



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
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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,

Daniese McMullin-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 very difficult for the field to come to consensus on the definition of *emotional disturbance*, which has remained unchanged since 1977. On February 10, 1993, the Department published a "Notice of Inquiry" in the Federal Register (58 FR 7938) 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 *emotional 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.

Mental Retardation (§ 300.8(c)(6))

Comment: One commenter suggested using the term "intellectual disability" in place of "mental retardation" because "intellectual disability" is a more acceptable term. The commenter also stated that the definition of *mental retardation* is outdated, and should, instead, address a child's functional limitations in specific life areas.

Discussion: Section 602(3)(A) of the Act refers to a "child with mental retardation," not a "child with intellectual disabilities," and we do not see a compelling reason to change the term. However, States are free to use a different term to refer to a child with mental retardation, as long as all children who would be eligible for special education and related services under the Federal definition of *mental retardation* receive FAPE.

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. 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 eligibility beyond what is provided for in the Act. The definition helps ensure that children with more than one disability are not counted more than once for the annual report of children served because States do not have to decide among two or more disability categories in which to count a child with multiple disabilities.

Changes: None.

Orthopedic Impairment (§ 300.8(c)(8))

Comment: One commenter requested that the examples of congenital anomalies in the definition of *orthopedic impairment* in current § 300.7(c)(8) be retained.

Discussion: The examples of congenital anomalies in current § 300.7(c)(8) are outdated and unnecessary to understand the meaning of *orthopedic impairment*. We, therefore, decline to include the examples 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 include 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 affects 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 disorders in the definition of *other health impairment* because children with Tourette syndrome are frequently

misclassified as emotionally disturbed. A number of commenters stated 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 category 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 misunderstood 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 conduct 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)(i).

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 "central 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 the medical profession.

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 a team of qualified professionals and the parent of the child, consistent with § 300.306(a)(1) 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 § 300.306(c). There is nothing in the Act that requires the team of qualified professionals and the parent to consider only health problems that are

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Developmental Disabilities Council
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SPECIFIC DISABILITIES

EMOTIONAL DISABILITY

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)

- [Guidance Document on Manifestation Determination](#) (PDF)
 - [Training & Technical Assistance Centers](#) (TTAC)
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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.

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