



STATE OF DELAWARE  
**STATE COUNCIL FOR PERSONS WITH DISABILITIES**  
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The Honorable John Carney,  
Governor

John McNeal, Director  
SCPD

**MEMORANDUM**

DATE: May 29, 2024

TO: Delaware Department of Education  
Office of the Secretary/Attn: Regulation Review

FROM: Benjamin Shrader, Chairperson   
State Council for Persons with Disabilities

RE: DDOE Proposed Regulation Regarding Student Athlete Eligibility, 27 DE Register of Regulations 812 (May 1, 2024)}

The State Council for Persons with Disabilities (SCPD) has reviewed the DDOE proposed regulation regarding student athlete eligibility and have the following comments:

- DDOE seeks to amend regulations related to eligibility for interscholastic athletics for students who transfer from one school to another, proposing to strike current section 2.4 of 1009 DIAA High School Interscholastic Athletics and add a new 1029 Student Athlete Eligibility: Transfers.
- Per the Impact Statement, the new regulation is a result of deliberations of the DIAA Task Force, which sought to address issues related to transfers driven by athletic motivations, inappropriate pressure on student athletes and unauthorized recruitment of athletes by other schools.
- The new regulation imposes an immediate period of ineligibility for most students who transfer from one school to another who have participated in competitive sports within the previous 180 days. There is a one-time exemption from this rule if: “the student transfers prior to the start of the earliest allowable start date of the fall sport’s season of the student’s third year of eligibility and the student does not participate in a contest in the same sport for different schools during the same school year.” (New 4.2) The ineligibility periods are listed in new 4.3, which are generally 30 days or half of the maximum number of regular season contests, whichever is less.

- There are several enumerated exceptions to the immediate ineligibility rule listed in New 5.0:
  - McKinney-Vento Act transfers for students who have become homeless;
  - Transfer Due to Court Action;
  - Relative Caregivers School Authorization;
  - Unsafe School Choice Policy ( student attends persistently dangerous school or is victim of violent felony at school);
  - HIB Transfer (student a victim of bullying or intimidation);
  - Sending School has dropped the sport;
  - Military Assignment; and
  - Bona Fide Change of Residence.
  
- The new regulation removes the Financial Hardship exception found in the existing transfer regulation.
- Of note to the SCPD: **This regulation does not address the circumstance in which a student with disabilities transfers schools for educational reasons, pursuant to an IEP or because the school offers the needed educational services or supports.**
- There are specific rules related to students who participate in the School Choice Program who then transfer to another school outside of the student’s feeder pattern. Students ineligible under these provisions can submit a waiver request although they would still be subject to the ineligibility periods listed in new 4.3.
- The new regulation is otherwise silent on the issue of waivers. However, the current administrative rules of the DIAA Board, 14 Del. Admin. Code 1020, Section 9.0 allows the Board to waive any rule or regulation.

As the benefits of participation in athletics and sports for students with disabilities are well documented. “The benefits of sports participation are significant for people with disabilities. Physical activity improves academic success, builds self-esteem, and prevents health problems.”<sup>1</sup> The United States Department of Education has directed districts to ensure that students with disabilities have equal access to such programs.<sup>2</sup> Students with IEPs must be afforded an equal opportunity to participate in extracurriculars, including with supplementary aids and services deemed appropriate and necessary by their IEP team. 34 CFR § 300.107 Moreover, inflexible eligibility criteria may have discriminatory impact against students whose reason for transfer related to disability services or a placement through an IEP.

There is case law around this issue, some of it favorable. In Washington v. Indiana High School Athletic Association, 181 F. 3<sup>rd</sup> 840 (7<sup>th</sup> Cir. 1999) a student with disabilities had a disruption in his education due to his learning disabilities. When he returned to school, he was ineligible to play sports due to age. The court found a nexus between the application of the age out rule and the student’s disability, and ordered the school district to allow him to play his sport. In another case with a wild procedural history, Crocker v. Tennessee Secondary School Athletic Assn, 735 F.Supp. 753 (M.D. Tenn. 1990), the court enjoined the TSSAA from applying a transfer rule to a student

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<sup>1</sup> Lawowski, Advancing Equity for Students with Disabilities in School Sports, Journal of Intercollegiate Sport, 2011, 4, 95-100 (<https://journals.ku.edu/jis/article/view/10047/9477>).

<sup>2</sup> <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf>

athlete with disabilities, as his transfer was found to be motivated by disability-related educational needs, which had been included in his IEP.

Logically, if a student transfers for disability-related reasons, then the transfer ineligibility rule should be waived so as not to allow DIAA to prevent the student's participation solely because of his disability. This argument is particularly compelling when the transfer rule has several other exceptions for students whose reason for transferring clearly is unrelated to athletic advantage, including being a crime victim, homeless, or in the custody of DCYF.

**Therefore, the SCPD asks DDOE for an additional exception to be enumerated in the regulation and in SB 281 for students with disabilities who transfer either under an IEP or to obtain educational or vocational services and supports. Alternatively, language could be added to SB 281 clearly indicating that students who transfer under an IEP or to obtain educational services should be granted a waiver (expressly stating that a transfer for a disability-related reason can be the basis of a waiver). Another approach is having language either in the regulation or the bill that DIAA must consider and grant requests from students with disabilities for exceptions from eligibility rules as a reasonable accommodation.**

The SCPD thanks you for considering our comments. Please contact SCPD if you have any questions or comments regarding our observations.

cc: Marissa Band, Esq., DLP  
Governor's Advisory Council for Exceptional Citizens  
Developmental Disabilities Council