



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

John McNeal, Director
SCPD

MEMORANDUM

DATE: January 31, 2024

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

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

RE: Proposed DOE Amendment Regulations [Children with Disabilities Subpart D, Evaluations, Eligibility, Determination, Individualized Education Programs (January 1, 2024)]

The State Council for Persons with Disabilities (SCPD) has reviewed the proposed changes to the Delaware Department of Education's (DDOE's) 27 Del. Admin. 925, Evaluations, Eligibility, Determination, Individualized Education Programs.

SCPD has the following comments and recommendations:

- DOE 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. **The SCPD supports this change.**
- DOE proposes to amend § 925.5.5 to add a requirement that public agencies conduct an evaluation before changing the educational classification of a student otherwise eligible under IDEA. As each classification sections already includes a requirement that in determining whether a student continues to meet a particular

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

educational classification, the IEP Team must follow the evaluation criteria, **the SCPD opposes this change as it is unnecessary.**

- DOE proposes 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 sentence is unnecessary because it is already encompassed in current § 924.1.2 (“[Each public agency providing services to children with disabilities shall use any forms or procedures as from time to time are specifically developed or promulgated by DOE in implementing the requirements of these regulations.”). Moreover, it is inconsistent with the language in § 924.1.2 because the proposed regulation uses the term LEA rather than public agency. Therefore, **the SCPD recommends removing this unnecessary proposed language.**
- DOE proposes to change references to “Speech/Language” to “Speech or Language” throughout this section of the regulations. This proposed change is consistent with how IDEA refers to this eligibility classification. *See* 34 C.F.R. § 300.8(c)(11), therefore **the SCPD supports the change.**
- DOE proposes 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 is consistent with the current definition of “child” at 14 Del. Admin. C. § 922.3.0, therefore **the SCPD supports the change.**
- DOE proposes 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). The way the regulation is currently structured, the two provisions are under only 6.6.1.2 despite seemingly applying to both. **The SCPD supports the change but recommends further amending 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.

- DOE proposes to amend the eligibility criteria for Traumatic-Brain Injury (“TBI”) (Section 6.16) by clarifying that a student’s eligibility under the TBI classification ends when a student receives their high school diploma or August 31st of the school year in which the child turns 22. The current language states that eligibility ends upon receipt of high school diploma and does not specifically include that eligibility would end at the end of the school year in which the child turns 22. This proposed change is consistent with the IDEA and the current definition of “child” in Delaware, therefore **the SCPD supports the change.**
- DOE proposes to add an 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. The proposed language would clarify that this means “i.e. areas in which there is evidence that the disability causes an adverse effect on educational performance”. The abbreviation “i.e.” stands for the Latin phrase “id est” which means “that is” or “specifically”. By using “i.e.,” DOE is saying that the present levels of academic achievement and functional performance means, *and only means*, areas where there is evidence that the student’s disability is causing an adverse effect on educational performance. This language makes this requirement *more* restrictive than that which is in IDEA. Moreover, it asks IEP Teams to consider and identify where the child struggles rather than also considering the student’s strengths.² Therefore, **the SCPD recommends DOE remove this parenthetical as overly restrictive, unnecessary, and problematic.**
- DOE proposes 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. This additional language poses two separate issues. One, the way it is written makes it so that if a student does not complete this form prior to their 18th birthday, they are prevented from appointing an educational representative or educational surrogate after that. Meaning, the student would be unable to appoint someone to act in this capacity after the student turns 18. Second, and related, the way the language is written makes it so the onus is on the student with a disability to know and understand the requirements and obligations of the public agency with respect to this matter in order to exercise their right

² Center for Parent Information & Resources provides a great explanation of Present Levels at <https://www.parentcenterhub.org/present-levels/#idea>.

(rather than putting the onus on the public agency to affirmatively provide this information and inquire as to whether the student wishes to appoint such an individual). **The SCPD recommends DOE remove this language or otherwise revise the language to put the affirmative obligation on the public agency.**

- DOE proposes to add new subsection 8.5.2 which would prohibit excusal of required IEP team members for purposes of eligibility determinations. **The SCPD supports this change.**
- DOE proposes to amend section 10.0 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. 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, **the SCPD recommends removal of this proposed additional requirement.**
- DOE proposes a single change to section 11.0 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.” DOE 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). DOE’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. **The SCPD supports this change but requests DOE 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.**

- DOE proposes to add section 13.2, which concerns students aged 3-5 who are not yet in kindergarten. Part B of the IDEA applies to all students aged 3-22 (inclusive) identified as eligible under this Part. There is no carve-out in Part B of the IDEA for students who are not yet in kindergarten or who are not in a regular school program. Therefore, the LRE requirements of Part B of the IDEA apply to all IDEA-eligible students aged 3-5, regardless of where they are currently being served. DDOE’s proposed LRE placements for students aged 3-5 does not comply with the LRE requirements of IDEA. **The SCPD recommends the DOE remove this separate LRE section for this population as it is unnecessary.**

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.

cc: Ms. Marissa Band, Esquire CLASI, DLP
Governor’s Advisory Council for Exceptional Citizens
Developmental Disabilities Council