



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. 1295 [DOE Proposed Procedural Safeguards 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, Procedural Safeguards for Parents with Children*. The proposed regulation was published as 14 DE Reg. 1295 in the June 1, 2011 issue of the Register of Regulations. As background, the SCPD commented on a set of DOE special education procedural safeguards regulations in January 2011. The DOE issued final regulations in March while deferring an amendment on disciplinary notices pending further study [14 DE Reg. 1065 (March 1, 2011)(final)]. The Department is now issuing a regulation which addresses the Council's concern about the time frame for parental notice of a disciplinary removal. The Council's original commentary and DOE response are contained in the attached March 10, 2011 DOE letter to the SCPD, page 2. The Council shared the following perspective:

Section 3.1.3 shortens the time period for providing notice to a parent of a disciplinary removal constituting a change in placement from 3 school days before the public agency proposes to change the child's placement to 3 school days before the change in placement. The relevant federal regulation [34 C.F.R. 300.530(h)] contemplates provision of notice to the parent when the decision is made to make a removal. This equates more closely to the "proposal" date. Moreover, both the existing and proposed timeframes are ostensibly inconsistent with the "reasonable time" benchmark in 34 C.F.R. 300.503 and Title 14 Del.C. §3133. As a practical matter, if a school mails a notice to a parent, it could easily take a few days simply to reach the parent. In computing time, the court systems anticipate that mailing takes at least 3 days:

Additional time after service by mail. - Whenever a party has the right to or is required to do some act or take some proceeding within a prescribed period after being served and service is by mail, 3 days shall be added to the prescribed period.

Superior Court Civil Rule 6(e). If a child is to be excluded from his home school, the parent needs time to react (e.g. provide employer notice of need for vacation; consult attorney).

The current proposal would extend the time period for parental notice of a disciplinary removal from a minimum of 3 school days before actual change in placement to 5 school days before proposing the change in placement:

3.1.3. In cases involving a change in placement for a disciplinary removal, written notice shall be provided no less than ~~three (3)~~ five (5) school days before the public agency proposes to change the child's placement.

SCPD prefers application of the standard ten (10) school day notice in all contexts, including discipline. See attached 14 DE Admin Code Part 926, §3.1. To the extent the DOE opts to adopt a different timeframe, SCPD supports the proposed regulation which represents a significant improvement over the current standard.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our position 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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3/29/11 emailed to DM-P/BH



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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 § 926, Children with Disabilities
(Procedural Safeguards for Parents and Children)

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

1. Council Comment

First, §1.4.3, last sentence, states that "...the public agency shall have a record of its attempt to ensure their involvement." Council recommends that an 's' be added to change "attempt" to "attempts" indicating that more than one attempt has been made to ensure parental involvement. Council feels that more than one attempt should be made to contact parents.

DOE Response

The Department has taken the Council's comment into consideration and declines to revise the regulation as suggested. Section § 1.4.3 was not identified for revision by the Department in the January 1st Register of Regulations. Section 1.4.3 also mirrors the language in the federal regulation at 34 C.F.R. § 300.501(c)(4). In addition, the regulations require public agencies to

make multiple attempts to ensure parent participation at IEP meetings and to maintain a record of such attempts, to include phone calls, home visits, and correspondence. See, 34 C.F.R § 300.322 and 14 DE Admin Code § 925.22.0.

2. Council Comment

Second, §3.1.3 shortens the time period for providing notice to a parent of a disciplinary removal constituting a change in placement from three school days before the public agency proposes to change the child's placement to three school days before the change in placement. The relevant federal regulation [34 C.F.R. 300.530(h)] contemplates provision of notice to the parent when the decision is made to make a removal. This equates more closely to the "proposal" date. Moreover, both the existing and proposed timeframes are ostensibly inconsistent with the "reasonable time" benchmark in 34 C.F.R. 300.503 and Title 14 Del.C. §3133. As a practical matter, if a school mails a notice to a parent, it could easily take a few days simply to reach the parent. In computing time, the court systems anticipate that mailing takes at least three days:

Additional time after service by mail. - Whenever a party has the right to or is required to do some act or take some proceeding within a prescribed period after being served and service is by mail, 3 days shall be added to the prescribed period.

Superior Court Civil Rule 6(e). If a child is to be excluded from his home school, the parent needs time to react (e.g. provide employer notice of need for vacation; consult attorney).

DOE Response

The Department proposed a revision to § 3.1.3 to clarify when prior written notice must be provided to parents for changes of placement related to discipline. As the Council mentions, the federal regulation and 14 *Del. C.* § 3133 require written notice to be provided "a reasonable time" before a public agency proposes to change the placement of a child with a disability. The Department adopted a general standard requiring 10 business days prior notice for most actions, and 3 business days prior notice for changes of placement due to disciplinary reasons. The Council suggests that 3 business days prior notice is inconsistent with the "reasonable time" period referenced in 34 C.F.R. § 300.503(a) and 14 *Del. C.* § 3133.

The Department has taken the Council's comments into consideration. The Department agrees to defer a revision to § 3.1.3 and will research the Council's comments further.

3. Council Comment

Third, in §11.0, it would be preferable to at least cross reference the new requirements in Title 14 Del.C. §3110(d) mandated by House Bill No. 387. The DOE issued a pre-publication draft implementing regulation on December 21. The same observation applies to §16.0. A district cannot file a civil action under this section without an affirmative vote of the local board.

DOE Response

The Department has taken the Council's comment into consideration and declines to revise the regulation as suggested. The Department adopted §§ 11.0 and 16.0 to primarily incorporate the provisions in federal regulations related to procedural safeguards and due process hearings. The Department's regulations addressing the duties of local school boards and individual members are addressed in a separate section of the administrative code.

4. Council Comment

Fourth, §12.1.1 is not very instructive. It would be preferable to include a note or other reference to the Delaware Supreme Court's *Arons* decision. Otherwise, the "cryptic" reference to "determined by State law" provides parents with no guidance even though the Delaware law is clear.

DOE Response

The Department has taken the Council's comments into consideration and declines to revise the regulation as suggested. The *Arons* decision involved a decision of the Delaware Supreme Court to affirm a decision of the Board on the Unauthorized Practice of Law concerning representation by lay advocates at special education due process hearings. The Department prefers not to reference a specific judicial decision in its agency regulations. However, the Department references the *Arons* decision on page 11 of its "Due Process Hearing Procedures" manual provided to parents, districts, and charter schools upon the filing of a due process complaint. The proposed revision also mirrors the current federal regulation at 34 C.F.R. § 300.512.

5. Council Comment

Fifth, in §30.2, some words are missing at the end. Council believes the reference should be to "...change of placement pursuant to 36.0".

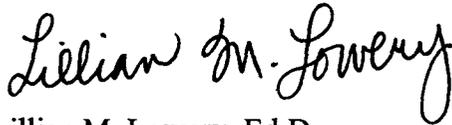
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DOE Response

The Department agrees with the Council's suggestion, and will revise the regulation to correct this technical error. The regulation should mirror the federal regulation at 34 C.F.R. 300. § 530(b)(1) and state "change of placement under 36.0".

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
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Paula Fontello, Deputy Attorney General
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Brian Hartman, Disabilities Law Program
Developmental Disabilities Council
Governor's Advisory Council for Exceptional Citizens

of the evaluation shall be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and may be presented by any party as evidence at a hearing on a due process complaint under 14 DE Admin. Code 926 regarding that child.

2.8 Requests for evaluations by hearing officers. If a hearing panel or a single hearing officer appointed for expedited appeals under 32.0 requests an independent educational evaluation as part of a hearing on a due process complaint, the cost of the evaluation shall be at public expense.

2.9 Agency criteria: If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, shall be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.

2.10 Except for the criteria described in 2.9, a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

(Authority: 20 U.S.C. 1415(b)(1) and (d)(2)(A); 14 Del.C. §3110)

3.0 Prior Notice by the Public Agency: Content of Notice

* 3.1 Notice: Written notice that meets the requirements of 3.2 shall be given to the parents of a child with a disability no less than ten (10) school days before the public agency:

3.1.1 Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or

3.1.2 Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; and

3.1.3 *In cases involving a change of placement for a disciplinary removal, written notice shall be provided no less than ~~three (3)~~ five (5) school days before the public agency proposes to change the child's placement.*

3.2 Content of notice: The notice required in 3.1 shall include:

3.2.1 A description of the action proposed or refused by the agency; and

3.2.2 An explanation of why the agency proposes or refuses to take the action; and

3.2.3 A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; and

3.2.4 A statement that the parents of a child with a disability have protection under the procedural safeguards of these regulations and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and

3.2.5 Sources for parents to contact to obtain assistance in understanding the provisions of these regulations; and

3.2.6 A description of any other options the IEP Team considered and the reasons why those options were rejected; and

3.2.7 A description of other factors which are relevant to the agency's proposal or refusal; and

3.2.8 *A full explanation of all the procedural safeguards available to the parents.*

3.3 Notice in understandable language: The notice required in 3.1 shall be:

3.3.1 Written in language understandable to the general public; and

3.3.2 Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

3.4 If the native language or other mode of communication of the parent is not a written language, the public agency shall take steps to ensure that:

3.4.1 The notice is translated orally or by other means to the parent in his or her native language or other mode of communication; and

3.4.2 The parent understands the content of the notice; and

3.4.3 There is written evidence that the requirements in 3.4.1 and 3.4.2 have been met.

(Authority: 20 U.S.C. 1415(b)(3) and (4), 1415(c)(1), 1414(b)(1)); 14 Del.C. §3110)

14 DE Reg. 1065 (04/01/11)

4.0 Procedural Safeguards Notice