DEPARTMENT OF EDUCATION

OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(b) (14 **Del.C.** §122(b))
14 **DE Admin. Code** 924

FINAL

REGULATORY IMPLEMENTING ORDER

924 Children with Disabilities Subpart C Local Educational Agency Eligibility

I. Summary of the Evidence and Information Submitted

The Secretary of Education, with the consent of the State Board of Education, proposed to amend regulation 14 **DE Admin. Code** 924, Children With Disabilities, Subpart C, Local Educational Agency Eligibility.

Regulations 922 through 929 address the special education needs of children with disabilities, and implement 14 **Del.C.** Ch. 31 and Part B of the *Individuals With Disabilities Education Act,* 20 U.S.C. 1400 *et seq.* ("IDEA").

The Secretary, with the consent of the State Board of Education, proposed to amend Regulation 924 as part of a comprehensive review of Delaware's special education regulations, undertaken in response to changes in federal special education regulations implementing the IDEA.

The revisions to 14 **DE Admin. Code** 924 are designed to continue the alignment of state and federal regulations addressing the education of children with disabilities and their families, and to establish the conditions under which school districts, charter schools, and other educational agencies may receive funding for the education of children with disabilities.

Notice of the proposed regulation was published in the *News Journal* and the *Delaware State News* on January 8, 2011**,** in the form hereto attached as *Exhibit "A"*. The Department received comments from the Governor's Advisory Council for Exceptional Citizens and the State Council for Persons With Disabilities.

II. Findings of Facts

The Secretary finds that it is appropriate to amend 14 **DE Admin. Code** 924 as part of a comprehensive review of Delaware's special education regulations, undertaken in response to changes in federal special education regulations.

III. Decision to Amend the Regulation

For the foregoing reasons, the Secretary concludes that it is appropriate to amend 14 **DE Admin. Code** 924. Therefore, pursuant to 14 **Del.C.** §122, 14 **DE Admin. Code** 924 attached hereto as *Exhibit "B"* is hereby amended. Pursuant to the provision of 14 **Del.C.** §122(e), 14 **DE Admin. Code** 924 hereby amended shall be in effect for a period of five years from the effective date of this order as set forth in Section V. below.

IV. Text and Citation

The text of 14 **DE Admin. Code** 924 shall be in the form attached hereto as *Exhibit "B"*, and said regulation shall be cited as 14 **DE Admin. Code** 924 in the *Administrative Code of Regulations* for the Department of Education.

V. Effective Date of Order

The actions hereinabove referred to were taken by the Secretary pursuant to 14 **Del.C.** §122 on March 17, 2011**.** The effective date of this Order shall be ten (10) days from the date this Order is published in the *Delaware Register of Regulations.*

IT IS SO ORDERED the 17th day of March, 2011.

Department of Education
Lillian M. Lowery, Ed.D., Secretary of Education

Approved this 17th day of March, 2011

State Board of Education

Teri Quinn Gray, Ph.D., President
Jorge L. Melendez, Vice President
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924 Children with Disabilities Subpart C Local Educational Agency Eligibility

Non-regulatory note: Some sections of this regulation are shown in *italics*. Federal law requires that the Delaware Department of Education identify in writing any Delaware rule, regulation or policy that is a state-imposed requirement rather than a federal requirement (see 20 USC §14079a)(2)). The *italicized portions* of this regulation are Delaware-imposed requirements for the education of children with disabilities and are not specifically required by federal special education law and regulations.

1.0 Condition of Assistance and Consistency with State Policies

1.1 An LEA is eligible for assistance under Part B of the Act for a fiscal year if the agency submits a plan that provides assurances to the DOE that the LEA meets each of the conditions in 1.2 through 13.0.

(Authority: 20 U.S.C. 1413(a); 14 **Del.C.** §3110)

1.2 The LEA, in providing for the education of children with disabilities within its jurisdiction, shall have in effect policies, procedures, and programs that are consistent with the State policies and procedures established under 14 **DE Admin. Code** 923.1.2 through 923.63.0 and 923.65.0 through 923.74.0. *In addition, each public agency providing services to children with disabilities shall use any forms or procedures as from time to time <u>are</u> specifically developed or promulgated by DOE in implementing the requirements of these regulations.*

(Authority: 20 U.S.C. 1413(a)(1); 14 **Del.C.** §3110)

2.0 Use of Amounts

2.1 General: Amounts provided to the LEA under Part B of the Act shall be expended in accordance with the applicable provisions of these regulations; shall be used only to pay the excess costs of providing special education and related services to children with disabilities, consistent with 2.2; and shall be used to supplement State, local, and other Federal funds and not to supplant those funds.

2.2 Excess cost requirement, General: The excess cost requirement prevents an LEA from using funds provided under Part B of the Act to pay for all of the costs directly attributable to the education of a child with a disability, subject to 2.2.1.

2.2.1 The excess cost requirement does not prevent an LEA from using Part B funds to pay for all of the costs directly attributable to the education of a child with a disability in any of the ages three (3), four (4), five (5), eighteen (18), nineteen (19), twenty (20) or twenty-one (21), if no local or State funds are available for nondisabled children of these ages. However, the LEA shall comply with the non supplanting and other requirements of these regulations in providing the education and services for these children.

2.2.2 An LEA meets the excess cost requirement if it has spent at least a minimum average amount for the education of its children with disabilities before funds under Part B of the Act are used.

2.2.2.1 The amount described in 2.2.2 is determined in accordance with the definition of excess costs in 14 **DE Admin. Code** 922.3.0. That amount may not include capital outlay or debt service.

2.2.3 If two or more LEAs jointly establish eligibility in accordance with 23.0, the minimum average amount is the average of the combined minimum average amounts determined in accordance with the definition of excess costs in 14 **DE Admin. Code** 922.3.0 in those agencies for elementary or secondary school students, as the case may be.

(Authority: 20 U.S.C. 1413(a)(2)(A); 14 **Del.C.** §3110)

3.0 Maintenance of Effort.

3.1 General: Except as provided in 4.0 and 5.0, funds provided to an LEA under Part B of the Act shall not be used to reduce the level of expenditures for the education of children with disabilities made by the LEA from local funds below the level of those expenditures for the preceding fiscal year.

3.2 Standard: Except as provided in 3.3, an LEA complies with 3.1 for purposes of establishing the LEA's eligibility for an award for a fiscal year if the LEA budgets, for the education of children with disabilities, at least the same total or per capita amount from either of the following sources as the LEA spent for that purpose from the same source for the most recent prior year for which information is available:

3.2.1 Local funds only.

3.2.2 The combination of State and local funds.

3.3 An LEA that relies on 3.2.1 for any fiscal year shall ensure that the amount of local funds it budgets for the education of children with disabilities in that year is at least the same, either in total or per capita, as the amount it spent for that purpose in the most recent fiscal year for which information is available and the standard in 3.2.1 was used to establish its compliance with this section.

3.4 The DOE shall not consider any expenditure made from funds provided by the Federal Government for which the DOE is required to account to the Federal Government or for which the LEA is required to account to the Federal Government directly or through the DOE in determining an LEA's compliance with the requirement in 3.1.

(Authority: 20 U.S.C. 1413(a)(2)(A); 14 **Del.C.** §3110)

4.0 Exception to Maintenance of Effort

4.1 Notwithstanding the restriction in 3.1, an LEA may reduce the level of expenditures by the LEA under Part B of the Act below the level of those expenditures for the preceding fiscal year if the reduction is attributable to any of the following:

4.1.1 The voluntary departure, by retirement or otherwise, or departure for just cause, of special education or related services personnel.

4.1.2 A decrease in the enrollment of children with disabilities.

4.1.3 The termination of the obligation of the agency, consistent with these regulations, to provide a program of special education to a particular child with a disability that is an exceptionally costly program, as individually determined by the DOE, because the child:

4.1.3.1 Has left the jurisdiction of the agency;

4.1.3.2 Has reached the age at which the obligation of the agency to provide FAPE to the child has terminated; or

4.1.3.3 No longer needs the program of special education.

4.1.3.4 The termination of costly expenditures for long term purchases, such as the acquisition of equipment or the construction of school facilities.

4.1.3.5 The assumption of cost by any high cost fund operated by the DOE under 34 CFR § 300.704(c).

(Authority: 20 U.S.C. 1413(a)(2)(B); 14 **Del.C**. §3110)

5.0 Adjustment to Local Fiscal Efforts in Certain Fiscal Years

5.1 Amounts in excess: Notwithstanding the requirement in 2.1 that amounts provided to the LEA under Part B of the Act shall be used only to pay the excess costs of providing special education and related services to children with disabilities, and further notwithstanding 2.2 and 3.1, and except as provided in 5.4 and 34 CFR § 300.230(e)(2)(relating to adjustments to State level fiscal efforts in certain fiscal years), for any fiscal year for which the allocation received by an LEA under 14 **DE Admin. Code** 928.5.0 exceeds the amount the LEA received for the previous fiscal year, the LEA may reduce the level of expenditures otherwise required by 3.1 by not more than 50 percent of the amount of that excess.

5.2 Use of amounts to carry out activities under ESEA: If an LEA exercises the authority in 5.1, the LEA shall use an amount of local funds equal to the reduction in expenditures 5.1 to carry out activities that could be supported with funds under the ESEA regardless of whether the LEA is using funds under the ESEA for those activities.

5.3 State prohibition: Notwithstanding 5.1, if the DOE determines that an LEA is unable to establish and maintain programs of FAPE that meet the requirements of section 613(a) of the Act and these regulations or the DOE has taken action against the LEA under 14 **DE Admin. Code** 927 the LEA is prohibited from reducing the level of expenditures in 5.1 for that fiscal year.

5.4 Special rule: The amount of funds expended by an LEA for early intervening services in 26.0 shall count toward the maximum amount of expenditures that the LEA may reduce in 5.1.

(Authority: 20 U.S.C. 1413(a)(2)(C); 14 **Del.C.** §3110)

6.0 School Wide Programs under Title I of the ESEA

6.1 General: Notwithstanding the provisions of 2.0 and 3.0 or any other provision of Part B of the Act, an LEA may use funds received under Part B of the Act for any fiscal year to carry out a school wide program under section 1114 of the ESEA, except that the amount used in any school wide program may not exceed the amount received by the LEA under Part B of the Act for that fiscal year; divided by the number of children with disabilities in the jurisdiction of the LEA; and multiplied by the number of children with disabilities participating in the school wide program.

6.2 Funding conditions: The funds described in 6.1 are subject to the following conditions:

6.2.1 The funds shall be considered as Federal Part B funds for purposes of the calculations required by 2.1.

6.2.2 The funds may be used without regard to the requirements of 2.1 that amounts provided to the LEA under Part B of the Act shall be expended in accordance with the applicable provisions of these regulations.

6.3 Meeting other Part B requirements: Except as provided in 6.2, all other requirements of Part B of the Act shall be met by an LEA using Part B funds in accordance with 6.1, including ensuring that children with disabilities in school wide program schools receive services in accordance with a properly developed IEP; and are afforded all of the rights and services guaranteed to children with disabilities under the Act.

(Authority: 20 U.S.C. 1413(a)(2)(D); 14 **Del.C.** §3110)

7.0 Personnel Development

The LEA shall ensure that all personnel necessary to carry out Part B of the Act are appropriately and adequately prepared, subject to the requirements of 14 **DE Admin. Code** 923.56.0 (related to personnel qualifications) and section 2122 of the ESEA.

(Authority: 20 U.S.C. 1413(a)(3); 14 **Del.C.** §3110)

8.0 Permissive Use of funds.

8.1 Uses: Notwithstanding 2.0 and 3.1, funds provided to an LEA under Part B of the Act may be used for the following activities:

8.1.1 Services and aids that also benefit nondisabled children: For the costs of special education and related services, and supplementary aids and services, provided in a regular class or other education related setting to a child with a disability in accordance with the IEP of the child, even if one (1) or more nondisabled children benefit from these services.

8.1.2 Early intervening services: To develop and implement coordinated, early intervening educational services in accordance with 26.0.

8.1.3 High cost special education and related services: To establish and implement cost or risk sharing funds, consortia, or cooperatives for the LEA itself, or for LEAs working in a consortium of which the LEA is a part, to pay for high cost special education and related services.

8.2 Administrative case management: An LEA may use funds received under Part B of the Act to purchase appropriate technology for recordkeeping, data collection, and related case management activities of teachers and related services personnel providing services described in the IEP of children with disabilities that is needed for the implementation of those case management activities.

(Authority: 20 U.S.C. 1413(a)(4); 14 **Del.C.** §3110)

9.0 Treatment of Charter Schools and their Students.

9.1 Rights of children with disabilities: Children with disabilities who attend public charter schools and their parents retain all rights under these regulations.

9.2 Charter schools that are public schools of the LEA:

9.2.1 In carrying out Part B of the Act and these regulations with respect to charter schools that are public schools of the LEA, the LEA shall:

9.2.1.1 serve children with disabilities attending those charter schools in the same manner as the LEA serves children with disabilities in its other schools, including providing supplementary and related services on site at the charter school to the same extent to which the LEA has a policy or practice of providing such services on the site to its other public schools; and

9.2.1.2 Provide funds under Part B of the Act to those charter schools:

9.2.1.2.1 On the same basis as the LEA provides funds to the LEA's other public schools, including proportional distribution based on relative enrollment of children with disabilities; and

9.2.1.2.2 At the same time as the LEA distributes other Federal funds to the LEA's other public schools, consistent with Delaware's charter school law (14 **Del.C.** Ch.5).

9.2.2 If the public charter school is a school of an LEA that receives funding under 14 **DE Admin. Code** 928.5.0 and includes other public schools:

9.2.2.1 The LEA is responsible for ensuring that the requirements of these regulations are met; and

9.2.2.2 The LEA shall meet the requirements in 9.2.1.

9.3 Public charter schools that are LEA's: If the public charter school is an LEA, consistent with the definition of LEA under 14 **DE Admin. Code** 922.3.0, that receives funding under 14 **DE Admin. Code** 928.5.0 that charter school is responsible for ensuring that the requirements of these regulations are met.

9.4 Reserved

(Authority: 20 U.S.C. 1413(a)(5); 14 **Del.C.** §§505 and 3110)

10.0 Coordination with NIMAC and Purchase of Instructional Materials

10.1 Coordination with NIMAC: LEAs and other public agencies shall coordinate with the National Instructional Materials Access Center (NIMAC) for the purposes of providing instructional materials to blind persons or other persons with print disabilities. When purchasing print instructional materials, LEAs and other public agencies shall acquire those instructional materials in the same manner, and subject to the same conditions as the DOE under 14 **DE Admin. Code** 923.72.0.

10.2 Responsibility of LEA and other public agencies: LEAs and other public agencies shall ensure that children with disabilities who need instructional materials in accessible formats but are not included under the definition of blind or other persons with print disabilities in 14 **DE Admin. Code** 923.72.4 or who need materials that cannot be produced from NIMAS files, receive those instructional materials in a timely manner.

(Authority: 20 U.S.C. 1413(a)(6); 14 **Del.C.** §3110)

11.0 Information for DOE

LEAs shall provide the DOE, consistent with a format and timetable acceptable to the Department, with information necessary to enable the DOE to carry out its duties under Part B of the Act, including, with

respect to information relating to the performance of children with disabilities participating in programs carried out under Part B of the Act.

(Authority: 20 U.S.C. 1413(a)(7); 14 **Del.C.** §3110)

12.0 Public Information

LEAs shall make available to parents of children with disabilities and to the general public all documents relating to the eligibility of the agency under Part B of the Act.

(Authority: 20 U.S.C. 1413(a)(8); 14 **Del.C.** §3110; see also 29 **Del.C.** §10003)

13.0 Records Regarding Migratory Children with Disabilities

LEAs shall cooperate with appropriate Delaware and federal agencies to ensure the linkage of records pertaining to migratory children with disabilities for the purpose of electronically exchanging, among the States, health and educational information regarding those children.

(Authority: 20 U.S.C. 1413(a)(9); 14 **Del.C.** §3110)

14.0 to 19.0 Reserved

20.0 Exception for Prior Local Plans

20.1 General: If an LEA or a State agency described in 28.0 has on file with the DOE policies and procedures that demonstrate that the LEA or State agency meets any requirement of 1.1, including any policies and procedures filed under Part B of the Act as in effect before December 3, 2004, the DOE shall consider the LEA or State agency to have met that requirement for purposes of receiving assistance under Part B of the Act.

20.2 Modification made by an LEA or State Agency: Subject to 20.3, policies and procedures submitted by an LEA or a State agency in accordance with 14 **DE Admin. Code** 924 remain in effect until the LEA or State agency submits to the DOE the modifications that the LEA or State agency determines are necessary.

20.3 Modifications required by the DOE. The DOE may require an LEA or a State agency to modify its policies and procedures, but only to the extent necessary to ensure the LEA's or State agency's compliance with Part B of the Act or with Delaware law, if:

20.3.1 After December 3, 2004 (the effective date of the Individuals with Disabilities Education Improvement Act of 2004), the applicable provisions of the Act (or the regulations developed to carry out the Act) are amended;

20.3.2 There is a new interpretation of an applicable provision of the Act by Federal or State courts; or

20.3.3 There is an official finding of noncompliance with Federal or State law or regulations.

20.4 Nothing in this section shall be construed to restrict the DOE from utilizing any other method, activity or authority available to monitor and enforce the requirements of Part B of the Act and these regulations.

(Authority: 20 U.S.C. 1413(b); 14 **Del.C.** §3110)

21.0 Notification of LEA or State Agency in Case of Ineligibility

If the DOE determines that an LEA or State agency is not eligible under Part B of the Act, then the DOE shall notify the LEA or State agency of that determination; and provide the LEA or State agency with reasonable notice and an opportunity for a hearing.

(Authority: 20 U.S.C. 1413(c); 14 **Del.C.** §3110)

22.0 LEA and State Agency Compliance

22.1 General: If the DOE, after reasonable notice and an opportunity for a hearing, finds that an LEA or State agency that has been determined to be eligible under 14 **DE Admin. Code** 924 is failing to comply with any requirement described in 1.0 through 13.0, any further payments to the LEA or State

agency shall be reduced or not provided until the DOE is satisfied that the LEA or State agency is complying with that requirement.

22.2 Notice requirement: Any State agency or LEA in receipt of a notice described in 22.1 shall, by means of public notice, take the measures necessary to bring the pendency of an action pursuant to 22.0 to the attention of the public within the jurisdiction of the agency.

22.3 Consideration: In carrying out its responsibilities under 22.0, the DOE shall consider any decision resulting from a hearing held under 14 **DE Admin. Code** 926.11.0 through 926.33.0 that is adverse to the LEA or State agency involved in the decision.

(Authority: 20 U.S.C. 1413(d); 14 **Del.C.** §3110)

23.0 Joint Establishment of Eligibility

23.1 General: The DOE may require an LEA to establish its eligibility jointly with another LEA if the DOE determines that the LEA will be ineligible under 14 **DE Admin. Code** 924 because the agency will not be able to establish and maintain programs of sufficient size and scope to effectively meet the needs of children with disabilities.

23.2 Charter school exception: The DOE may not require a charter school that is an LEA to jointly establish its eligibility under 23.1 unless the charter school is explicitly permitted to do so under the State's charter school statute.

23.3 Amounts of payments: If the DOE requires the joint establishment of eligibility under 23.1, the total amount of funds made available to the affected LEAs shall be equal to the sum of the payments that each LEA would have received under 14 **DE Admin. Code** 928.5.0, if the agencies were eligible for those payments.

(Authority: 20 U.S.C. 1413(e)(1) and (2); 14 **Del.C.** §3110)

24.0 Requirements for Establishing Eligibility

24.1 Requirements for LEAs in general: LEAs that establish joint eligibility under 23.0 and 24.0 shall adopt policies and procedures that are consistent with the State's policies and procedures and be jointly responsible for implementing programs that receive assistance under Part B of the Act.

24.2 Requirements for educational service agencies in general: If an educational service agency is required by Delaware law to carry out programs under Part B of the Act, the joint responsibilities given to LEAs under Part B of the Act do not apply to the administration and disbursement of any payments received by that educational service agency; and shall be carried out only by that educational service agency.

24.3 Additional requirements: Notwithstanding any other provision of 23.0 and 24.0, an educational service agency shall provide for the education of children with disabilities in the least restrictive environment, as required by 14 **DE Admin. Code** 923.14.0.

(Authority: 20 U.S.C. 1413(e)(3) and (4); 14 **Del.C**. §3110)

25.0 Reserved

26.0 Early Intervening Services

26.1 General: An LEA may not use more than 15 fifteen percent **(15%)** of the amount the LEA receives under Part B of the Act for any fiscal year, less any amount reduced by the LEA pursuant to 5.0, if any, in combination with other amounts (which may include amounts other than education funds), to develop and implement coordinated, early intervening services, which may include interagency financing structures, for students in kindergarten through grade twelve (12) (with a particular emphasis on students in kindergarten through grade three) who are not currently identified as needing special education or related services, but who need additional academic and behavioral support to succeed in a general education environment.

26.2 Activities: In implementing coordinated, early intervening services under this section, an LEA may carry out activities that include:

26.2.1 Professional development (which may be provided by entities other than LEAs) for teachers and other school staff to enable such personnel to deliver scientifically based academic and behavioral interventions, including scientifically based literacy instruction, and, where appropriate, instruction on the use of adaptive and instructional software; and

26.2.2 Providing educational and behavioral evaluations, services, and supports, including scientifically based literacy instruction.

26.3 Construction: Nothing in 26.0 shall be construed to either limit or create a right to FAPE under Part B of the Act or to delay appropriate evaluation of a child suspected of having a disability.

26.4 Reporting: Each LEA that develops and maintains coordinated, early intervening services under this section shall annually report to the DOE, consistent with a format and timetable acceptable to the Department, on:

26.4.1 The number of children served under 26.0 who received early intervening services; and

26.4.2 The number of children served under 26.0 who received early intervening services and subsequently receive special education and related services under Part B of the Act during the preceding two (2) year period.

26.5 Coordination with ESEA: Funds made available to carry out 26.0 may be used to carry out coordinated, early intervening services aligned with activities funded by, and carried out under the ESEA if those funds are used to supplement, and not supplant, funds made available under the ESEA for the activities and services assisted under this section.

(Authority: 20 U.S.C. 1413(f); 14 **Del.C.** §3110)

27.0 Direct Services by the DOE

27.1 General: The DOE shall use the payments that would otherwise have been available to an LEA or to a State agency to provide special education and related services directly to children with disabilities residing in the area served by that LEA, or for whom that State agency is responsible, if DOE determines that the LEA or State agency:

27.1.1 Has not provided the information needed to establish the eligibility of the LEA or State agency, or elected not to apply for its Part B allotment, under Part B of the Act;

27.1.2 Is unable to establish and maintain programs of FAPE that meet the requirements of these regulations;

27.1.3 Is unable or unwilling to be consolidated with one or more LEAs in order to establish and maintain the programs; or

27.1.4 Has one (1) or more children with disabilities who can best be served by a regional or State program or service delivery system designed to meet the needs of these children.

27.2 DOE administrative procedures:

27.2.1 In meeting the requirements in 27.1, DOE may provide special education and related services directly, by contract, or through other arrangements.

27.2.2 The excess cost requirements of 2.2 do not apply to the DOE.

27.3 Manner and location of education and services: The DOE may provide special education and related services under 27.1 in the manner and at the locations (including regional or State centers) as the DOE considers appropriate. The education and services shall be provided in accordance with these regulations.

(Authority: 20 U.S.C. 1413(g); 14 **Del.C.** §3110)

28.0 State Agency Eligibility

28.1 Any State agency that desires to receive a sub grant for any fiscal year under 14 **DE Admin. Code** 928.5.0 shall demonstrate to the satisfaction of the DOE that:

28.1.1 All children with disabilities who are participating in programs and projects funded under Part B of the Act receive FAPE, and that those children and their parents are provided all the rights and procedural safeguards described in these regulations; and

28.1.2 The agency meets the other conditions of this subpart that apply to LEAs.
(Authority: 20 U.S.C. 1413(h); 14 **Del.C.** §3110)

29.0 Disciplinary Information

29.1 Each public agency shall maintain a discipline record for children with disabilities in accordance with 14 ***DE Admin. Code*** *252.*

29.2 If a child with a disability transfers from one (1) school to another, the transmission of such child's records shall include both the child's current IEP and discipline record in accordance with 14 ***DE Admin. Code*** *252.*

(Authority: 20 U.S.C. 1413(i); 14 **Del.C.** §3110)

10 DE Reg. 1816 (06/01/07)
14 DE Reg. 607 (01/01/11)
14 DE Reg. 1059 (04/01/11) (Final)