



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES

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February 26, 2015

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

RE: 18 DE Reg. 618 [DOE Proposed Extended School Year Services Regulation]

Dear Ms. Shockley:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposal to amend its regulation regarding *Children with Disabilities Subpart B*. The proposed regulation was published as 18 DE Reg. 618 in the February 1, 2015 issue of the Register of Regulations. SCPD has the following observations.

In October, 2014, the Department of Education published a regulation amending its extended school year standards to implement recently enacted S.B. 229. The SCPD and GACEC issued a negative analysis of the proposed regulation since it did not conform to the letter or spirit of S.B. 229. In January, the DOE adopted a final regulation with one minor amendment prompted by the commentary.

Representatives of the Legislature, Councils, Disabilities Law Program (DLP), Attorney General's Office, and DOE met in January to discuss the Councils' concerns. The Councils shared the attached "Supplemental Analysis of Regulations Implementing S.B. 229" to clarify their view that the regulation did not fully implement recent legislation. As a result, the DOE agreed to issue a new proposed regulation incorporating the amendment reflected in the Supplemental Analysis.

The DOE has now formally published its regulation which, with one exception, mirrors the version reflected in the Supplemental Analysis. The Department omitted the following amendment:

6.2. Extended school year services shall be provided only if a child's IEP Team determines, on an individual basis, in accordance with 14 DE Admin Code 925.20.0 through 925.24.0, that the services are necessary for the provision of FAPE to the child or are otherwise specifically authorized by statute.

The omission is problematic. The Supplemental Analysis stresses that the legislative history of S.B. 229 supported presumptive summer services even if their provision might exceed a minimum FAPE. The omission of the amendment to §6.2 creates some "tension" within the

regulation: 1) §6.2 literally bars ESY unless necessary for a FAPE; 2) §6.7 creates a presumption of ESY eligibility with no reference to FAPE. IEP teams may be confused and attempt to justify denial of ESY based on minimum FAPE standards. This “tension” would have been obviated if the agreed-upon revision to §6.2 were included in the regulation.

SCPD is requesting that the DOE include the proposed amendment to §6.2 in the final regulation.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations 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, Department of Education
Ms. Paula Fontello, 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
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SUPPLEMENTAL ANALYSIS OF REGULATIONS IMPLEMENTING S.B. NO. 229

Brian J. Hartman
January 10, 2015

I. NEW STATUTE (S.B. NO. 229)

(e) With respect to any child with a disability who is not beginning to read by age seven, each IEP prepared for such student until that student is beginning to read shall (a) enumerate the specific, evidence-based interventions that are being provided to that student to address the student's inability to read, and (b) provide for evidence-based interventions through extended school year services during the summer absent a specific explanation in the IEP as to why such services are inappropriate.

II. 2 FINAL REGULATIONS

A. IEP (Part 925, §24.0)

The IEP Team shall:

...
24.2.7. In the case of any child with limited reading proficiency, consider the reading services, supports and evidenced based interventions as those relate to the child's IEP;

24.2.7.1. For a child who is not beginning to read by age seven, or who is beyond age seven and is not yet beginning to read, enumerate the specific, evidence-based interventions that are being provided to that child to address the child's inability to read.

B. ESY (Part 923, §6.0)

...
6.2 Extended school year services shall be provided only if a child's IEP Team determines, on an individual basis, in accordance with 14 DE Admin Code 925.20 through 925.24.0, that the services are necessary for the provision of FAPE to the child.

...
6.5. ...The following factors are to be considered by the IEP team in making a decision that, without extended school year services over the summer months, the child would not receive a free appropriate public education (FAPE) during the regular school year.

...
6.5.4 Reading acquisition: For a child who is not beginning to read by age seven, or who is beyond age seven and not yet beginning to read, the team should determine whether, without extended school year services, appropriate and meaningful progress on IEP goal(s) related to reading will not be achieved.

6.5.4.1. For purposes of the extended school year services (ESY) determination, a child is beginning to read if the child demonstrates phonological awareness and ability to use letter sound knowledge and decode unknown words.

III. PROBLEM(S) WITH REGULATIONS

A. Statute creates a presumption of summer school. An exception is permitted only if team provides specific explanation in the IEP why summer services are inappropriate. The default is that summer program is provided. Under the regulation, the default is that covered students get no summer school. A burden is placed on the IEP team to justify ESY.

B. The overall ESY regulation is constrictive. It literally and categorically bars ESY unless "necessary" for a FAPE and an enumerated factor is met. The statute mandates a presumption of summer school regardless of whether necessary for a FAPE. The House Committee report stridently supports presumptive summer services even if their provision might exceed a minimum FAPE standard:

Committee findings: The Committee found that this bill is long overdue and ensures that these students are receiving the best education possible to make certain that they are prepared for their futures.

Moreover, the Legislature has mandated service eligibility for children regardless of "FAPE" in multiple contexts. See 14 Del.C. §1703(1) [12 month programs for children with certain disabilities]; and 14 Del.C. §206(a) [presumption of Braille instruction for students who are blind], implemented by 14 DE Admin Code 925, §20.6 and 24.2.3 with no reference to "FAPE."

IV. SOLUTION

A. Amend the IEP regulation as follows:

24.2.7. In the case of any child with limited reading proficiency, consider the reading services, supports and evidenced based interventions as those relate to the child's IEP;

24.2.7.1. For a child who is not beginning to read by age seven, or who is beyond age seven and is not yet beginning to read, enumerate the specific, evidence-based interventions that are being provided to that child to address the child's inability to read. Eligibility for reading-based extended school year services shall be determined in accordance with 14 DE Admin Code §923.6.0.

B. Amend the ESY regulation as follows:

6.2 Extended school year services shall be provided only if a child's IEP Team determines, on an individual basis, in accordance with 14 DE Admin Code 925.20.0 through 925.24.0, that the services are necessary for the provision of FAPE to the child or are otherwise specifically authorized by statute.

Delete §§6.5.4 and 6.5.4.1 (reproduced above) and renumber §§6.5.5 and 6.5.6 as 6.5.4 and 6.5.5 respectively.

Insert a new §6.7 as follows:

6.7 Reading acquisition: Notwithstanding any contrary provision in this section, if a child is not beginning to read by age seven, or is beyond age seven and not yet beginning to read, the team shall presumptively include extended school year services in the IEP which incorporate evidence-based interventions that address the child's inability to read. The team may decline to include such extended school year services in the IEP only if the team provides a specific explanation in the IEP why such services are inappropriate.

6.7.1 For purposes of this subsection, a child is beginning to read if the child demonstrates phonological awareness and ability to use letter sound knowledge and decode unknown words.

Renumber §§6.7-6.11 as 6.8-6.12 respectively and add "14 Del.C. §3110" to "Authority".

E:leg/readingreganalysis