



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
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June 29, 2011

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

RE: 14 DE Reg. 1280 [DOE Proposed Purposes & Definition Regulation]

Dear Ms. Haberstroh:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposal to amend its regulations regarding *Children with Disabilities, Purposes and Definition*. The proposed regulation was published as 14 DE Reg. 1280 in the June 1, 2011 issue of the Register of Regulations. As background, the SCPD commented on a set of Department of Education special education *Purposes and Definition* regulation in January 2011. The DOE adopted a set of final regulations in March incorporating most of the Council's suggestions. However, it deferred action on references to "hearing impairment" and "mental retardation". See attached March 10, 2011 DOE letter. The letter recites as follows:

SCPD Comment

In §3.0, there are references to "mental retardation" in the definition of "Child with a Disability", definition of "Mental Retardation", definition of "Multiple Disabilities", and definition of "Specific Learning Disability". The corresponding federal regulation [34 C.F.R. 300.8] still uses the term "mental retardation". The pending "needs-based funding legislation (H.B. No. 1) uses the term "mental disability" in lieu of the term "mental retardation" at Section 41. Moreover, other DOE regulations use the term "mental disability". See, e.g., 14 DE Admin Code 928, §3.2.3 and 3.3.1; and 14 DE Admin Code 925, §6.12. At a minimum, the DOE may wish to consider adding an italicized sentence or note to the end of the definition of "mental retardation" as follows: "The terms 'mental disability' or 'intellectual disability' are sometimes used as substitutes for the term "mental retardation" and shall be considered equivalent terms for purposes of this regulation." Given the use of the term "mental disability" in the 925 and

928 regulations, the DOE could also consider inserting a discrete definition of the term.

DOE Response

The Department has taken the Council's comments into consideration and declines to revise the regulation as suggested. The Department agrees to reconsider the Council's comments concerning §922.3.0 with the upcoming regulatory revisions for the needs based funding system. The definition of "Child with a Disability" in 14 DE Admin Code §922.3.0 was not identified for revision by the Department in the January 1st Register of Regulations. As noted, the state regulation currently mirrors the federal regulation at 34 C.F.R. §300.8.

SCPD Comment

In §3.0, there are definitions of "Deafness" and Hearing Impairment". However, the term "hard of hearing" is used in §3.0, definition of "Interpreting Services". It is also used in Title 14 Del.C. §§3112 and 1331(c) as well as 14 DE Admin Code 1574 (Teacher of Students Who Are Deaf or Hard of Hearing). At a January 5 meeting involving the DOE's special education director and counsel, consensus was reached on using the term "hard of hearing" in the context of a proposed regulation covering interpreter/tutors. The DOE should therefore consider adding an italicized sentence or note to the end of the definition of "hearing impairment" as follows: "The term 'hard of hearing' is sometimes used as a substitute for the term 'hearing impairment' and shall be considered an equivalent term for purposes of this regulation."

DOE Response

The Department has taken the Council's comments into consideration and declines to revise the regulation as suggested. The Department agrees to reconsider the Council's comments concerning §922.3.0 with the upcoming regulatory revisions for the needs based funding system. The definition of "Deafness" and "Hearing Impairment" in 14 DE Admin Code §922.3.0 was not identified for revision by the Department in the January 1st Register of Regulations. In addition, the state regulation mirrors the federal regulation at 34 C.F.R. §§300.8 (c) (3) and (5).

Apart from correction of a citation in the definition of "Services Plan" and minor revision to definition of "multiple disabilities", the DOE is now proposing to insert the clarifying sentences proffered by SCPD into the definitions of "hearing impairment" and "mental retardation".

SCPD endorses the "hearing impairment" sentence but requests reconsideration of the approach to the definition of "mental retardation". By the time the regulation is final in September 2011 H.B. 91 should be in effect. H.B. 91 has already passed the House and

Senate. The legislation discourages use of the term “retarded” and adoption of regulations containing pejorative references to persons with disabilities. Moreover, with enactment of S.B. 1, State education law has substituted “mental disability” for “mental retardation”. See, e.g., Title 14 Del.C. §1703(e). Finally, the DOE proposes conversion of “mental retardation” to “intellectual disability” in other regulations published this month. See 14 DE Reg. 1294 (June 1, 2011), revising 14 DE Admin Code 923. Consistent with the attached May 16, 2011 DOE report to the GACEC, the DOE clearly intends to adopt “intellectual disability” as the preferred language. SCPD therefore recommends that the DOE substitute “Intellectual Disability” for “Mental Retardation” and insert the following revised clarifying sentence: “The terms “mental retardation” or “mental disability” are sometimes used as substitutes for the term “intellectual disability” and shall be considered equivalent terms for purposes of these regulations. SCPD also recommends substitution of “intellectual disability” for “mental retardation” in the definition of “Child with a Disability”, second line.

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

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.
Ms. Terry Hickey, Esq.
Mr. John Hindman, Esq.
Mr. Charlie Michels
Mr. Brian Hartman, Esq.
Developmental Disabilities Council
Governor’s Advisory Council for Exceptional Citizens

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DEPARTMENT OF EDUCATION

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Secretary of Education
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March 10, 2011

MAR 29 2011

Ms. Daniese McMullin-Powell, Chairperson
State Council for Persons with Disabilities
Margaret M. O'Neill Building
410 Federal Street, Suite 1
Dover, DE 19901

Dear Ms. McMullin-Powell:

Thank you for your letter of January 28, 2011 concerning the following regulation:

14 DE Admin Code § 922, Children with Disabilities (Purposes and Definition)

The following are the Council's comments requiring the Department's response:

1. Council Comment

In §2.2.4, substitute "Correction" for "Corrections". The correct reference is Department of Correction. See Title 29 Del.C. §8901.

DOE Response

Section 922.2.2.4 was not identified for revision by the Department. The Department agrees, however, to substitute "Correction" for "Corrections" as the change is nonsubstantive and consistent with the title of the Department of Correction as defined in 29 Del. C. § 8901.

2. Council Comment

In §3.0, there are references to "mental retardation" in the definition of "Child with a Disability", definition of "Mental Retardation", definition of "Multiple Disabilities", and definition of "Specific Learning Disability". The corresponding federal regulation [34 C.F.R. 300.8] still uses the term "mental retardation". The pending "needs-based funding legislation (H.B. No. 1) uses the term "mental disability" in lieu of the term "mental retardation" at Section 41. Moreover,

other DOE regulations use the term “mental disability”. See, e.g., 14 DE Admin Code 928, §3.2.3 and 3.3.1; and 14 DE Admin Code 925, §6.12. At a minimum, the DOE may wish to consider adding an italicized sentence or note to the end of the definition of “mental retardation” as follows: “The terms ‘mental disability’ or ‘intellectual disability’ are sometimes used as substitutes for the term “mental retardation” and shall be considered equivalent terms for purposes of this regulation.” Given the use of the term “mental disability” in the 925 and 928 regulations, the DOE could also consider inserting a discrete definition of the term.

DOE Response

The Department has taken the Council’s comments into consideration and declines to revise the regulation as suggested. The Department agrees to reconsider the Council’s comments concerning § 922.3.0 with the upcoming regulatory revisions for the needs based funding system. The definition of “Child with a Disability” in 14 DE Admin Code § 922.3.0 was not identified for revision by the Department in the January 1st Register of Regulations. As noted, the state regulation currently mirrors the federal regulation at 34 C.F.R. § 300.8.

3. Council Comment

In §3.0, there are definitions of “Deafness” and Hearing Impairment”. However, the term “hard of hearing” is used in §3.0, definition of “Interpreting Services”. It is also used in Title 14 Del. C. §§3112 and 1331(c) as well as 14 DE Admin Code 1574 (Teacher of Students Who Are Deaf or Hard of Hearing). At a January 5 meeting involving the DOE special education director and counsel, consensus was reached on using the term “hard of hearing” in the context of a proposed regulation covering interpreter/tutors. The DOE should therefore consider adding an italicized sentence or note to the end of the definition of “hearing impairment” as follows: “The term ‘hard of hearing’ is sometimes used as a substitute for the term ‘hearing impairment’ and shall be considered an equivalent term for purposes of this regulation.”

DOE Response

The Department has taken the Council’s comments into consideration and declines to revise the regulation as suggested. The Department agrees to reconsider the Council’s comments concerning § 922.3.0 with the upcoming regulatory revisions for the needs based funding system. The definition of “Deafness” and “Hearing Impairment” in 14 DE Admin Code § 922.3.0 was not identified for revision by the Department in the January 1st Register of Regulations. In addition, the state regulation mirrors the federal regulation at 34 C.F.R. §§ 300.8(c)(3) and (5).

4. Council Comment

In §3.0, the definition of “Autism” includes the following statement, “Autism does not apply if a child’s educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in this section.” If this statement is not found in federal regulations, the DOE should consider deletion.

DOE Response

The Department has taken the Council’s comment into consideration and declines to revise the regulation as suggested. The definition of “Autism” in 14 DE Admin Code § 922.3.0 was not identified for revision by the Department in the January 1st Register of Regulations. In addition, the state regulation mirrors the federal regulation at 34 C.F.R. § 300.8 (c)(1)(i)-(iii).

5. Council Comment

In §3.0, definition of “Core Academic Subjects”, the DOE should consider substituting “world languages” for “foreign languages”. See 14 DE Reg. 555 (12/1/10).

DOE Response

The definition of “Core Academic Subjects” in 14 DE Admin Code § 922.3.0 was not identified for revision by the Department in the January 1st Register of Regulations. In addition, the state regulation mirrors the federal regulation at 34 C.F.R. § 300.10. The Department agrees, however, to substitute the term “world languages” for “foreign languages” as the change is nonsubstantive and consistent with the terminology describing the high school graduation requirements in 14 DE Admin Code § 505.

6. Council Comment

In §3.0, the definition of “Free Appropriate Public Education” does not include State-law enhancements in Title 14 Del. §3101 amended in 2010 by House Bill No. 328. This is a major omission. They should be incorporated into the regulation.

DOE Response

The definition of “Free Appropriate Public Education” (“FAPE”) in 14 DE Admin Code § 922.3.0 was not identified for revision by the Department in the January 1st Register of Regulations. The state regulation also mirrors the federal regulation at 34 C.F.R. § 300.10. Given the recent legislative amendment to 14 Del. C. § 3101, however, the Department will revise its state regulation defining “FAPE” to include the statements in subsections (5)(e) and (5)(f) of § 3103. The Department considers the change an amendment to its existing regulation to allow consistency with recent changes to the Delaware Code.

7. Council Comment

In §3.0, the definition of “Services Plan” is difficult to follow and could benefit from a review of grammar.

DOE Response

The Department has taken the Council’s comment into consideration and declines to revise the regulation as suggested. The definition of “Services Plan” in 14 DE Admin Code § 922.3.0 was not identified for revision by the Department in the January 1st Register of Regulations. In addition, the state regulation mirrors the federal regulation at 34 C.F.R. § 300.37.

8. Council Comment

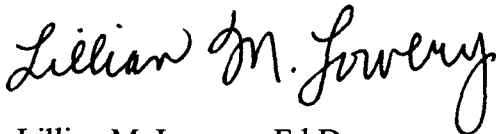
In §3.0, the definition of “Consent” omits the FERPA requirements of dating and recitation of purpose of disclosure for consent to disclosure of records. Compare 34 C.F.R. §99.30.

DOE Response

The Department has taken the Council’s comment into consideration and declines to revise the regulation as suggested. The definition of “Consent” in 14 DE Admin Code § 922.3.0 mirrors the federal regulation at 34 C.F.R. § 300.9. The Family Educational Rights to Privacy Act (“FERPA”) applies specifically to the disclosure of educational records to third parties. The parental consent provisions in the state and federal regulations implementing the IDEA apply to a broader range of activities for which parental consent is required, such as the initial provision of special education services and the evaluation or reevaluation of a child. Similar to its federal counterpart, the state regulation requires parents be “fully informed of information relevant to the activity for which consent is sought”.

The Department appreciates the Council’s time and suggestions.

Sincerely,



Lillian M. Lowery, Ed.D.
Secretary of Education

LL:MTJK:jp

cc: Dr. Teri Quinn Gray, President, State Board of Education
Dr. Susan Keene Haberstroh, DOE
Dr. Linda Rogers, DOE
Martha Toomey, DOE
Jennifer Kline, DOE
Charlie Michels, DOE

Paula Fontello, Deputy Attorney General
John Hindman, Deputy Attorney General
Catherine T. Hickey, Deputy Attorney General
Brian Hartman, Disabilities Law Program
Developmental Disabilities Council
Governor’s Advisory Council for Exceptional Citizens

Brian J. Hartman

From: Wendy Strauss [wstrauss@gacec.k12.de.us]
Sent: Monday, May 16, 2011 3:34 PM
To: Brian J. Hartman
Subject: FW:

Importance: High

-----Original Message-----

From: Toomey Martha [mailto:mtoomey@DOE.K12.DE.US]
Sent: Sunday, May 15, 2011 2:08 PM
To: Strauss Wendy
Subject:

Wendy,

Here is my DOE report. If you have any questions let me know. I will be out of state but will have my blackberry with me.

Proposed regulations for the "900" series will be posted for public comment in June. These include some of the regulations we did not change during the last round because we agreed with comments received from GACEC and believed that the changes were substantive and therefore required another 60 day public comment period. This included, for example, changing the timing for beginning transition planning to an earlier time so that, for example, planning could include applying for a vocational technical school.

The other change incorporated into the proposed regulations is the change for secondary disability. The ability to identify a secondary disability through "e school" the state data collection system has always remained although the second disability did not appear on the IEP. Brian Touchette is working with the IEP plus system so that this data can now appear on the first page of the IEP and will be incorporated the next time changes are made.

* Another proposed regulatory change made is changing cognitive disability to intellectual disability. Language was changed to mild, moderate and severe intellectual disability. A note was added as was done with some other disability language as suggested by Brian Hartman that these terms have the same meaning as cognitive disability as used in code.

Thanks to GACEC members for comments regarding Section 928 for needs based funding. There were changes incorporated which included reference to the statute as well as incorporating more language from the statute.

The proposed regulations should be posted in June.

The annual IDEA application for funding was submitted May 10. The proposed use of funds, as always, can be found on our website.