



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
Margaret M. O'Neill Bldg., Suite 1, Room 311
410 Federal Street
Dover, Delaware 19901
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The Honorable John Carney
Governor

John McNeal
SCPD Director

September 28, 2017

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

RE: 21 DE Reg. 176 [Proposed Foster Care Student Placement (9/1/17)]

Dear Ms. Haberstroh:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposed regulation to implement the attached S.B. No. 87 which was effective July 21, 2017. As the synopsis indicates, the legislation was motivated by changes in federal law. In a nutshell, students in the custody of DSCY&F are entitled to remain in their school of origin unless a decision is reached that such placement is not in the student's "best interest". The legislation requires the Department of Education to issue regulations defining the process for making the "best interest" determination. This proposed regulation was published as 20 DE Reg. 176 in the September 1, 2017 issue of the Register of Regulations.

The SCPD has the following observations.

First, the attached federal law [20 USC §6311] requires the "best interest" determination to specifically include consideration of "the appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement." These considerations should be explicitly included in the DOE regulation,

Second, there is a major "disconnect" between the regulation and the enabling law. Although a principal impetus for S.B. No. 87 was ostensibly federal law addressing children in foster care, the bill is literally much broader in scope. It is not limited to children in foster care. The text of the bill never mentions foster care. Rather, the bill uniformly refers to "children in the custody of the Department of Services for Children, Youth and Their Families" and applies to any child covered by 13 Del.C. Ch. 25 (lines 11-12). That chapter never mentions foster care and broadly covers a broad range of children in DSCY&F custody. As a result, the title to the regulation ("Students in Foster Care") and all of the references to foster care are much narrower than the enabling law. The DOE was ostensibly under the impression that all students in DSCY&F custody are in foster care. Compare §§4.1.1 and 4.1.2 with §4.1.3. See also §2.0, definitions of "child in DSCY&F custody" and "student in foster care".

Third, the regulation categorically presumes that all children in DSCY&F custody are in DFS custody. Only DFS representatives are involved in the process established by the regulation and only a DFS caseworker is authorized to coordinate the scheduling of the Best Interest Meeting. See, e.g., §2.0, definitions of “DFS”, “DFS Caseworker”; §5.1; and §5.1.2. In fact, there may be no DFS caseworker involved with the child. The Family Court may grant custody of a child to any division of the DSCY&F. Compare Title 10 Del.C. §1009(b)(5) with §1009(b)(7). The DSCY&F Division of Prevention and Behavioral Health Services (DPBHS) may have sole custody of a child.

Fourth, the role of charter schools is unclear. There is a definition of “charter school” in §2.0. However, it is unclear if a charter school can be a “school of origin” (§3.0). A charter school is excluded from consideration as a “school of origin” under §3.1.3 (which refers to “Local School District”) but is not literally excluded from qualifying as a “school of origin” under §§3.1.1 and 3.1.2.

Fifth, the time period (10 working days) to notify the DOE of the inability to schedule a “Best Interest Meeting” is too long. See §4.2. A student covered by §4.1.3 may be receiving no or inappropriate services and the notice to DOE could be a simple email with attachments.

Sixth, the DOE should consider making the parent or educational representative one of the decision-makers at the Best Interest Meeting convened under §5.3. S.B. No. 52 (lines 52-54) indicates that the public representatives are “minimum”. The analogous federal law covering homeless youth prioritizes the views of the parent or unaccompanied youth:

(B) School stability. In determining the best interest of the child or youth under subparagraph (A), the local educational agency shall -

(i) presume that keeping the child or youth in the school of origin is in the child’s or youth’s best interest, except when doing so is contrary to the request of the child’s or youth’s parent or guardian, or (in the case of an unaccompanied youth) the youth;...

42 U.S.C. §11432(g)(3)

Seventh, the regulation does not provide notice of any appeal right. The analogous federal law covering homeless youth authorizes appeals. See 42 U.S.C. §§11432(g)(1) (C) and 11432(g)(3)(B)(E). If the placement decision can be appealed, the regulation should address notice of such right.

We expect that a high percentage of kids in DCYSF custody would be subject to IDEA or Section 504 for protection and therefore the placement decision would be effected protected by the regulations under those laws. Current regulation could be improved by addressing potential conflicts between the identified decision-making system and the decision-making system under 504 and the IDEA.

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

Sincerely,



Jamie Wolfe, Chairperson
State Council for Persons with Disabilities

cc: The Honorable Susan S. Bunting, 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

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Delaware General Assembly (Λ)

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Senate Bill 87

149th General Assembly (Present)

Bill Progress

Current Status:
Signed 7/21/17

What happens next?
Becomes effective upon date of signature of the Governor or upon date specified

Bill Details

Introduced on:
5/22/17

Primary Sponsor:
[Henry \(/LegislatorDetail?personId=227\)](#)

Additional Sponsor(s):
[Sen. Sokola \(/LegislatorDetail?personId=90\)](#)
[Reps. Jaques \(/LegislatorDetail?personId=111\)](#), [M. Smith \(/LegislatorDetail?personId=1051\)](#), [K. Williams \(/LegislatorDetail?personId=199\)](#)

Co-Sponsor(s):
[Sen. Bushweller \(/LegislatorDetail?personId=2\)](#), [Hansen \(/LegislatorDetail?personId=3212\)](#), [Marshall \(/LegislatorDetail?personId=294\)](#), [Townsend \(/LegislatorDetail?personId=13\)](#)
[Reps. Baumbach \(/LegislatorDetail?personId=252\)](#), [Bolden \(/LegislatorDetail?personId=332\)](#), [Lynn \(/LegislatorDetail?personId=317\)](#), [Wilson \(/LegislatorDetail?personId=92\)](#)

Long Title:
AN ACT TO AMEND TITLES 13 AND 14 OF THE DELAWARE CODE RELATING TO PUBLIC SCHOOL ENROLLMENT OF CHILDREN IN THE CUSTODY OF THE DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH AND THEIR FAMILIES.

Original SynopsIs:
This Act updates the school stability law for children in the custody of the Department of Services for Children, Youth and Their Families (DSCYF) following passage of the federal Every Student Succeeds Act (ESSA), which reauthorizes the Elementary and Secondary Education Act (ESEA). ESSA requires Delaware to eliminate the provision "awaiting foster care placement" under § 202(c), Title 14 in accordance with the federal McKinney Vento Homeless Assistance Act by December 10, 2017, and instead create a distinct provision regarding school stability for children in the custody of DSCYF. [42 U.S.C. §§ 11431 to 11435; ESEA section 1111(g)(1)(E)(i)-(iii)], 20 U.S.C. §6311(g)(1)(E)]. This Act clarifies that children in the custody of DSCYF remain entitled to attend their school of origin if it is in their best interests to do so, or are eligible for immediate enrollment in a new school. Sections 1, 2, and 3 of this Act take effect on the effective date of final regulations published in the Register of Regulations and promulgated under authority granted by § 202A(d) of Title 14, which is created by Section 2 of this Act.

Volume Chapter:
81:92

Fiscal Note/Fee Impact:
Not Required

Effective Date:
7/21/17

Bill Text

Original Text:



SPONSOR: Sen. Henry & Sen. Sokola & Rep. Jaques &
Rep. M. Smith & Rep. K. Williams
Sens. Bushweller, Hansen, Marshall, Townsend; Reps.
Baumbach, Bolden, Lynn, Wilson

DELAWARE STATE SENATE
149th GENERAL ASSEMBLY

SENATE BILL NO. 87

AN ACT TO AMEND TITLES 13 AND 14 OF THE DELAWARE CODE RELATING TO PUBLIC SCHOOL ENROLLMENT OF CHILDREN IN THE CUSTODY OF THE DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH AND THEIR FAMILIES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

1 Section 1. Amend § 202, Title 14 of the Delaware Code by making deletions as shown by strikethrough and
2 insertions as shown by underline as follows:

3 § 202. Free schools; ages; attendance within school district; nonresidents of Delaware.

4 (c) Persons attending the public schools of this State shall attend the public schools in the school district within
5 which they reside, except as provided in Chapters 4, 5 and 6 of this title and in Chapter 92, Volume 23, Laws of Delaware,
6 as amended by Chapter 172, Volume 55, Laws of Delaware. Notwithstanding the foregoing, homeless children and
7 unaccompanied youth, as defined by 42 U.S.C. § 11434a, shall attend school in accordance with the McKinney-Vento
8 Homeless Education Assistance Improvement Act [42 U.S.C. §§ 11431 to 11435]; provided any person determined to be
9 ineligible under the act may be denied enrollment. ~~For the purpose of this section and provisions of the McKinney-Vento~~
10 ~~Homeless Education Assistance Improvement Act [42 U.S.C. §§ 11431-11435], the words "awaiting foster care placement"~~
11 ~~include all children in foster care. Children in the custody of the Department of Services for Children, Youth and Their~~
12 Families under Chapter 25 of Title 13 must attend school in accordance with § 202A of this title.

13 (e)(1) For purposes of this section, a student shall be considered a resident of the school district in which that
14 student's parents or legal guardian resides. If the child's parents do not reside together and a court of appropriate jurisdiction
15 has entered a custody order, the child's residency for school attendance purposes shall be determined as follows unless
16 otherwise agreed in a writing signed by both parents:

17 a. In cases in which 1 parent is awarded sole custody, the child shall be considered a resident of the
18 district in which the sole custodian resides.

19 b. In cases in which the parents are granted joint custody, the child shall be considered a resident of the
20 district in which the primary residential parent resides.

21 c. In cases in which the parents are granted shared custody, the child may be considered a resident of
22 either parent's district.

23 Under no circumstances shall a child be enrolled in 2 different schools at the same time.

24 (3) Children under the care or custody of the Department of Services for Children, Youth and Their Families
25 are exempted from the provisions of this subsection. Children in the care and custody of the Department of Services for
26 Children, Youth and Their Families who are in foster care ~~shall attend school in accordance with the McKinney-Vento~~
27 ~~Homeless Education Assistance Improvement Act (42 U.S.C. §§ 11431-11435) under Chapter 25 of Title 13 must~~
28 attend school in accordance with § 202A of this title.

29 Section 2. Amend Subchapter I, Chapter 2, Title 14 of the Delaware Code by making deletions as shown by
30 strikethrough and insertions as shown by underline as follows:

31 § 202A. School enrollment for children in the custody of the Department of Services for Children, Youth and
32 Their Families.

33 (a) For purposes of this section, "school of origin" means any of the following:

34 (1) The school in which the child is enrolled at the time of entry into the custody of the Department of
35 Services for Children, Youth and Their Families (DSCYF).

36 (2) The school in which the child is enrolled at the time of any change in placement while in the custody of
37 DSCYF.

38 (3) The school identified for the next grade level in the same school district where the child in the custody of
39 DSCYF is enrolled.

40 (b)(1) A child in the custody of DSCYF under Chapter 25 of Title 13 must remain in the child's school of origin,
41 unless a determination is made that it is not in the child's best interest to attend such school.

42 (2) If it is determined that it is not in the best interest of a child to remain in the child's school of origin, the
43 child must immediately be enrolled in the child's school of residence based on the current address of the DSCYF
44 custody placement, even if the records or other documents normally required for enrollment are not produced. The
45 school in which the child is enrolled shall immediately contact the child's school of origin to obtain relevant academic
46 and other records.

47 (3) The determination of a child's best interest under this subsection must, at a minimum, be made by a
48 representative of DSCYF, a representative of the child's school of origin, and a representative of the child's school of
49 residence based on the address of the DSCYF custody placement at the time of the determination.

50 (c)(1) If a child leaves the custody of DSCYF, the child must remain in the school in which the child is enrolled
51 through the remainder of the academic year, unless a determination is made that it is not in the child's best interest.

52 (2) The determination of a child's best interest under this subsection must, at a minimum, be made by a
53 representative of DSCYF, a representative of the school in which the child is enrolled, and a representative of the
54 child's school of residence based on the address of the DSCYF custody placement at the time of the determination.

55 (d) The Secretary of Education shall promulgate regulations to establish a process for the determination of a
56 child's best interest under subsection (b) and (c) of this section.

57 Section 3. Amend § 2502, Title 13 of the Delaware Code by making deletions as shown by strike through and
58 insertions as shown by underline as follows:

59 § 2502. Definitions.

60 For the purposes of this chapter, unless the context indicates differently:

61 (20) "School of origin" ~~is defined as the school the child attended at the time the child was placed in the~~
62 ~~custody of DSCYF~~ means as defined in § 202A(a) of Title 14.

63 Section 4. Sections 1, 2, and 3 of this Act take effect on the effective date of final regulations published in the
64 Register of Regulations and promulgated under § 202A(d) of Title 14, as contained in Section 2 of this Act. The Secretary
65 of the Department of Education shall provide notice to the Registrar of Regulations that the publication of final regulations
66 is required for Sections 1, 2, and 3 of this Act to become effective.

67 Section 5. Section 202A(a)(3) of Title 14, as contained in Section 2 of this Act, expires on June 30, 2020, unless
68 otherwise provided by a subsequent act of the General Assembly.

SYNOPSIS

This Act updates the school stability law for children in the custody of the Department of Services for Children, Youth and Their Families (DSCYF) following passage of the federal Every Student Succeeds Act (ESSA), which reauthorizes the Elementary and Secondary Education Act (ESEA). ESSA requires Delaware to eliminate the provision "awaiting foster care placement" under § 202(c), Title 14 in accordance with the federal McKinney Vento Homeless Assistance Act by December 10, 2017, and instead create a distinct provision regarding school stability for children in the custody of DSCYF. [42 U.S.C. §§ 11431 to 11435; ESEA section 1111(g)(1)(E)(i)-(iii)], 20 U.S.C. §6311(g)(1)(E)]. This Act clarifies that children in the custody of DSCYF remain entitled to attend their school of origin if it is in their best interests to do so, or are eligible for immediate enrollment in a new school.

Sections 1, 2, and 3 of this Act take effect on the effective date of final regulations published in the Register of Regulations and promulgated under authority granted by § 202A(d) of Title 14, which is created by Section 2 of this Act.

Author: Senator Henry

Cornell Law School

U.S. Code › Title 20 › Chapter 70 › Subchapter I › Part A › Subpart 1 › § 6311

20 U.S. Code § 6311 - State plans

(a) FILING FOR GRANTS

(1) **IN GENERAL** For any State desiring to receive a grant under this part, the State educational agency shall file with the Secretary a plan that is—

(A) developed by the State educational agency with timely and meaningful consultation with the Governor, members of the State legislature and State board of education (if the State has a State board of education), local educational agencies (including those located in rural areas), representatives of Indian tribes located in the State, teachers, principals, other school leaders, charter school leaders (if the State has charter schools), specialized instructional support personnel, paraprofessionals, administrators, other staff, and parents; and

(B) is coordinated with other programs under this chapter, the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), the Rehabilitation Act of 1973 (20 U.S.C. 701 et seq.),^[1] the Carl D. Perkins Career and Technical Education Act of 2006 (20 U.S.C. 2301 et seq.), the Workforce Innovation and Opportunity Act (29 U.S.C. 3101 et seq.), the Head Start Act (42 U.S.C. 9831 et seq.), the Child Care and Development Block Grant Act of 1990 (42 U.S.C. 9858 et seq.),^[2] the Education Sciences Reform Act of 2002 (20 U.S.C. 9501 et seq.), the Education^[3] Technical Assistance Act of 2002 (20 U.S.C. 9601 et seq.), the National Assessment of Educational Progress Authorization Act (20 U.S.C. 9621 et seq.), the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11301 et seq.), and the Adult Education and Family Literacy Act (29 U.S.C. 3271 et seq.).

(2) LIMITATION

Consultation required under paragraph (1)(A) shall not interfere with the timely submission of the plan required under this section.

(3) CONSOLIDATED PLAN

A State plan submitted under paragraph (1) may be submitted as part of a consolidated plan under section 7842 of this title.

(4) PEER REVIEW AND SECRETARIAL APPROVAL

(E) the steps a State educational agency will take to ensure collaboration with the State agency responsible for administering the State plans under parts B and E of title IV of the Social Security Act (42 U.S.C. 621 et seq. and 670 et seq.) to ensure the educational stability of children in foster care, including assurances that—

(i) any such child enrolls or remains in such child's school of origin, unless a determination is made that it is not in such child's best interest to attend the school of origin, which decision shall be based on all factors relating to the child's best interest, including consideration of the appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement;

(ii) when a determination is made that it is not in such child's best interest to remain in the school of origin, the child is immediately enrolled in a new school, even if the child is unable to produce records normally required for enrollment;

(iii) the enrolling school shall immediately contact the school last attended by any such child to obtain relevant academic and other records; and

(iv) the State educational agency will designate an employee to serve as a point of contact for child welfare agencies and to oversee implementation of the State agency responsibilities required under this subparagraph, and such point of contact shall not be the State's Coordinator for Education of Homeless Children and Youths under section 722(d)(3) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11432(d)(3));

(F) how the State educational agency will provide support to local educational agencies in the identification, enrollment, attendance, and school stability of homeless children and youths; and

(G) such other factors the State educational agency determines appropriate to provide students an opportunity to achieve the knowledge and skills described in the challenging State academic standards.