

DEPARTMENT OF EDUCATION

OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(d) (14 Del.C. §122(d))
14 DE Admin. Code 925

PROPOSED

Education Impact Analysis Pursuant to 14 Del.C. Section 122(d)

925 Children with Disabilities, Subpart D, Evaluations, Eligibility Determination, Individualized Education Programs

A. Type of Regulatory Action Required

Amendment to Existing Regulation

B. Synopsis of Subject Matter of the Regulation

The Secretary of Education seeks the consent of the State Board of Education to amend 14 DE Admin. Code 925, Children with Disabilities, Subpart D, Evaluations, Eligibility Determination, Individualized Education Program.

The Department of Education recently adopted Regulation 925 as part of a comprehensive review of Delaware's special education regulations, undertaken in response to changes in federal special education regulations implementing the *Individuals with Disabilities Education Act*, 20 USC §1400, et.seq. ("IDEA"). The Department received extensive public comment to parts of Regulation 925 that addressed "Response to Intervention" requirements. The Department also received comments suggesting improvements to the special education eligibility requirements for children with visual impairments.

The Department now proposes to amend Regulation 925 to address the suggestions, concerns and other comments the Department received about Response to Intervention and special education eligibility for children with visual impairments.

Please note that the IDEA specifically requires that the Department of Education notify school districts and other education agencies of any State requirements for the education of children with disabilities that exceed federal requirements. These proposed regulations identify those additional State requirements by *italicizing* them in the text of these proposed regulations.

Persons wishing to present their views regarding this matter may do so in writing by the close of business on or before June 30, 2007 to Martha Toomey, Director, Exceptional Children and Early Childhood Education, Department of Education, at 401 Federal Street, Suite 2, Dover, DE 19901. A copy of this regulation is available from the above address or may be viewed at the Department of Education business office. The proposed regulations are also available by contacting Ms. Louann Vari at the above address, or by email at: lvvari@doe.k12.de.us.

C. Impact Criteria

1. Will the amended regulation help improve student achievement as measured against state achievement standards? The proposed amendments address the achievement of children with and without disabilities, including their achievement measured against state standards.

2. Will the amended regulation help ensure that all students receive an equitable education? The proposed amendments help assure that all students, including children with disabilities, receive equitable educational services.

3. Will the amended regulation help to ensure that all students' health and safety are adequately protected? The proposed amendments do not directly address health and safety issues, but those issues are addressed by regulations already in place.

4. Will the amended regulation help to ensure that all students' legal rights are respected? The proposed regulations specifically ensure and implement the rights of children with disabilities and their families under a variety of state and federal laws, including the *Individuals with Disabilities Education Act*, the *No Child Left Behind Act*, and the *Family Educational Rights and Privacy Act* and the provisions of Chapter 31 of Title 14 of the

Delaware Code.

5. Will the amended regulation preserve the necessary authority and flexibility of decision making at the local board and school level? The proposed regulations are specifically designed to minimize State regulations to those required under state and federal statutes. The Individuals with Disabilities Education Act specifically requires that the Department of Education notify school districts and other education agencies of any State requirements for the education of children with disabilities that exceed federal requirements. These proposed regulations identify those “excess” State requirements by *italicizing* them in the text of these proposed regulations.

6. Will the amended regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels? The proposed regulations are specifically designed to require only the local reporting and administration necessary to comply with State statutory and federal requirements consistent with the improved achievement and educational performance of children with disabilities.

7. Will the decision making authority and accountability for addressing the subject to be regulated be placed in the same entity? The State and school districts and other local educational agencies share authority and accountability for the education of children with disabilities, and the proposed regulations reflect that partnership.

8. Will the amended regulation be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational policies addressing achievement in the core academic subjects of mathematics, science, language arts and social studies? The proposed amendments more closely align requirements for the education of children with disabilities with other State educational policies, particularly those addressing achievement in reading and mathematics. The proposed regulations further reflect the increased federal alignment between the *Individuals with Disabilities Education Act* and the *No Child Left Behind Act*.

9. Is there a less burdensome method for addressing the purpose of the regulation? The proposed regulations are designed to assure compliance with applicable laws regarding the education of children with disabilities in these most efficient and effective way for the Department, the school districts and other affected State and local agencies.

10. What is the cost to the State and to the local school boards of compliance with the regulation? Compliance with the IDEA is required as a condition of federal funding.

925 Children with Disabilities Subpart D, Evaluations, Eligibility Determination, Individualized Education Programs

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.

(Break in Continuity of Sections)

6.0 Determination of Eligibility

6.1 General: Upon completion of the administration of assessments and other evaluation measures, a group of qualified professionals and the parent of the child shall determine whether the child is a child with a disability, as defined in 14 **DE Admin. Code** 922.3.0, in accordance with 6.1.1 and the educational needs of the child; and the public agency shall provide a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent. *The evaluation report shall document the IEP team’s discussion of the eligibility determination including, where appropriate, the additional requirements for students with a learning disability.*

6.2 Special rule for eligibility determination: A child shall not be determined to be a child with a disability under these regulations if the determinant factor for that determination is:

6.2.1 Lack of appropriate instruction in reading, including the essential components of reading instruction (as defined in section 1208(3) of the ESEA);

6.2.2 Lack of appropriate instruction in math; or

6.2.3 Limited English proficiency; and

6.2.4 If the child does not otherwise meet the eligibility criteria to be determined a child with a

disability as defined in 14 **DE Admin. Code** 922.3.0.

6.3 Procedures for determining eligibility and educational need: *Eligibility decisions may include historical information to the extent relevant to the child's current needs.* In interpreting evaluation data for the purpose of determining if a child is a child with a disability under 14 **DE Admin. Code** 922.3.0, and the educational needs of the child, each public agency shall:

6.3.1 Draw upon information from a variety of sources, including, as appropriate, aptitude and achievement tests, information acquired from response to intervention processes, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and ensure that information obtained from all of these sources is documented and carefully considered.

6.3.2 If a determination is made that a child has a disability and needs special education and related services, an IEP shall be developed for the child in accordance with 20.0 through 24.0.

6.4 ~~Reserved~~ If, prior to the effective date of 6.11, a child has been identified as a child with a learning disability or an educable mental disability, and is receiving special education services from a Delaware public agency as a result of that identification, the child shall continue to be eligible for services in Delaware as a learning disabled or educably mentally disabled student until the child's reevaluation as required in 3.0. Reevaluation of such students shall apply the eligibility requirements of 6.11 and 7.0 through 12.0 as appropriate to the child's grade level as of the date of the reevaluation.

(Authority: 20 U.S.C. 1414(b)(4) and (5); 14 **Del.C.** §3110)

6.5 Other Eligibility requirements and exit criteria.

6.5.1 A child shall be entitled to receive special education and related services, and shall be eligible to be counted as a special education student for purposes of the unit funding system established under 14 **Del.C.** Ch. 17, when the child's team has determined that the child meets the eligibility criteria of at least one of the disability classifications in this section, and by reason thereof, needs special education and related services.

6.5.2 A child's IEP team may, but is not required to, determine that a child is eligible for special education and related services under more than one disability classification. The disability classification selected by the IEP team shall not be a relevant factor in determining whether the child received FAPE, provided that the child's IEP is based on the child's educational needs.

6.5.3 When an IEP team determines that a child is eligible for special education and related services under more than one disability classification, and includes the child as a special education student in the unit funding system, the LEA or other public agency shall report the child in the disability classification which best describes the effect of the disability on the child in the educational setting. The child's primary disability classification shall be recorded first on the IEP.

6.5.4 Exit Criteria: A child's eligibility for special education and related services shall terminate when:

6.5.4.1 the child reaches his or her 21st birthday; or

6.5.4.2 the child graduates from high school with a regular high school diploma. As used in this subsection, regular high school diploma does not include a GED; or

6.5.4.3 the IEP team determines the child is no longer a child with a disability in need of special education and related services. In making such determination, the team shall consider: eligibility criteria; data based and documented measures of educational progress; and other relevant information.

6.6 Eligibility Criteria for Autism. The educational classification of autism encompasses the clinical condition of Autistic Disorder, as well as other typically less severe Pervasive Developmental Disorders, (i.e., Asperger Syndrome and Pervasive Developmental Disorder, Not Otherwise Specified). These conditions share important features, and together, comprise the Autistic Spectrum Disorders (ASDs). Students with educational classifications of autism may have ASD of differing severity as a function of the number and pattern of features defined in the eligibility criteria listed below.

6.6.1 In order for the IEP team to determine eligibility for special education services under the Autism category, the following is required:

6.6.1.1 All students with an educational classification of autism demonstrate a significant, qualitative impairment in reciprocal social interaction, as manifested by deficits in at least two of the following:

6.6.1.1.1 Use of multiple nonverbal behaviors to regulate social interactions;

6.6.1.1.2 Development of peer relationships;

6.6.1.1.3 Spontaneous seeking to share enjoyment, interests, or achievements with other people, including parent(s) and caregivers; or

6.6.1.1.4 Social or emotional reciprocity.

6.6.1.2 All students with an educational classification of autism also demonstrate at least one feature from either 6.6.1.2.1 or 6.6.1.2.2.

6.6.1.2.1 A qualitative impairment in communication, as manifested by:

6.6.1.2.1.1 A lack of, or delay in, spoken language and failure to compensate through gesture;

6.6.1.2.1.2 Relative failure to initiate or sustain a conversation with others;

6.6.1.2.1.3 Stereotyped, idiosyncratic, or repetitive speech; or

6.6.1.2.1.4 A lack of varied, spontaneous make believe play or social imitative play.

6.6.1.2.2 Restricted, repetitive, and stereotyped patterns of behavior, as manifested by:

6.6.1.2.2.1 Encompassing preoccupation or circumscribed and restricted patterns of interest;

6.6.1.2.2.2 Apparently compulsive adherence to specific, nonfunctional routines and rituals;

6.6.1.2.2.3 Stereotyped and repetitive motor mannerisms; or

6.6.1.2.2.4 Persistent preoccupation with parts and sensory qualities of objects.

6.6.1.3 All students with an educational classification of autism have impairments that:

6.6.1.3.1 Are inconsistent with the student's overall developmental and functional level; and

6.6.1.3.2 Result in an educationally significant impairment in important areas of functioning; and

6.6.1.3.3 Are a part of a clear pattern of behavior that is consistently manifested across a variety of people, tasks and settings, and that persists across a significant period of time; and

6.6.1.3.4 Are not primarily accounted for by an emotional disorder.

6.6.2 An educational classification of autism is established:

6.6.2.1 Using specialized, validated assessment tools that provide specific evidence of the features of ASD described above;

6.6.2.2 By individuals who have specific training in the assessment of students with ASD in general, and in the use of the assessment procedures referred to in 6.6.3.2.1; and

6.6.2.3 Based upon an observation of the student in a natural education environment, an observation under more structured conditions, and information regarding the student's behavior at home.

6.6.3 Age of Eligibility: The age of eligibility for children with autism shall be from birth through age 20, inclusive.

6.7 Eligibility Criteria for Developmental Delay: A developmental delay is a term applied to a young child who exhibits a significant delay in one or more of the following developmental domains: cognition, communication (expressive and receptive), physical (gross motor and fine motor) social emotional functioning and adaptive behavior. A developmental delay shall not be primarily the result of a significant visual or hearing impairment.

6.7.1 In order for an IEP team to determine eligibility for special education services under the Developmental Delay category, the following is required:

6.7.1.1 Standardized test scores of 1.5 or more standard deviations below the mean in two or more of the following developmental domains: cognition, communication (expressive and/or receptive), physical (gross motor and fine motor) social emotional functioning and adaptive behavior; or

6.7.1.2 Standardized test scores of 2.0 or more standard deviations below the mean in any one of the developmental domains listed above; or

6.7.1.3 Professional judgment of the IEP team that is based on multiple sources of information used in the assessment process and with justification documented in writing in the evaluation report of

a significant difference between the child's chronological age and his or her current level of functioning. A significant difference is defined as a minimum of a 25% delay in comparison to same aged peers.

6.7.2 Multiple sources and methods of information shall be used in the determination of eligibility for service provision. An assessment shall include, but not be limited to, the following sources of information:

6.7.2.1 Developmental and medical history;

6.7.2.2 Interview with the child's parent or primary caregiver;

6.7.2.3 Behavioral observations;

6.7.2.4 Standardized norm referenced instruments; and

6.7.2.5 Other assessments which could be used for intervention planning, such as dynamic or criterion referenced assessments, behavior rating scales, or language samples.

6.7.3 The assessment of a child suspected of a developmental delay shall be culturally and linguistically sensitive.

6.7.4 Age of eligibility: The age of eligibility for classification under the developmental delay classification is from the third birth date until the ninth birth date.

6.8 Eligibility Criteria for Deaf Blind: An IEP team shall consider the following in making a determination that a child has a deaf blind condition:

6.8.1 A qualified physician or licensed audiologist shall document that a child has a hearing loss so severe that he or she cannot effectively process linguistic information through hearing, with or without the use of a hearing aid. Such documentation shall be based upon a formal observation or procedure; and a licensed ophthalmologist or optometrist shall document that a child has a best, corrected visual acuity of 20/200 or less in the better eye, or a peripheral field so contracted that the widest lateral field of vision subtends less than 20 degrees; and

6.8.2 An IEP team shall consider the documentation of auditory and visual impairment in addition to other information relevant to the child's condition in determining eligibility for special education under the above definition.

6.8.3 Classification as a child who is deaf blind shall be made by the IEP team after consideration of the above eligibility criteria.

6.8.4 Age of Eligibility: The age of eligibility for children identified under this definition shall be from birth through 20 years, inclusive.

6.9 Eligibility Criteria for Emotional Disturbance: The IEP team shall consider documentation of the manifestation of the clusters or patterns of behavior associated with emotional disturbance and documentation from multiple assessment procedures. Such procedures shall include, but not be limited to, an evaluation by either a licensed or certified school psychologist, or a licensed psychiatrist, classroom observations by teacher(s) and at least one other member of the IEP team, a review of records, standardized rating scales, and child interviews.

6.9.1 The documentation shall show that the identified behaviors have existed over a long period of time and to a marked degree, and:

6.9.2 Adversely affect educational performance. This means that the child's emotions and behaviors directly interfere with educational performance. It also means that such interference cannot primarily be explained by intellectual, sensory, cultural, or health factors, or by substance abuse; and

6.9.2.1 Are situationally inappropriate for the child's age. This refers to recurrent behaviors that clearly deviate from behaviors normally expected of other students of similar age under similar circumstances. That is, the student's characteristic behaviors are sufficiently distinct from those of his or her peer groups; or

6.9.2.2 Preclude personal adjustment or the establishment and maintenance of interpersonal relationships. This means that the child exhibits a general pervasive mood of unhappiness or depression, or is unable to enter into age appropriate relationships with peers, teachers and others; and

6.9.3 The age of eligibility for children identified under this definition shall be from the 4th birthday through 20 years, inclusive.

6.10 Eligibility Criteria for Hearing Impairment: A qualified physician or licensed audiologist shall document that a child has a hearing loss such that it makes difficult or impossible the processing of linguistic information through hearing, with or without amplification. Such documentation shall be based upon a formal observation or procedure; and

6.10.1 The IEP team shall consider the documentation of hearing impairment in addition to other information relevant to the child's condition in determining eligibility for special education under the above definition.

6.10.2 The age of eligibility of children identified under this definition shall be from birth through 20 years, inclusive.

6.11 Eligibility Criteria for Learning Disability:

6.11.1 ~~Reserved.~~ Elimination of discrepancy model: As of the effective date of this section, public agencies shall not use discrepancy between achievement and intellectual ability to determine eligibility for special education and related services under the learning disability category.

6.11.2 ~~Reserved.~~ Existence of a learning disability: As of the effective date of this section, and subject to the requirements of 6.11.3, public agencies shall use the standards and procedures in 7.0 through 11.0 to determine whether a child is eligible for special education and related services under the learning disability category.

6.11.3 ~~Reserved.~~ Phase in of response to intervention procedures:

6.11.3.1 ~~Reserved.~~ Elementary school children: No later than the beginning of the 2008- 2009 school year, public agencies shall use the standards and procedures in 7.0 through 12.0, including the response to intervention process, to determine whether a child in elementary school (as elementary school is defined by the public agency) is eligible for special education and related services under the learning disability category.

6.11.3.2 ~~Reserved.~~ Other students: No later than the beginning of the 2009-2010 school year, public agencies shall use the standards and procedures in 7.0 to 12.0, including the response to intervention process, to determine whether a student is eligible for special education and related services under the learning disability category.

6.11.4 ~~Reserved.~~ Use of response to intervention procedures for 2007-2008: During the 2007-2008 school year, public agencies are permitted to use the response to intervention procedures in 12.0 to determine whether a child is eligible for special education and related services as a result of a learning disability. Local education agencies implementing response to intervention procedures during the 2007-2008 school year may do so in all or some of its schools, and at all or some grade levels.

6.11.5 The age of eligibility for students identified under this definition shall be from the fourth birthday through 20 years inclusive.

6.12 Eligibility Criteria for Mental Disability: Eligibility Criteria for Mental Disability: In order for the IEP team to determine eligibility for special education services under the Mental Disability category, the following is required:

6.12.1 A level of intellectual functioning, as indicated below:

6.12.1.1 Educable Mental Disability: IQ 50 to 70 +/- 5 points;

6.12.1.2 Trainable Mental Disability: IQ 35 to 50 +/- 5 points;

6.12.1.3 Severe Mental Disability: IQ below 35; and Significant limitations in two or more areas of adaptive behavior, including communication, self care, home and school living, social and interpersonal, community use, self direction and coping, health and safety, functional academics, leisure, play and work.

6.12.2 Assessment for both intellectual functioning and adaptive behavior shall be conducted by a licensed psychologist or certified school psychologist.

6.12.3 ~~Reserved.~~ Additional requirements for eligibility for Educable Mental Disability: In addition to the other requirements of 6.12, eligibility for special education services under the Educable Mental Disability category shall require written documentation that the child's response to scientific, research based intervention was assessed in accordance with 12.0.

6.12.3.1 ~~Reserved.~~ This requirement shall apply no later than the beginning of the 2008-2009 school year for children in elementary school (as elementary school is defined by the public agency) and no later than the beginning of the 2009-2010 school year for all other children.

6.12.3.2 ~~Reserved.~~ During the 2007-2008 school year, public agencies are permitted, but not required, to assess the child's response to scientific, research based intervention in determining a child's eligibility for special education services under the Educable Mental Disability category.

6.12.4 Age of Eligibility: The age of eligibility for children identified as Trainable Mental Disability and Severe Mental Disability shall be from the third birthday through 20 years, inclusive. Children identified as

Educable Mental Disability shall be from the fourth birthday through 20 years, inclusive. These children may be served at age 3, as having a Developmental Delay.

6.13 Eligibility Criteria for Orthopedic Impairment: In order for an IEP team to determine eligibility for special education services under the orthopedic impairment category, the following is required:

6.13.1 A qualified physician shall document that a child has an orthopedic impairment in order to be considered for special education and related services.

6.13.2 The IEP team shall consider the child's need for special education and related services if the orthopedic impairment substantially limits one or more major activities of daily living and the child has:

6.13.2.1 Muscular or neuromuscular disability(ies) which significantly limit(s) the ability to communicate, move about, sit or manipulate the materials required for learning; or

6.13.2.2 Skeletal deformities or other abnormalities which affect ambulation, posture, and body use necessary for performing educational activities.

6.13.3 Determination by the IEP team of eligibility for services shall be based upon data obtained from:

6.13.3.1 Medical records documenting the physical impairment (required) and current prescriptions (e.g., O.T., P.T., medications, etc., if available);

6.13.3.2 Results from physical and occupational therapist screening(s) using appropriate measures which identify educational and related service needs, as well as environmental adjustments necessary; and

6.13.3.3 Prior program or school records (if available), and, when determined necessary, a speech and language evaluation, adaptive behavior scale, vision or hearing screening, social history or psychological evaluation.

6.13.4 For purposes of initial eligibility or continued eligibility determination, at least one of the following, and as many as are appropriate for the child's needs; physical therapist, occupational therapist, or nurse, shall be members of the IEP team.

6.13.5 Age of Eligibility: The age of eligibility for children with orthopedic impairments shall be from the third birthday through 20 years, inclusive.

6.14 Eligibility Criteria for Other Health Impairment: In order for an IEP team to determine eligibility for special education services under the Other Health Impairment category, the following is required:

6.14.1 Documentation from a qualified physician that a child has a chronic or acute health problem.

6.14.2 For ADD and ADHD, the above requirement and a school team of qualified evaluators that determine the child exhibits:

6.14.2.1 Six (or more) of the following symptoms of inattention for at least six months, to a degree that is maladaptive and inconsistent with developmental level;

6.14.2.1.1 Often fails to give close attention to details or makes careless mistakes in schoolwork, work, or other activities;

6.14.2.1.2 Often has difficulty sustaining attention in tasks or play activities;

6.14.2.1.3 Often does not seem to listen when spoken to directly;

6.14.2.1.4 Often does not follow through on instructions and fails to finish schoolwork, chores, or duties in the work place (not due to oppositional behavior or failure to understand instructions);

6.14.2.1.5 Often has difficulty organizing tasks and activities;

6.14.2.1.6 Often avoids, dislikes, or is reluctant to engage in tasks that require sustained mental effort (such as school work or homework);

6.14.2.1.7 Often loses things necessary for tasks or activities (e.g., toys, school assignments, pencils, books, or tools);

6.14.2.1.8 Is often easily distracted by extraneous stimuli;

6.14.2.1.9 Is often forgetful in daily activities; or

6.14.2.2 Six (or more) of the following symptoms of hyperactivity impulsivity have persisted for at least six months to a degree that is maladaptive and inconsistent with developmental level:

6.14.2.2.1 Often fidgets with hands or feet and squirms in seat;

6.14.2.2.2 Often leaves seat in classroom or in other situations in which remaining seated is expected;

6.14.2.2.3 Often runs about or climbs excessively in situations in which it is inappropriate (in adolescents or adults, may be limited to subjective feelings of restlessness);

6.14.2.2.4 Often has difficulty laying or engaging in leisure activities quietly;

6.14.2.2.5 Is often "on the go" or often acts as if "driven by a motor";

6.14.2.2.6 Often talks excessively;

6.14.2.2.7 Often blurts out answers before questions have been completed;

6.14.2.2.8 Often has difficulty waiting turn;

6.14.2.2.9 Often interrupts or intrudes into conversations or games; and

6.14.2.3 Some hyperactive impulsive or inattentive symptoms that caused impairment were present before seven years of age;

6.14.2.4 A clear pattern that is consistently manifested across a variety of people, tasks and settings, and that persists across a significant period of time;

6.14.2.5 Clear evidence of clinically significant impairment in social, academic or occupational functioning; and

6.14.2.6 The symptoms do not occur exclusively during the course of a pervasive developmental disorder, schizophrenia, or other psychotic disorder, and are not better accounted for by another mental disorder (e.g. mood disorder, anxiety disorder, dissociative disorder, or personality disorder).

6.14.3 Determination by the IEP team of eligibility for services shall be based upon data obtained from:

6.14.3.1 Written documentation from the formative intervention process used with the student under 14 **DE Admin. Code** 923.11.9 (relating to referral to Intervention Support Team). The documentation shall include a clear statement of the student's presenting problem(s); summary of diagnostic data collected, and the sources of that data; and summary of interventions implemented to resolve the presenting problem(s) and the effects of the interventions; and

6.14.3.2 Medical records documenting the health impairment or, in the case of students with ADD and ADHD, medical or psychological records documenting that a child has such health impairment and determination by a school team of qualified evaluators, or, in the case of reevaluation, the IEP team, including the school psychologist, that the child exhibits the criteria listed in 4.11.2.

6.14.4 For purposes of initial eligibility or continued eligibility determination, the school psychologist and the school nurse shall be members of the IEP team.

6.14.5 Age of Eligibility: The age of eligibility for children with Other Health Impairments shall be from the third birthday through 20 years, inclusive.

6.15 Eligibility Criteria for Speech and/or Language Impairment: In determining eligibility under the Speech and Language classification, the IEP team shall consider the results of an evaluation conducted by a licensed Speech and Language Pathologist which identifies one or more of the following conditions: an articulation disorder, a language disorder, dysfluent speech; or a voice disorder.

6.15.1 The age of eligibility for children identified under this definition shall be from the fifth birthday through 20 years, inclusive, except where speech and language therapy is provided as a related service. In the latter instance, the age of eligibility shall correspond with that of the identified primary disability condition.

6.16 Eligibility Criteria for Traumatic Brain Injury. A qualified physician shall document that a child has a traumatic brain injury in order to be considered for special education and related services under the above definition.

6.16.1 The IEP team shall consider the child's need for special education and related services if the traumatic brain injury substantially limits one or more major activities of daily living.

6.16.2 The age of eligibility for children under this definition shall be from the third birthday through 20 years, inclusive.

6.17 Eligibility Criteria for Visual Impairment including Blindness:

6.17.1 ~~Legally Blind~~ Blindness shall be defined as a visual acuity of 20/200 or less in the better eye with best correction, or a peripheral field so contracted that the widest diameter of such field subtends less than 20 degrees.

6.17.2 Partially Sighted shall be defined as a visual acuity between 20/70 and 20/200 in the better eye after best correction, or a disease of the eye or visual system that seriously affects visual function directly, not perceptually. Partially sighted shall also include a degenerative eye disease, which in the opinion of a licensed ophthalmologist or optometrist, is expected to reduce, in the future, either visual acuity or visual field.

resulting in partial sight or blindness. A visual impairment may be accompanied by one or more additional disabilities, but does not include visual perceptual or visual motor dysfunction resulting solely from a learning disability.

6.17.3 A licensed ophthalmologist or optometrist shall document that a child has at best, corrected visual acuity of 20/200 or less in the better eye, or a peripheral field so contracted that the widest diameter of such field subtends less than 20 degrees, ~~legally blind (for blindness)~~, or a visual acuity of 20/70 or less in the better eye after all correction (for partially sighted), or a degenerative eye disease.

6.17.4 The IEP team shall consider the documentation of visual impairment in addition to other information relevant to the child's condition in determining eligibility for special education under the above definition.

6.17.5 The age of eligibility for children identified under this definition shall be from birth through 20 years, inclusive.

6.18 Eligibility Criteria for Preschool Speech Delay (3 and 4 year olds only):

6.18.1 A speech disability is defined as a communication disorder or delay involving articulation, voice quality, or speech fluency to such a degree that it interferes with a child's overall communicative performance.

6.18.2 In order to determine a significant delay or disorder in this area, the child shall receive a speech and language evaluation conducted by a licensed Speech and Language Pathologist.

6.18.2.1 A speech and language evaluation shall include assessment of articulation, receptive language and expressive language as measured by a standardized norm based instrument. It is strongly recommended that the evaluation include clinical observations or an assessment of oral motor functioning, voice quality and speech fluency. Results of the evaluation may identify a significant delay or disorder in one or more of the following areas:

6.18.2.1.1 Articulation errors of sounds that are considered to be developmentally appropriate for the child's age as measured by an articulation test,

6.18.2.1.2 Conversational speech that is not developmentally appropriate for the child's age as measured by a speech and language pathologist,

6.18.2.1.3 Oral motor involvement which may affect the development of normal articulation,

6.18.2.1.4 Speech fluency, or

6.18.2.1.5 Voice quality

6.18.3 Results of the evaluation may indicate a significant delay in receptive and expressive language which warrants further evaluation. In this event, the child is to be referred for a multidisciplinary evaluation to determine if he/she meets the eligibility criteria for developmental delay.

6.18.4 The age of eligibility for preschool children identified under this definition shall be from the third birth date until the fifth birth date.
(Authority: 14 Del.C. §3110)

7.0 Learning Disabilities

7.1 ~~General: Eligibility for special education services under the learning disability category shall be determined in accordance with 8.0 to 11.0. Subject to the effective dates in 6.11 and the special grandfathering rule in 6.4, eligibility for special education services under the learning disability category shall be contingent on the prior delivery of appropriate instruction, and shall further consider the child's response to scientific, research based interventions delivered according to the procedures in 12.0.~~

7.2 ~~Reserved: Assessments of intellectual functioning are not required to determine eligibility for special education services under the learning disability category. Assessments of intellectual functioning should generally be reserved for students suspected of having a mental disability or where an Intervention Support Team, or other group of qualified professionals (see 6.1), and the parent determines such tests are relevant in selecting appropriate instructional or behavioral interventions.~~

(Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6); 14 Del.C. §3110)

8.0 Additional Group Members.

8.1 The determination of whether a child suspected of having a specific learning disability is a child with a disability as defined in 14 DE Admin. Code 922.3.0 shall be made by the child's parents and a team of

qualified professionals, which shall include:

- 8.1.1 The child's regular teacher; or
 - 8.1.2 If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or
 - 8.1.3 For a child of less than school age, an individual qualified by the DOE to teach a child of his or her age; and
 - 8.1.4 At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.
- (Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6)); 14 Del.C. §3110)

9.0 Determining the Existence of a Specific Learning Disability.

9.1 Subject to 6.4 and 6.11, the ~~The~~ group described in 6.1 may determine that a child has a specific learning disability if:

9.1.1 Lack of achievement: The child does not achieve adequately for the child's age or to meet State approved grade level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child's age or State approved grade level standards as further described in 12.0:

- 9.1.1.1 Oral expression.
- 9.1.1.2 Listening comprehension.
- 9.1.1.3 Written expression.
- 9.1.1.4 Basic reading skill.
- 9.1.1.5 Reading fluency skills.
- 9.1.1.6 Reading comprehension.
- 9.1.1.7 Mathematics calculation.
- 9.1.1.8 Mathematics problem solving; and

9.1.2 Insufficient progress: The child does not make sufficient progress to meet age or State approved grade level standards in one or more of the areas identified in ~~9.4~~ 9.1.1 when using a process based on the child's response to scientific, research based intervention as further described in 12.0; or

9.1.3 Pattern of strengths and weaknesses: The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with 4.0 and 5.0; and

9.1.4 Rule out other conditions: The group determines that its findings under 9.1.1, 9.1.2 and 9.1.3 are not primarily the result of:

- 9.1.4.1 A visual, hearing, or motor disability;
- 9.1.4.2 Mental retardation;
- 9.1.4.3 Emotional disturbance;
- 9.1.4.4 Cultural factors;
- 9.1.4.5 Environmental or economic disadvantage; or
- 9.1.4.6 Limited English proficiency.

9.2 To ensure that underachievement in a child suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, the group shall consider, as part of the evaluation described in 4.0 through 6.0:

9.2.1 Data that demonstrate that prior to, or as a part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel; and

9.2.2 Data based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents.

9.3 The public agency shall promptly request parental consent to evaluate the child to determine if the child needs special education and related services, and shall adhere to the timeframes described in 2.3 and 3.0 (unless extended by mutual written agreement of the child's parents and a group of qualified professionals, as described in 6.1):

9.3.1 If, prior to a referral, a child has not made adequate progress after an appropriate period of time (as further provided in 12.0) when provided instruction, as described in 9.2; and

9.3.2 Whenever a child is referred for an evaluation.
(Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6); 14 Del.C. §3110)

10.0 Observation

10.1 The public agency shall ensure that the child is observed in the child's learning environment (including the regular classroom setting) to document the child's academic performance and behavior in the areas of difficulty.

10.2 The group described in 6.1, in determining whether a child has a specific learning disability, shall decide to use information from an observation in routine classroom instruction and monitoring of the child's performance that was done before the child was referred for an evaluation; or have at least one member of the group conduct an observation of the child's academic performance in the regular classroom after the child has been referred for an evaluation and parental consent is obtained.

10.3 In the case of a child of less than school age or out of school, a group member shall observe the child in an environment appropriate for a child of that age.
(Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6); 14 Del.C. §3110)

11.0 Specific Documentation for the Eligibility Determination

11.1 For a child suspected of having a specific learning disability, the documentation of the determination of eligibility, as required in 6.1, shall contain a statement of:

11.1.1 Whether the child has a specific learning disability;

11.1.2 The basis for making the determination, including an assurance that the determination has been made in accordance with 6.3;

11.1.3 The relevant behavior, if any, noted during the observation of the child and the relationship of that behavior to the child's academic functioning;

11.1.4 The educationally relevant medical findings, if any;

11.1.5 Whether,

11.1.5.1 The child does not achieve adequately for the child's age or to meet State approved grade level standards consistent with 9.1.1; and

11.1.5.2 The child does not make sufficient progress to meet age or State approved grade level standards consistent with 9.1.2; or

11.2 The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State approved grade level standards or intellectual development consistent with 9.1.3;

11.3 The determination of the group concerning the effects of a visual, hearing, or motor disability; mental retardation; emotional disturbance; cultural factors; environmental or economic disadvantage; or limited English proficiency on the child's achievement level; and

11.4 If the child has participated in a process that assesses the child's response to scientific, research based intervention:

11.4.1 The instructional strategies used and the student centered data collected; and

11.4.2 The documentation that the child's parents were notified about:

11.4.2.1 The DOE's policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided;

11.4.2.2 Strategies for increasing the child's rate of learning; and

11.4.2.3 The parents' right to request an evaluation.

11.5 Each group member shall certify in writing whether the report reflects the member's conclusion. If it does not reflect the member's conclusion, the group member shall submit a separate statement presenting the member's conclusions.

(Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6); 14 Del.C. §3110)

12.0 Response to Intervention Procedures. Reserved.

12.1 Each public agency shall establish and implement procedures to determine whether a child responds to scientific, research-based interventions (RTI) for reading and mathematics.

12.1.1 Agencies may also establish and implement procedures to determine whether a child responds to scientific, research-based interventions in oral expression, listening comprehension, and written expression.

12.2 Public agencies shall use rubrics approved by DOE to evaluate and select programs of instruction, and Tier 2 and Tier 3, interventions for reading and mathematics.

12.3 Instructional screening and progress monitoring instruments used as part of RTI procedures shall be curriculum based.

12.4 RTI procedures, including the same frequency and intensity of instruction, and small group settings available to all students, shall apply to children with disabilities who already receive special education and related services. RTI procedures shall not be required for students who participate in Alternate Assessment based on Alternate Achievement standards (AA-AAS).

12.4.1 IEP teams of children with disabilities may specialize the instruction and method of delivering interventions under RTI procedures.

12.4.2 IEP teams may also determine that a child with a disability requires more intensity or frequency of instruction, or smaller group settings than would otherwise be provided under RTI procedures.

12.5 RTI procedures shall include the tiers and types and duration of services and interventions described in 12.6 through 12.10.

12.6 Tier 1: Core Classroom Instruction: Tier 1 services shall be designed to be delivered in a general education setting, by a general education teacher. Instruction shall be delivered with fidelity as part of a scientifically based core curriculum and matched to student need.

12.6.1 Universal Tier 1 instructional screenings for reading and mathematics shall be conducted at least 3 times each regular school year at routine and fairly spaced intervals. The first screening shall be conducted within 2 weeks of the beginning of the regular school year, or within 2 weeks of the child's entry into school.

12.6.2 Children who score at or below the 25th percentile on any instructional screening, and children with disabilities already receiving special education and related services, shall be provided Tier 2 interventions.

12.6.3 A school based team (such as a literacy team, a leadership team or a grade-level team) shall review the program and progress of any child who does not score at benchmark on any instructional screening, but who does score above the 25th percentile, to assure that the child is receiving differentiated, needs-based instruction. In addition, the team's review shall include the fidelity of program implementation, pacing and appropriateness of instructional groupings.

12.6.3.1 The child's progress toward end of year benchmarks shall occur at least once every 2 weeks until progress monitoring consistently demonstrates that the child is on a trajectory to meet end of year benchmarks.

12.6.3.2 If, after 6 weeks of progress monitoring, the child is not on a trajectory to meet end of the year benchmarks, the child shall be provided Tier 2 interventions unless the school based team specifically determines that further progress monitoring is required before additional interventions are provided.

12.7 Tier 2: Intervention: Tier 2 interventions shall be designed to be delivered primarily in the general education setting, by a general education teacher, but may be delivered in other or additional settings or by other trained staff as appropriate to the specific intervention. It shall be implemented with fidelity to its scientific research base and matched to student need.

12.7.1 Tier 2 intervention shall be in addition to regularly scheduled core instruction in the general education curriculum, and shall be delivered in small group, at least 3 times each school week for at least 30 minutes per session.

12.7.2 Tier 2 interventions shall be delivered for at least 6 school weeks. Progress shall be monitored weekly against established benchmarks.

12.7.3 If, after 6 school weeks of Tier 2 intervention, a child has made no progress toward benchmarks, or has made progress, but is not on a trajectory to meet end-of-year benchmarks, an Intervention Support Team (IST) formulated in accordance with 14 **DE Admin. Code** 923.11.9, shall meet to review the child's program and progress, to assure that the child is receiving differentiated, needs-based instruction. In addition, the IST's review shall include fidelity of program implementation, pacing, and appropriateness of instructional groupings. Based on its review, the IST shall determine whether: additional assessments are required; additional changes to instructional or behavioral methods are required; or the child requires Tier 3 intervention.

12.7.4 If, after an additional 6 school weeks of Tier 2 intervention (or up to a total of 12 school weeks of intervention) a child has made no progress toward benchmarks, or has made progress, but is not on a

trajectory to meet end-of-year benchmarks, the child shall begin receiving Tier 3 intervention as outlined by the IST.

12.8 Tier 3: Intervention: Tier 3 interventions shall be designed to be delivered primarily in the general education setting, by a general education teacher and additional staff, but is likely to be delivered in other or additional settings, or by other trained staff as appropriate to the specific intervention. It shall be implemented with fidelity to its scientific research base and matched to the student's needs.

12.8.1 Tier 3 intervention shall be in addition to regularly scheduled core instruction in the general education curriculum, and shall be delivered in group settings smaller than those for intervention delivered in Tier 2, at least 5 times each school week for at least 30 minutes per session.

12.8.2 Tier 3 interventions shall be delivered for at least 6 school weeks. Progress shall be monitored weekly against established benchmarks.

12.8.3 If, after 6 school weeks of Tier 3 interventions (or up to a total of 18 school weeks of intervention), a child has made no progress toward benchmarks, the IST shall refer the child for an initial evaluation for special education services

12.8.4 If, after 6 school weeks of Tier 3 interventions (or up to a total of 18 school weeks of intervention), a child has made progress toward benchmarks, but is not on a trajectory to meet end-of-year benchmarks, the IST shall meet to review the child's program and progress, to assure that the child is receiving differentiated needs-based instruction. In addition, the IST's review shall include fidelity of program implementation, pacing, and appropriateness of instructional groupings. Based on its review, the IST shall determine whether: additional assessments are required; additional changes to instructional or behavioral methods are required; or the child should be referred for an initial evaluation for special education services.

12.8.5 If, after an additional 6 school weeks of Tier 3 interventions (or up to a total of 24 school weeks of interventions), a child has made progress toward benchmarks, but is not on a trajectory to meet end-of-year benchmarks, the IST shall refer the child for an initial evaluation for special education services.

12.9 RTI procedures shall also be designed to permit students to move between tiers of intervention based on the child's progress against benchmarks as measured through weekly progress monitoring. Weekly progress monitoring shall continue after a student is referred for an initial special education evaluation and for any student who is evaluated and determined eligible for special education and related services after receiving the interventions required in this section. In addition, the child's IEP team shall specifically consider the information gathered about the child's response to interventions, and the results of ongoing progress monitoring, in developing and revising the child's IEP. Subject to 3.0, a public agency shall initiate a reevaluation when ongoing progress monitoring indicates that the child's performance in reading or mathematics has improved such that the child may no longer require special education and related services.

12.10 If 80% or more of children in a classroom score below benchmark on any instructional screening, a school-based team, including a building level administrator, shall meet to consider the need for additional classroom supports and strategies.

12.11 Consistent with 1.0 through 5.0, a parent of a child may initiate a request for an initial evaluation at any time, including during the RTI process. The public agency may grant or decline the request. If the public agency declines to conduct the initial evaluation, it must provide written notice consistent with 14 **DE Admin. Code** 926.3.0. If the public agency agrees to conduct an initial evaluation, the evaluation shall be completed, and an eligibility determination made, within the timeframe established in 2.3. However, a child may be determined ineligible for services under the learning disability or educable mentally disabled categories where there are insufficient data to demonstrate that the child was provided appropriate instruction in the regular education setting, or where there is insufficient data-based documentation of repeated assessments of achievement. If a child is determined ineligible for special education services on these grounds, the child may be referred back to an IST to gather the required documentation and data by completing the RTI process. Eligibility for special education services may then be reconsidered at the request of the parent or a member of the IST.

(Authority: 20 U.S.C. 1221e-3; 1401(30); 1414(b)(6); 14 **Del.C.** §3110)

***Please Note: As the rest of the sections were not amended, they are not being published. A complete set of the rules and regulations for the Department of Education is available at: <http://regulations.delaware.gov/AdminCode/title14>**

10 DE Reg. 1761 (06/01/07) (Prop.)