

DEPARTMENT OF EDUCATION
OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(d) (14 **Del.C.** §122(d))
14 **DE Admin. Code** 928

FINAL

REGULATORY IMPLEMENTING ORDER

928 Children With Disabilities Subpart G, Use and Administration of Funds

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** 928, Children With Disabilities, Subpart G, Use and Administration of Funds.

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 928 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** 928 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 June 3, 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 related to funding and the September 30th unit count date; use of the term "paraprofessionals" in 3.2.2; suggested revision to the list of professional staff in 3.2.5; omission of "preschool" under 3.2.5.1; review by the IEP team of the needs based funding unit and assurances; and a request to have the unit funding level designated on the IEP. The Department has agreed to some of the recommended revisions; however, will not be accepting all recommendations. A letter to the Councils will be provided to the Councils related to the recommendations.

The Department has agreed to the following recommendations and the changes have been made to the regulation:

- The Governor's Advisory Council for Exceptional Citizens and the State Council for Persons With Disabilities observed that while Section 3.2.5.1 requires districts to submit documentation to DOE to certify that basic, intensive, and complex units earned are used to provide services to the children counted in those units, Section 3.2.5.1 does not reference preschool units. DOE inadvertently omitted a reference to preschool units in Section 3.2.5.1. The Department has revised Section 3.2.5.1 to identify preschool units in alignment with the Delaware Code and 14 **Del.C.** §1703.
- In addition, the Councils requested the DOE adopt an explicit reference to 14 **Del.C.** §1703(d)(8) to requiring teams to discuss and review the needs based funding unit and assure in writing that adequate resources are available to implement the IEP. The Department has revised Section 4.0 to explicitly reference this statutory requirement.

A public hearing was held on July 27, 2011 and there were no participants.

II. Findings of Facts

The Secretary finds that it is appropriate to amend 14 **DE Admin. Code** 928 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** 928. Therefore, pursuant to 14 **Del.C.** §122, 14 **DE Admin. Code** 928, attached hereto as *Exhibit "B"* is hereby amended. Pursuant to the provision of 14 **Del.C.** §122(e), 14 **DE Admin. Code** 928 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** 928 shall be in the form attached hereto as *Exhibit "B"*, and said regulation shall be cited as 14 **DE Admin. Code** 928 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 August 18, 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 18th day of August, 2011.

Department of Education

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

Approved this 18th day of August, 2011

State Board of Education

Teri Quinn Gray, Ph.D., President

Jorge L. Melendez, Vice President

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928 Children with Disabilities Subpart G Use and Administration of Funds

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 §14079(a)(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 Administration of Funds: DOE Audit

- 1.1 Administration of Funds: Funds for the education of children with disabilities shall be administered pursuant to Title 14 of the **Delaware Code**, these regulations and 14 **DE Admin. Code** 701.
- 1.2 Child Count procedures: Each public agency shall participate in the annual count of children served under the Act in accordance with procedures and forms developed by the DOE. Such procedures and forms shall conform to applicable state and federal requirements, regulations and written instructions.
- 1.3 Unit count audit and recovery of funds for ~~misclassified~~ children counted in needs based funding levels incongruent with IEP needs identified: DOE shall conduct a random ~~file~~ audit in each LEA as soon as possible after September 30.
 - 1.3.1 The purpose of the audit is to ensure that students reported as part of a special education unit as of September 30 are eligible for special education services as part of that unit on or prior to September 30 and that such services are being provided. The audit may be joined with other monitoring activities in the discretion of the DOE.
 - 1.3.2 The ~~DOE shall implement~~ specific procedures used to authenticate the count of children with disabilities shall be provided through written guidance by the DOE.
 - 1.3.3 Nothing in this regulation limits DOE's monitoring and general supervisory authority or its ability to ~~identify children who have been misclassified~~ identify any federal or state regulatory non-compliance at times other than the audit of State units as of September 30, including as part of other routine monitoring activities.
(Authority: 14 **Del.C.** §§122 and 3110)

14 DE Reg. 1069 (04/01/11)

2.0 Reserved

3.0 State Funding for Children with Disabilities

- 3.1 State funding under the unit system is contingent upon: the proper identification of children with disabilities in accordance with Title 14 of the **Delaware Code** and these regulations; and a satisfactory DOE audit to document the child count for units awarded on September 30, and to document the availability of current and complete IEPs for children included in the count.
- 3.2 Paraprofessional Positions for Services to Children with Disabilities authorized under 14 **Del.C.** §1324.

3.2.1 As used in 3.2, the term “**Paraprofessional**” means “**Paraeducator**” “**Instructional Paraeducator**” and “**Service Paraeducator**” all as defined in 14 DE Admin. Code 1584.2.0 1517.

3.2.2 All paraprofessionals shall work under the supervision of teachers.

3.2.3 The following positions are authorized:

3.2.3.1 ~~Trainable Mental Disability Unit: One classroom teacher (or in lieu of a teacher, two paraprofessionals) may be employed, as long as the number of paraprofessionals does not exceed the number of teachers in any approved special school or program. Teachers or paraprofessionals who work during the eleventh and twelfth months shall be paid for two hundred twenty two (222) days.~~

3.2.3.2 ~~Severe Mental Disability Unit: One classroom teacher and one classroom paraprofessional may be employed per unit in any approved special school or program. In lieu of the teacher, two additional paraprofessionals may be employed, as long as the number of paraprofessionals does not exceed the number of teachers in any given school or program by a 2 to 1 ratio. Teachers or paraprofessionals who work during the eleventh and twelfth months shall be paid for two hundred twenty two (222) days.~~

3.2.3.3 ~~Autism Unit: One teacher and one paraprofessional may be employed per unit. Teachers or paraprofessionals who work during the eleventh and twelfth months shall be paid for two hundred twenty two (222) days, or in the event of additional student attendance as authorized in 14 ~~Del.C.~~ §1703(e), such additional time not exceeding 230 teacher days.~~

3.2.3.4 ~~Orthopedic Impairment Unit: One classroom teacher and one paraprofessional may be employed per unit in any approved special school or program.~~

3.2.3.5 ~~Hearing Impairment Unit: One classroom teacher and one paraprofessional per unit in grades K to 3, one classroom teacher and one paraprofessional per unit in grades 4 to 12, and one clerk aide for the parent child program may be employed in any approved special school or program.~~

3.2.3.6 ~~Deaf-Blindness Unit: One classroom teacher and one classroom paraprofessional may be employed per unit. In lieu of the teacher, two additional paraprofessionals may be employed as long as the number of paraprofessionals does not exceed the number of teachers in any approved special school by a 2 to 1 ratio. Teachers or paraprofessionals who work during the eleventh and twelfth months shall be paid for two hundred and twenty two (222) days.~~

3.2.3.7 ~~Intensive Learning Center Unit: One classroom teacher (or in lieu of a teacher, two paraprofessionals) may be employed as long as the number of paraprofessionals does not exceed the number of teachers in any center, and that all paraprofessionals work under the direct supervision of teachers.~~

3.2.43 The use and ratio of paraprofessionals to teachers shall be dependent upon the rationale developed by the public agency.

3.2.4 The DOE will authorize the needs based funding rubric which reflects the primary services and costs associated with the needs based funding units.

3.2.4.1 The rubric authorized by DOE will be consistent with the conditions for needs based units described in Title 14 Chapter 17 1703(d) and must be used by all districts and charter schools.

3.2.4.2 The rubric will be published electronically annually through DOE’s unit count web based portal.

3.2.4.3 Districts and charter schools shall assign each student with a disability as a preschool, basic, intensive or complex unit based on the educational needs of the student identified in the Individualized Education Program (IEP).

3.2.5 All units generated by special education students are to be used for professional staff to support students with disabilities to include special education teachers, school psychologists, speech language pathologists, reading specialists, educational diagnosticians, counselors, class aides and social workers. All other conditions as described in Title 14, Chapter 17 regarding needs based unit funding apply.

3.2.5.1 All districts and charter schools will submit annual documentation to the DOE certifying that [preschool,] basic, intensive and complex units earned are used to provide services to children counted in those units.

3.2.5.2 Forms for annual certifying documentation for needs based units will be published electronically through DOE’s web based unit count portal.

3.3 School Nurses (as authorized by 14 Del.C. §1310)

3.3.1 A nurse shall be employed for a combination of eight (8) or more complex or intensive units of children or a combination with autism, orthopedic impairment, trainable mental disability, severe mental disability, thereof when those units are counted through a special school or program, and for hearing impairment as

per statutory formula, i.e., 40:1. Such units shall be subtracted from the LEA's total units so that they are not counted twice.

3.4 Other Positions for Services to Children with Disabilities

3.4.1 Any special school or program with an enrollment of 10 or more units may employ a secretary (for 12 months per year) and proportional secretarial services for less than 10 units. Such units must be subtracted from the LEA's total units so that they are not counted twice.

3.4.2 Custodial services shall be provided upon the regular custodial formula with consideration given for residence hall care.

3.4.3 An instructional media specialist shall be assigned to the school for the hearing-impaired deaf when there is a minimum of ~~10 units~~ 60 children.

3.4.4 Whenever the DOE with the approval of the State Board of Education designates a particular school district to serve as administrator for the statewide program for deaf blind pupils, that district may employ as a statewide coordinator at the principal's rank and salary, ~~a principal for 8 or more such units of deaf blind children. If a principal is assigned responsibility for such a program for fewer than 8 units, the support for the assignment shall be in the same ratio as the number of authorized units is to 8 units.~~

(Authority: 14 Del.C. §§122 and 3110)

4.0 ~~Reserved~~ Team Assurance

At the completion of an IEP meeting for a child with a disability, the team will discuss and review the needs based funding unit and assure in writing that adequate resources are available to implement the IEP.]

5.0 Federal Sub Grants to LEAs

5.1 DOE shall distribute any funds the State receives as part of its federal allocation under Part B of the Act, and does not reserve for permissible state activities, to LEAs (including public charter schools that operate as LEAs) in Delaware that have established their eligibility under section 613 of the Act (20 U.S.C. 1413) and these regulations for use in accordance with Part B of the Act.

5.2 Allocations to LEAs: The amount of the allocation DOE makes to eligible LEAs for each fiscal year Delaware receives a federal allocation under Part B of the Act shall be determined in accordance with 34 C.F.R. §300.705(b) and corresponding federal guidance and instructions.

5.3 Reallocation of funds: If DOE determines that an LEA is adequately providing FAPE to all children with disabilities residing in the area served by that agency with State and local funds, the DOE may reallocate any portion of the federal funds under these regulations that are not needed by that LEA to provide FAPE, to other LEAs in Delaware that are not adequately providing special education and related services to all children with disabilities residing in the areas served by those other LEAs.

5.4 *Application required: Each LEA seeking a sub grant shall complete and submit an application to DOE. The application shall: be submitted during the time frames established by DOE; be completed on or in such written or electronic form as DOE requires; include any certifications and assurances required by DOE; and be consolidated with the LEA's application for other federal programs to the extent permitted by DOE procedures.*

5.5 Review of application: appeal of adverse determination

5.5.1 *DOE shall review each timely sub grant application, notify the LEA whether its application is approved or not approved, and advise the LEA of any conditions which must be met in order for the application to be approved.*

5.5.2 Any amendment or revision to an LEA application shall be submitted in such written or electronic form as DOE requires and reviewed using the same requirements and procedures used for an initial application.

5.5.3 In the event that DOE and the LEA cannot negotiate and effect an approved sub grant application, DOE shall notify the LEA in writing of its intent to disapprove all or part of the application. This notice shall also inform the LEA that it is entitled to a hearing before the DOE's final decision to disapprove all or part of the application, and shall advise the LEA of the procedure for requesting a hearing.

5.5.4 An LEA shall have thirty (30) days to request a hearing, beginning on the date of the DOE's notice to the LEA of its right to a hearing. The request for a hearing must be filed in writing with the Secretary and shall explain why the LEA believes its application should be approved.

5.5.5 The LEA shall have access, at a reasonable time and location, to all of the Department's records pertaining to the application and to the applications of other LEAs.

5.5.6 The DOE shall schedule and conduct a hearing on the record within 30 days of the Secretary's receipt of a hearing request from the LEA. *Except as otherwise specifically provided in this section, the hearing shall*

be conducted in accordance with Delaware Department of Education's "Hearing Procedures and Rules" as from time to time amended.

5.5.7 No later than 10 days after the hearing, the DOE shall issue its written ruling, which shall include findings of fact and the reasons for its decision.

5.5.7.1 If the DOE determines that its intention to disapprove all or part of the application was contrary to applicable state or federal law, the Department shall rescind its intent to disapprove the application and shall issue an approval consistent with the requirements of such laws.

5.5.7.2 If the DOE issues a final disapproval of all or part of the application, the LEA may appeal that decision to the Secretary of the United States Department of Education. The LEA must file a notice of appeal with the Secretary of the United States Department of Education within 20 days of the final disapproval of the Delaware Department of Education. *A copy of the LEA's federal notice of appeal must be filed with the Delaware Department of Education when it is filed with the United States Secretary of Education.*

(Authority: 20 U.S.C. 1411(f); 14 **Del.C.** §3110; see also 34 CFR 76.401(d))

6.0 to 17.0 Reserved

18.0 Facilities, Equipment and Materials

18.1 *All instructional or treatment programs for children with disabilities shall provide appropriate materials and equipment for implementation of individualized education programs.*

18.2 Compliance with certain regulations. *All facilities which house programs for children with disabilities shall meet State and federal standards with regard to space, health, fire, safety, and barrier free regulations, including as applicable:*

18.2.1 Appendix A of part 36 of title 28, Code of Federal Regulations (commonly known as the "Americans with Disabilities Accessibility Standards for Buildings and Facilities"); or

18.2.2 Appendix A of subpart 101-19.6 of title 41, Code of Federal Regulations (commonly known as the "Uniform Federal Accessibility Standards").

(Authority: 20 U.S.C. 1404; 14 **Del.C.** §3110)

Subpart H Reserved

1.0 through 18.0 Reserved

Note to Readers: Subpart H of the federal regulations addresses the way the United States Department of Education's allocates Preschool Grants for Children with Disabilities to the State, i.e., no further state level regulation is necessary to implement Subpart H. The subpart is reserved, however, to preserve the integrity of the federal numbering system to the extent feasible under the State regulatory numbering system.

10 DE Reg. 1816 (06/01/07)

15 DE Reg. 356 (09/01/11) (Final)