



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES

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June 25, 2014

Ms. Susan K. Haberstroh, Associate Secretary
Education Supports & Innovative Practices Branch
Department of Education
35 Commerce Way – Suite 1
Dover, DE 19904

RE: DOE Proposed Limitations on Use of Seclusion & Restraint Regulation [17 DE
Reg. 1133 (6/1/14)]

Dear Ms. Haberstroh:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposal to amend Title 14 of the Delaware Administrative Code by adopting a new *Limitations on Use of Seclusion and Restraint* regulation. The proposed regulation was published as 17 DE Reg. 1133 in the June 1, 2014 issue of the Register of Regulations. SCPD submitted comments on an initial, pre-publication version of this regulation on May 8 2014 (attached). SCPD has the following observations which includes references to the previous SCPD commentary by number.

First, consistent with earlier Comment #1, §1.1 omits any reference to "chemical" restraint. Compare §2.0, definition of "chemical restraint"; and §3.1.1. The first sentence could be amended as follows: "The purpose...physical restraint, chemical restraint, mechanical restraint..."

Second, consistent with earlier Comment #2, add a reference to 14 Del.C. §3110.

Third, consistent with earlier Comment §5, in §2.0, definition of "mechanical restraint", second bullet, insert "or" between "movement" and "stability".

Fourth, in §3.2.9, strike "; and" and substitute a period.

Fifth, consistent with earlier Comment #11, the training standards in §4.1 are too weak. The reference to "nationally recognized training programs" is an insufficient standard. The term "approved by the Department" should be inserted after "programs". Compare 14 DE Admin Code 910 (DOE must approve alternatives to GED testing).

Sixth, in §6.1.2, first line, convert "Written" to low case. Compare §6.1.3.

Seventh, consistent with earlier Comment #22, insert "duration" of restraint. This is a very important component of a restraint, i.e., did it last 5 minutes or an hour. Compare §8.3.3 and Title 16 Del.C. §5162(a).

Eighth, in §8.1.2.1, delete the word “and” at the end.

Ninth, in §8.2, the 60 day period for the review committee to issue a decision would be followed by a review period for the Secretary to “consider the whole record of the case and the committee’s recommendations” (§8.4) followed by mailing of a decision. If a student is manifesting extreme behaviors during this period, a quicker review may be in everyone’s interests. At a minimum, consider the following revision to §8.2: “All requests.....shall be rendered as soon as practicable but in no event more than 60 days from receipt of the waiver request.”

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.

Sincerely,



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

cc: The Honorable Mark Murphy, Secretary of Education
Mr. Chris Kenton, Professional Standards Board
Dr. Teri Quinn Gray, State Board of Education
Ms. Mary Ann Mieczkowski
Ms. Paula Fontello, Esq.
Ms. Terry Hickey, Esq.
Ms. Ilona Kirshon, Esq.
Mr. Brian Hartman, Esq.
Developmental Disabilities Council
Governor’s Advisory Council for Exceptional Citizens

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May 8, 2014

Ms. Susan K. Haberstroh, Ed.D.
Department of Education
35 Commerce Way – Suite 1
Dover, DE 19904

RE: DOE Pre-Publication Draft Regulation on Restraints and Seclusion (April 7, 2014)

Dear Ms. Haberstroh:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) pre-publication draft regulation on restraints and seclusion. SCPD certainly appreciates the opportunity to review this prepublication draft and has the following observations.

1. In §1.0, the first sentence is "underinclusive" since the regulation a) establishes standards for chemical and mechanical restraint; b) addresses parental notice and due process; and c) addresses data collection and reporting. Council recommends substituting the following: "The purpose of these regulations is to implement state law and federal guidance concerning the use of seclusion and restraint by public school personnel." The reference to "federal guidance" would encompass the U.S. DOE Restraint and Seclusion: Resource Document (May, 2012) as well as other policy interpretations.
2. In §2.0, consider an amendment to read "...in accordance with 14 Del..C. §4112F and 14 Del.C. §3110." There are many "special education" aspects to the regulations and it is preferable to base the regulations on both the authority in §4112F and §3110.
3. Council suggests inserting the following preface to §3.0: "The following words and terms, when used in this regulation, shall have the following meaning unless the context clearly indicates otherwise." See Delaware Administrative Code Drafting and Style Manual [hereinafter "Manual"], §3.1.2.
4. In §3.0, the definitions of "mechanical restraint", "physical restraint", and "public school personnel" have subparts. Council recommends not capitalizing the first word in each subpart. The Manual (§3.1.2) offers the following guidance:

Uppercase the first letter of the first word in each definition. All subsequent words in each definition should be lowercase, unless words are proper nouns.

In the same sections, although the Manual (§3.1.2.1) recites that individual definitions are not numbered, the subparts would benefit from some numbers or letters to make it easier to read. Compare 14 DE Admin Code 103, §1.2, definition of "persistently low achieving school"; and 14 DE Admin Code 614, §3.0, definition of "bullying".
5. In §3.0, definition of "mechanical restraint", insert "or" between "movement" or "stability".

6. In §3.0, definition of "private program", consider the following amendment - "...a school district or charter school, including, without limitation, a private alternative program or a setting approved pursuant to 14 Del.C. §3124. This would explicitly clarify that the definition covers Interagency Collaborative Treatment Team (ICT)-approved placements and private "alternative programs". The amendment would also facilitate appropriate references in §7.1.2.
7. In §3.0, definition of "written report", substitute "means" for "includes".
8. In §4.2.3, substitute "neck" for "heck".
9. Section §4.2.10 copies the statute. It is confusing to recite that the restraint will conform to applicable regulations when these are the regulations. Consider substituting the following: "The physical restraint and consequent activity conform to §§5.0 - 9.0." This would encompass parental reporting, student interview, and reporting to DOE.
10. In §5.1, the term "employee" may be overly limiting since it would exclude a contractual worker (e.g. physical therapist). Likewise, the term "public school employee" would not cover private placement personnel. Compare §3.0, definition of "public school personnel". In §5.1, Council recommends substituting "public school or private program personnel who have..." for "a public school employee who has...".
11. In §5.1.1, for consistency with §5.1, Council recommends deleting the words "public school". Also, the reference to "nationally-recognized training program" is too weak a standard. There may be some "nationally recognized" programs which are used in adult or juvenile corrections or Judge Rotenberg-type settings. Council recommends the following substitute: "Such ~~public school~~ personnel shall receive annual training in the use of emergency safety interventions consistent with a nationally-recognized training programs approved by the Department which meets the following minimum requirements:". By comparison, Council would like to point out that §5.2 includes a requirement of reporting personnel completion of "training approved by the Department". Council has been informed that programs may differ widely in emphasis. For example, one program may devote 70% of time to restraint techniques and 30% of time to de-escalation and positive behavioral techniques. Another program may "reverse" this emphasis, i.e, devoting 70% of time to de-escalation and positive behavior techniques and 30% of time to restraint techniques.
12. In §5.1.1.2, substitute "public school or private program personnel" for "public school employees".
13. In §5.1.2, substitute "personnel" for "each public school employee".
14. Section 5.0 could be improved by including the concept of demonstration of competency rather than simply participation in the training. Some programs have "certifications" based on assessment of competency.
15. Section 6.1 could be improved by adding the following second sentence: "The school shall maintain written documentation of successful and unsuccessful attempts to notify a parent." Parenthetically, since many children are enrolled by guardians, custodians, and relative caregivers, it would be preferable to include a definition of "parent" in §3.0 to encompass such parental surrogates. See Title 14 Del.C. §§3101(7) and 202(e).
16. The text of §6.2.1 could be simply included as a second sentence in §6.2.
17. Amend §6.3 as follows: "...student's IEP or §504 plan, the parents and IEP or multidisciplinary team shall determine....".
18. In §7.1.1, consider substituting "public school or private program personnel" for "public school personnel".

19. In §7.1.2, if the DOE adopts the amendment suggested in Par. 6 above, the term “contracted private or alternative program” could be shortened to “contracted private program”.
20. In §7.0, it would be preferable for the DOE to require submission of the report based on a uniform format/form. Otherwise, schools will be providing an assortment of information to the DOE which will be difficult to aggregate into statistics for the DOE annual report. Section 7.1.3.1 already contains an outline of expected content which could be used to develop a standard form. Senate Bill No. 100 (lines 114-115) contemplates adoption of a “uniform reporting document”.
21. In §7.1.2, the DOE envisions private programs reporting to the public contracting school which then submits the report to the DOE. The DOE should consider an alternative, i.e., the private program could submit the report directly to both the contracting public school and DOE. This requirement could be included in the standard “boilerplate” for students placed through the ICT or placed in private alternative schools. This would reduce delayed submissions to the DOE.
22. Section 7.1.3.1 omits the “duration” of the physical restraint which would be useful information.
23. Section 7.1.3.2 requires reports to include information on age, race, ethnicity and disability category. Consistent with the recommendation in Par. 20, it would be preferable to have a standard form with uniform terms. Some schools will report race and ethnicity differently which will complicate DOE aggregation of data for its annual report. Moreover, the DOE should review the Office of Civil Rights (OCR) Civil Rights Data Collection so the data submitted to OCR and the DOE are based on the same definitions and schools can have a single data collection system for both the federal and state DOE. It would be dysfunctional to have schools reporting data to OCR and the DOE which adopt different definitions and criteria. The U.S. DOE Restraint and Seclusion: Resource Document (May, 2012) notes that OCR compiles seclusion/restraint data disaggregated based on race/ethnicity, sex, limited English proficiency status, and disability. At p. 5. Since schools are reporting data to OCR which includes limited English proficiency status, the DOE should also consider adding this data to reporting requirements.
24. Section 7.1.3.4.1 omits some “plans” covered by Senate Bill No. 100 (lines 92-94).
25. Sections 7.1.3.4.1 and 7.1.3.4.2 use the term “and/or”. The Manual (§6.6.1) recites that this term “should never be used.”
26. Section 8.1 should simply be the text of §8.0. Since there is no §8.2, there is no need for a §8.1.
27. Apart from renumbering, §8.1 is “underinclusive” since it refers to “LEA”. It also omits some key concepts, including “rates of usage by individual school (not LEA), identification of trends, and analysis of significant results.” These annual report components are not discretionary. They are mandatory. See Senate Bill No. 100 (lines 116-118).
28. In §9.1, substitute “or” for “and/or”. See Manual, §6.6.1. Delete “review of” which is surplusage. Substitute “Secretary’s” for “his/her”. See Manual, §3.3.2.1. Substitute “request” for “action”.
29. Section 9.1.1 is very confusing. It literally characterizes educational records, behavioral plans, etc. as “medical” documentation. The sentence is very complicated and difficult to follow.
30. In §9.0, it would be preferable for the DOE to develop a form for submission of a waiver since this would promote inclusion of all information considered necessary for review.
31. In §9.1.2.2, the reference to “consistent with Section 6.0” is problematic since §6.0 does not cover mechanical restraint or seclusion. Substitute “which conforms to the procedure compiled in Section 6.0 for reporting physical restraint” for “consistent with Section 6.0”.

32. In §9.1.3, substitute "or" for "and/or". See Manual, §6.6.1. If the DOE adopts a definition of "parent" as recommended in Par. 15, the reference to "or guardian" could be deleted. Substitute "Department" for "committee" since the Secretary and designee will be reviewing confidential information and are not members of the committee. This approach is also consistent with §9.1.4 which refers to maintenance of confidentiality by the "Department".

33. Section 9.2, the committee that is appointed by the Secretary of the Department of Education should include a representative from the Governor's Advisory Council for Exceptional Citizens (GACEC).

34. Section 9.3 would benefit from adding a subsection covering "specific conditions and safeguards". See Senate Bill No. 100 (line121). For example, the committee might recommend: a) durational limits; b) approval of only certain forms of mechanical restraint; or c) use of seclusion or restraint only after other interventions (e.g. redirection; positive engagement) have failed.

35. Section 9.3 would benefit from a requirement of a student interview equivalent to the post-physical restraint interview envisioned by §7.1.3.3.

36. Section 9.3 would benefit from a subsection addressing the committee's recommendation on data collection. The committee could insist on data collection on antecedents, frequency, duration, etc.

37. In §9.4, substitute "a" for "his or her". See Manual, §3.3.2.1.

38. In §9.4, the capitalization of "Committee's" is inconsistent with prior lowercase references to "committee".

39. In §9.4, it would be preferable to contemporaneously send a copy of the Secretary's decision to the parent.

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 Mark Murphy, Secretary of Education
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