



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
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October 29, 2010

Ms. Susan K. Haberstroh
Education Associate
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

RE: 14 DE Reg. 227 [DOE Proposed Supportive Instruction (Homebound) Regulation]

Dear Ms. Haberstroh:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposal to effect amendments to its supportive instruction (homebound) regulation as part of its 5 year review cycle. The proposed regulation was published as 14 DE Reg. 227 in the October 1, 2010 issue of the Register of Regulations. Council has the following observations and recommendations.

First, §§2.1.1, 2.1.3, and 2.1.3.2 limit certifications of medically-related absences to "physicians". It would be preferable to change the references to "physician or advanced practice nurse". As a practical matter, many individuals are now primarily treated by an advanced practice nurse rather than a traditional physician. Advanced practice nurses are authorized to perform independent acts of diagnosis and prescribe drugs. See Title 24 Del.C. §1902(b)(1). State law bars health insurers from denying benefits for eligible services when provided by an advanced practice nurse instead of a physician. See Title 18 Del.C. §2318. The DLP was recently involved in a case in which a district declined a request for homebound since the certification was provided by an advanced practice nurse rather than a physician. Therefore, inserting "advanced practice nurse" in the regulation would address a "real-life" concern.

Second, the homebound regulation is literally limited to "districts". SCPD recommends changing the references in §§1.2, 1.3, and 2.1 from "district" to "public school" to encompass charter schools. Otherwise, students in public educational programs could face both short and long-term exclusion from services due to illness, pregnancy, or disability. Cf. 14 DE Admin Code, Part 975, §4.3.3 [requiring charter school compliance with IDEA and §504].

Third, in §2.1.3.2, the word "remain" should be "remains".

Fourth, § 1.2, second sentence, could be improved by recasting the standard in the affirmative. Rather than obliquely stating “(n)othing in this regulation shall prevent a district from providing supportive instruction to children with disabilities [consistent with IDEA]”, it would be preferable to simply substitute “(p)ublic schools shall provide supportive instruction to qualifying children with disabilities [consistent with the IDEA].” It is anomalous to have an affirmatively-worded first sentence requiring conformity with IDEA and a “weakly-worded” second sentence.

Fifth, §1.3 could likewise be improved with a more “affirmative” approach. DOE regulations affirmatively disallow public schools from discriminating based on disability [14 DE Admin Code Part 225, §1.0]. In other contexts, DOE has adopted affirmative standards guiding public school compliance with §504. See, e.g., 14 DE Admin Code, Part 609, §3.0; 14 DE Admin Code, Part 612, §§3.2 and 3.11. Thus, the following could be substituted for the second sentence in §1.3: “A public school’s provision of supportive instruction to such students shall be in conformity with Section 504 and the Americans with Disabilities Act.”

Sixth, the DOE has not included §3.0 of the supportive instruction regulation in the current proposal. That part of the regulation establishes 3 and 5 hour weekly minimums for supportive instruction. Unfortunately, these benchmarks are typically treated as “norms” or “caps” rather than “minimums”. Concomitantly, it is manifest that 3-5 hours of homebound instruction will predictably be inadequate to allow a student to “maintain pace” with peers receiving 30 hours of classroom instruction from specialized teachers. SCPD recommends that the DOE incorporate more robust guidance in the regulation in this context.

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

Sincerely,



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

cc: The Honorable Lillian Lowery
Dr. Teri Quinn Gray
Ms. Martha Toomey
Ms. Paula Fontello, Esq.
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