls a “vulnerable individual.” SCPD will focus on this specific population in their analysis.

The definition DOE proposes for a “vulnerable individual” (proposed 14 Del. Admin. C. § 1011.2.0.) is a person who:

... is strongly advised to shelter in place based on the Delaware Division of Public Health's guidance, including a person who is over the age of 65, a person who is immunocompromised, and a person with an underlying health condition. Conditions that can cause a person to be immunocompromised include cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications. Underlying health conditions include chronic lung disease, moderate to severe asthma, a serious heart condition, severe obesity (body mass index of 40 or higher), and diabetes.

This will likely impact a significant number of Delaware students with disabilities, including those who have participated in DIAA activities in the past and those who may be looking at starting those activities this year.

The requirements and limitations that DOE proposes for a “vulnerable individual” are more severe than those for non-vulnerable populations. These limitations include the following:

- DIAA Return to Play Stage 1 - During DIAA Return to Play Stage 1, Workouts are permitted subject to the limitations in subsection 4.5.4.4. Practices, Scrimmages, Competitions, Play Days, Tournament events, Conditioning Programs, and Open Gym Programs are not permitted. Vulnerable individuals shall not attend Workouts. Proposed 14 Del. Admin. C. § 1011.4.5.4 (emphasis added).
- DIAA Return to Play Stage 2 - During DIAA Return to Play Stage 2, Workouts; Practices in the sports specified in subsection 4.5.5.4; and Practices, Scrimmages, and Competitions in the sports specified in subsection 4.5.5.5 are permitted subject to the limitations in subsection 4.5.5.6. Play Days and Tournament events are not permitted. Conditioning

Programs and Open Gym Programs that are held indoors or outdoors are permitted. Vulnerable Individuals shall not attend Workouts, Practices, Scrimmages, Competitions, Conditioning Programs, or Open Gym Programs. Proposed 14 Del. Admin. C. § 1011.4.5.5 (emphasis added).

- DIAA Return to Play Stage 3 - During DIAA Return to Play Stage 3, Workouts; modified Practices in the sports specified in subsection 4.5.6.4; and Practices, Scrimmages, and Competitions in the sports specified in subsection 4.5.6.5 are permitted subject to the limitations in subsection 4.5.6.6. Play Days and Tournament events are not permitted. Conditioning Programs and Open Gym Programs (indoors and outdoors) are permitted. Vulnerable Individuals may attend Workouts, Practices, Scrimmages, Competitions, Conditioning Programs, and Open Gym Programs if permitted by the Delaware Division of Public Health's guidelines. Proposed 14 Del. Admin. C. § 1011.4.5.6 (emphasis added).
- DIAA Return to Play Stage 4 - During DIAA Return to Play Stage 4, Workouts and Practices, Scrimmages, and Competitions in all sports are permitted subject to the limitations in subsection 4.5.6.6. Play Days and Tournament events are permitted provided the plans have been approved by the Delaware Division of Public Health. Conditioning Programs and Open Gym Programs (indoors and outdoors) are permitted. Vulnerable Individuals may attend Workouts, Practices, Scrimmages, Competitions, Conditioning Programs, Open Gym Programs, Play Days, and Tournament events if permitted by the Delaware Division of Public Health's guidelines. Proposed 14 Del. Admin. C. § 1011.4.5.7 (emphasis added).

SCPD believes that the more restrictive limitations proposed by DOE for a “vulnerable individual” are to ensure the utmost safety and health of each individual student. However, DOE cannot forget the requirements set forth under the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504) which require equal access to all students with disabilities to the programs, activities, and facilities of a school and school district.

Although the DIAA is not an official arm of the DOE, such as the Exceptional Children Resources Workgroup, the General Assembly, in creating the DIAA, intended for it to work “in consultation and cooperation with the DOE to implement its charge.” Annual Report to the 149th General Assembly and Governor of Delaware, DIAA, January 1, 2017 to December 31, 2017 (<https://www.doe.k12.de.us/cms/lib/DE01922744/Centricity/Domain/326/Annual%20Report%20to%20%20G%20A%20%202017%20-%20.pdf>).

The DIAA is responsible for developing rules and regulations for its Delaware member schools, both public and private, relating to middle and high school interscholastic athletics. Id. As of the above Annual Report, membership in DIAA includes 63 Delaware high schools and 55 Delaware middle schools for a total of 118 Delaware schools, both public and private. Id. Furthermore, during the 2016-17 school year, over 30,000 students participated in high school interscholastic athletics with DIAA. Id.

Based on the above information, it is clear that participating in interscholastic athletics is an activity in which many students desire to participate. Although the DIAA Annual Report cited above does not include information about how many students with disabilities participate in their activities, it is unlikely that that number has been or remains at zero. Regardless of that number, DOE and the DIAA need to ensure that equal access to these programs, activities, and facilities are, indeed, provided to all students, inclusive of those students with disabilities which may put them in the proposed category of a “vulnerable individual.”

SCPD does not believe the proposed regulations should completely restrict the participation for a “vulnerable individual” in interscholastic activities; instead, there should be an individualized assessment to determine whether it is appropriate for a student to participate and/or return to play. Failure to do so could lead to a violation of the ADA or Section 504 and will surely begin and continue to further segregate students with disabilities from their peers. In addition, the DOE and DIAA should consider the inclusion of a waiver process based on the needs of the individual. For example, what is the process if a student with a disability passes a physical to participate in interscholastic activities, but still may be considered a “vulnerable individual” consistent with the current language in the proposed regulations?

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,



Terri Hancharick, 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  
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