May 25, 2016

Ms. Tina Shockley, Education Associate
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

RE: 19 DE Reg. 967 [DOE Proposed “Emotional Disability” Regulation (5/1/16)]

Dear Ms. Shockley:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education’s (DOE’s) proposal to adopt a discrete change to the “definitions” section of its IDEA regulations. In a nutshell, it is substituting “emotional disability” for “emotional disturbance.” The proposed regulation was published as 19 DE Reg. 967 in the May 1, 2016 issue of the Register of Regulations. SCPD endorses the proposed regulations and has the following observations.

The current reference to “emotional disturbance” is based on the federal IDEA regulation, 34 C.F.R. §300.8. In adopting regulations in 2006, the U.S. Department of Education provided some background on the term which it noted has remained unchanged since 1977. See attached 71 Fed Reg 46550 (August 14, 2006). The term “disability” is arguably less pejorative than “disturbance” since “disturbance” has a more “negative” connotation than “disability.” Colloquially, characterizing someone as “disturbed” is generally viewed as derisive or ridiculing.

At least one other state, Virginia, has ostensibly adopted “emotional disability” in its IDEA regulations. See attachment. The Delaware DOE indicates that it views the terms “emotional disturbance” and “emotional disability” as “equivalent.” At 969.

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

Sincerely,

[Signature]
Danise Mc Mullin-Powell, Chairperson
State Council for Persons with Disabilities
cc: The Honorable Steven Godowsky, Ed.D, Secretary of Education
Mr. Chris Kenton, Professional Standards Board
Dr. Teri Quinn Gray, State Board of Education
Ms. Mary Ann Mieczkowski, Department of Education
Ms. Laura Makransky, Esq., Department of Justice
Ms. Terry Hickey, Esq., Department of Justice
Ms. Valerie Dunkle, Esq., Department of Justice
Mr. Brian Hartman, Esq.
Developmental Disabilities Council
Governor’s Advisory Council for Exceptional Citizens

19reg967 “emotional disability” 5-1-16
many children with autism are
inappropriately placed in alternative
educational programs designed for
children with serious emotional and
behavioral problems.

Discussion: Historically, it has been
ever so difficult for the field to come to
consensus on the definition of
emotion disturbance, which has
remained unchanged since 1977. On
February 16, 1993, the Department
published a ‘‘Notice of Inquiry’’ in the
Federal Register (58 FR 7238) soliciting
comments on the existing definition of
serious emotional disturbance. The
comments received in response to the
notice of inquiry expressed a wide range
of opinions and no consensus on the
definition was reached. Given the lack of
consensus and the fact that Congress
did not make any changes that required
changing the definition, the Department
recommended that the definition of
emotional disturbance remain
unchanged. We reviewed the Act and
the comments received in response to
the NPRM and have come to the same
conclusion. Therefore, we decline to
make any changes to the definition of
emotion disturbance.

Changes: None.

Comment: One commenter suggested
that the regulations include a process to
identify children who are at risk for
having an emotional disturbance.

Discussion: We decline to include a
process to identify children who are at
risk for having an emotional
disturbance. A child who is at risk for
having any disability under the Act is
not considered a child with a disability
under § 300.8 and section 602(3) of the
Act and, therefore, is not eligible for
services under the Act.

Changes: None.

We do not believe the definition of
mental retardation needs to be changed
because it is defined broadly enough in
§ 300.8(c)(6) to include a child’s
functional limitations in specific life
areas, as requested by the commenter.

Discussion: There is nothing in the Act or these
regulations that would prevent a State
from including ‘‘functional limitations in
specific life areas’’ in a State’s
definition of mental retardation, as long
as the State’s definition is consistent
with these regulations.

Changes: None.

Multiple Disabilities (§ 300.8(c)(7))

Comment: One commenter asked why
the category of multiple disabilities is
included in the regulations when it is
not in the Act.

Discussion: The definition of multiple
disabilities has been in the regulations
since 1977 and does not expand
equality beyond what is provided for
in the Act. The definition helps ensure that
children with more than one
disability are counted more than once
for the annual report of children
served because States do not have to
determine if a child has two or more disability
categories in which to count a child
with multiple disabilities.

Changes: None.

Orthopedic Impairment (§ 300.8(e)(6))

Comment: One commenter requested
that the examples of congenital
anomalies in the definition of
orthopedic impairment in current
§ 300.8(c)(8) be retained.

Discussion: The examples of
congenital anomalies in current
§ 300.8(c)(8) are outdated and
discouraged to understand the meaning
of orthopedic impairment. We,
therefore, decline to include the
effects in § 300.8(c)(8).

Changes: None.

Other Health Impairment (§ 300.8(c)(9))

Comment: We received a significant
number of comments requesting that we add
other examples of specific acute or
chronic health conditions in the
definition of other health impairment. A
few commenters recommended including
children with dysphagia because these children have a
swallowing and feeding disorder that effects a child’s vitality and alertness
due to limitations in nutritional intake.

Other commenters recommended including FAS, bipolar disorders, and
organic neurological disorders.

Numerous commenters requested
including Tourette syndrome disruptors
in the definition of other health impairment because children with
Tourette syndrome are frequently
misclassified as emotionally disturbed.

A number of commenters state that
Tourette syndrome is a neurological
disorder and not an emotional disorder,
yet children with Tourette syndrome
continue to be viewed as having a
behavioral or conduct disorder and,
therefore, do not receive appropriate
special education and related services.

Discussion: The list of acute or
chronic health conditions in the
definition of other health impairment is
not exhaustive, but rather provides
examples of problems that children
have that could make them eligible for
special education and related services
under the categories of other health
impairment. We decline to include
dysphagia, FAS, bipolar disorders, and
other organic neurological disorders in
the definition of other health
impairment because these conditions
are commonly understood to be health
impairments. However, we do believe that
Tourette syndrome is commonly
understood to be a behavioral or
emotional condition, rather than a
neurological condition. Therefore,
including Tourette syndrome in the
definition of other health impairment may help correct the misperception of
Tourette syndrome as a behavioral or
cognitive disorder and prevent the
misdiagnosis of their needs.

Changes: We have added Tourette
syndrome as an example of an acute or
chronic health problem in
§ 300.8(c)(9).

Comment: A few commenters
expressed concern about determining a
child’s eligibility for special education
services under the category of other
health impairment based on conditions
that are not medically determined
health problems, such as ‘‘auditory processing disorders’’ or
‘‘sensory integration disorders.’’ One
commenter recommended that the
regulations clarify that ‘‘chronic or acute
health problems’’ refer to health
problems that are universally
recognized by professionals.

Discussion: We cannot make the
change requested by the commenters.

The determination of whether a child is
eligible to receive special education and
related services is made by the team of
qualified professionals and the parent of
the child, consistent with
§ 300.300(5) and section 614(b)(4) of
the Act. The team of qualified
professionals and the parent of the child
must base their decision on careful
consideration of information from a
variety of sources, consistent with
§ 300.300(c). There is nothing in the Act
that requires the team of qualified
professionals and the parent to consider
only health problems that are...
CO: The Honorable Steven Godowsky, Ed.D, Secretary of Education
     Mr. Chris Kenton, Professional Standards Board
     Dr. Teri Quinn Gray, State Board of Education
     Ms. Mary Ann Mieczkowski, Department of Education
     Ms. Kathleen Geiszler, Esq., Department of Justice
     Ms. Terry Hickey, Esq., Department of Justice
     Ms. Ilona Kirshon, Esq., Department of Justice
     Mr. Brian Hartman, Esq.
     Developmental Disabilities Council
     Governor's Advisory Council for Exceptional Citizens
It is common for the terms emotional disturbance or disability and behavioral disorder to be used interchangeably. The federal and state regulations define emotional disability as:

...a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance:

- An inability to learn which cannot be explained by intellectual, sensory, or health factors;
- An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- Inappropriate types of behavior or feelings under normal circumstances;
- A general pervasive mood of unhappiness or depression; or
- A tendency to develop physical symptoms or fears associated with personal or school problems.

The term includes children who are schizophrenic, but does not include children who are socially maladjusted unless it is determined that they are emotionally disturbed.

In considering students as having an emotional disability the multidisciplinary team must answer if the behaviors have existed over a long period of time, not just on occasion or for a short period of time; and to a serious degree, that interferes with their learning. Identification of students with emotional disability may, like other disabilities span a range from mild to moderate or severe.

Professionals agree that working with students identified with an emotional disability requires systematic educational programming and support.

Resources

Better Serving Students with Emotional Disabilities: A Virginia Plan, August 23, 2010

- Emotional Disabilities Summit Information
  - Summit Proceedings (PDF)
  - Evidence-based Practices and References (PDF)
  - Presentation - Robert Gable and Stephen Tonelson (PDF)
  - Presentation - Richard Van Acker (PDF)
- Functional Behavioral Assessment (FBA) Guidelines (PDF)
- Appendix A Forms:
  - Functional Assessment Checklist for Teachers and Staff (FACTS-Part A) (PDF)
  - Functional Behavioral Assessment Interview Forms (PDF)
  - ABC Observation Form and Functional Assessment Scatterplot (PDF)
  - Problem Behavior Questionnaire (PDF)
- Guidelines for the Development of Policies and Procedures for Managing Student Behaviors In Emergency Situations in Virginia Public Schools (PDF)

http://www.doe.virginia.gov/special_ed/disabilities/emotion_disability/
Outside Resources

- Federal Agencies
  - The U.S. Department of Education’s Office of Special Education Programs
  - A Guide to the Individualized Education Program (USED)
  - Special Education and Rehabilitative Services (OSERS)
  - Office for Civil Rights

- State Agencies
  - Virginia Department of Behavioral Health and Developmental Services
  - Old Dominion University Effective Schoolwide Discipline
  - TTAC Online – A community linking people and resources to help children and youth with disabilities.