

DEPARTMENT OF EDUCATION
OFFICE OF THE SECRETARY
Statutory Authority: 14 Delaware Code, Section 122 (14 **Del.C.** §122)
14 **DE Admin. Code** 925

FINAL

REGULATORY IMPLEMENTING ORDER

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

I. SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED

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 Programs. The amendment to subsection 6.17 bring the regulation into compliance with applicable federal law.

Notice of the proposed regulation was published in the *News Journal* and the *Delaware State News* on November 1, 2017, in the form hereto attached as *Exhibit "A"*. Comments were received from Governor's Advisory Council for Exceptional Citizens and the State Council for Persons with Disabilities. Comments specifically related to the language of the regulation expressed the belief that clarification could be provided by including additional language from federal guidance. The Department considered the comment and determined that the federal guidance, which is discretionary, may not be applicable to all situations and could be confusing; no changes were made in that area.

The Department determined that there was a technical error in the proposed regulation as published. The technical error was in subsection 6.17.5. This subsection was inadvertently stricken and the language has now been reinserted as subsection 6.17.3 so as to be in compliance with the law.

II. FINDINGS OF FACTS

The Secretary finds that it is appropriate to amend 14 **DE Admin. Code** 925 Children with Disabilities Subpart D, Evaluations, Eligibility Determination, Individualized Education Programs in subsection 6.17 to bring the regulation into compliance with applicable federal law.

III. DECISION TO AMEND THE REGULATION

For the foregoing reasons, the Secretary concludes that it is appropriate to amend 14 **DE Admin. Code** 925 Children with Disabilities Subpart D, Evaluations, Eligibility Determination, Individualized Education Programs. Therefore, pursuant to 14 **Del.C.** §122, 14 **DE Admin. Code** 925 Children with Disabilities Subpart D, Evaluations, Eligibility Determination, Individualized Education Programs attached hereto as Exhibit "B" is hereby amended. Pursuant to the provision of 14 **Del.C.** §122(e), 14 **DE Admin. Code** 925 Children with Disabilities Subpart D, Evaluations, Eligibility Determination, Individualized Education Programs 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** 925 Children with Disabilities Subpart D, Evaluations, Eligibility Determination, Individualized Education Programs amended hereby shall be in the form attached hereto as Exhibit "B", and said regulation shall be cited as 14 **DE Admin. Code** 925 Children with Disabilities Subpart D, Evaluations, Eligibility Determination, Individualized Education Programs 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 January 18, 2018. 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 January 2018.

Department of Education

Susan S. Bunting, Ed.D., Secretary of Education

Approved this 18th day of January 2018

State Board of Education

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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 §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 Parental Consent

- 1.1 Parental consent for initial evaluation: The public agency proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability shall, after providing notice consistent with 14 **DE Admin. Code** 926.3.0 and 926.4.0, obtain informed written consent from the parent of the child before conducting the evaluation.
 - 1.1.1 Parental consent for initial evaluation shall not be construed as consent for initial provision of special education and related services.
 - 1.1.2 The public agency shall make reasonable efforts to obtain the informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability.
 - 1.1.3 For initial evaluations only, if the child is a ward of the State and is not residing with the child's parent, the public agency is not required to obtain informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability if:
 - 1.1.3.1 Despite reasonable efforts to do so, the public agency cannot discover the whereabouts of the parent of the child; the rights of the parents of the child have been terminated in accordance with State law; or the rights of the parent to make educational decisions have been subrogated by a judge in accordance with State law and consent for an initial evaluation has been given by an individual appointed by the judge to represent the child.
 - 1.1.4 If the parent of a child enrolled in public school or seeking to be enrolled in public school does not provide consent for initial evaluation under 1.1, or the parent fails to respond to a request to provide consent, the public agency may, but is not required to, pursue the initial evaluation of the child by utilizing the procedural safeguards in 14 **DE Admin. Code** 926 (including the mediation procedures or the due process procedures, if appropriate).
 - 1.1.4.1 The public agency does not violate its obligation under 14 **DE Admin. Code** 923.11.0 and 14 **DE Admin. Code** 925.2.0 through 925.12.0 if it declines to pursue the evaluation.
- 1.2 Parental consent for services: A public agency that is responsible for making FAPE available to a child with a disability shall obtain informed consent from the parent of the child before the initial provision of special education and related services to the child. If any Delaware agency obtains consent for the initial provision of special education and related services under the child's first IEP, and the child transfers to, or subsequently receives services from, another Delaware public agency, the receiving agency shall not be required to obtain parental consent for the provision of special education and related services.
 - 1.2.1 The public agency shall make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services to the child.
 - 1.2.2 If the parent of a child fails to respond to a request for, or refuses to consent to, the initial provision of special education and related services under 1.2, the public agency:
 - 1.2.2.1 May not use the procedures in 14 **DE Admin. Code** 926 including the mediation procedures or the due process procedures in order to obtain agreement or a ruling that the services may be provided to the child;
 - 1.2.2.2 Will not be considered to be in violation of the requirement to make available FAPE to the child for the failure to provide the child with the special education and related services for which the parent refuses to or fails to provide consent; and
 - 1.2.2.3 Is not required to convene an IEP Team meeting or develop an IEP for the child.
 - 1.2.3 If, at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency –

- 1.2.3.1 May not continue to provide special education and related services to the child, but must provide prior written notice in accordance with 14 **DE Admin. Code** 926.3.0 before ceasing the provision of special education and related services;
 - 1.2.3.2 May not use the procedures in 14 **DE Admin. Code** 926 (including the mediation procedures) or the due process procedures in order to obtain agreement or a ruling that the services may be provided to the child;
 - 1.2.3.3 Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services; and
 - 1.2.3.4 Is not required to convene an IEP Team meeting or develop an IEP for the child for further provision of special education and related services.
- 1.3 Parental consent for reevaluations: Subject to 1.3.1, each public agency shall obtain informed parental consent, in accordance with 1.1 prior to conducting any reevaluation of a child with a disability.
- 1.3.1 If the parent refuses to consent to the reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the consent override procedures described in 1.1.4.
 - 1.3.2 The public agency does not violate its obligation under 14 **DE Admin. Code** 923.11.0 and 2.0 through 12.0 if it declines to pursue the evaluation or reevaluation.
 - 1.3.3 The informed parental consent described in 1.3 need not be obtained if the public agency can demonstrate that it made reasonable efforts to obtain such consent; and the child's parent has failed to respond.
- 1.4 Other consent requirements: Parental consent is not required before reviewing existing data as part of an evaluation or a reevaluation; or administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children.
- 1.5 Each public agency shall establish and implement effective procedures to ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE.
- 1.6 A public agency may not use a parent's refusal to consent to one service or activity under this section to deny the parent or child any other service, benefit, or activity of the public agency, except as required by these regulations.
- 1.7 If a parent of a child who is home schooled or placed in a private school by the parents at their own expense does not provide consent for the initial evaluation or the reevaluation, or the parent fails to respond to a request to provide consent, the public agency may not use the consent override procedures in 1.1.4 and 1.3; and
- 1.7.1 The public agency is not required to consider the child as eligible for services under 14 **DE Admin. Code** 923.32.0 through 923.44.0.
- 1.8 To meet the reasonable efforts requirement of this section, the public agency shall document its attempts to obtain parental consent using the procedures in 22.6.
- (Authority: 20 U.S.C. 1414(a)(1)(D) and 1414(c); 14 **Del.C.** §3110)

14 DE Reg. 1060 (04/01/11)
20 DE Reg. 172 (09/01/16)

2.0 Initial Evaluations

- 2.1 Initial Evaluations General: Each public agency shall conduct a full and individual initial evaluation in accordance with 5.0 and 6.0 before the initial provision of special education and related services to a child with a disability under these regulations. *The initial evaluation shall be completed in a manner which precludes undue delay in the evaluation of students.*
- 2.2 Request for initial evaluation: Consistent with the consent requirements in 1.0, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.
- 2.3 Procedures for initial evaluation: *Within forty-five (45) school days or ninety (90) calendar days, whichever is less, of receiving written parental consent, the initial evaluation shall be conducted; and the child's eligibility for special education and related services must be determined at a meeting convened for that purpose.*
- 2.3.1 The initial evaluation shall consist of procedures to determine if the child is a child with a disability as defined in 14 **DE Admin. Code** 922.3.0; and to determine the educational needs of the child.
- 2.4 Exception: The time frame described in 2.3 of this section does not apply to a public agency if:
- 2.4.1 The parent of a child repeatedly fails or refuses to produce the child for the evaluation; or
 - 2.4.2 A child enrolls in a school of another public agency after the relevant time frame in 2.3 has begun, and prior to a determination by the child's previous public agency as to whether the child is a child with a disability.

- 2.5 The exception in 2.4.2 applies only if the subsequent public agency is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent public agency agree to a specific time when the evaluation will be completed.
- 2.6 Screening for instructional purposes is not evaluation: The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services.
(Authority: 20 U.S.C. 1414(a); 14 **Del.C.** §3110)

14 DE Reg. 1060 (04/01/11)

3.0 Reevaluations

- 3.1 **General:** A public agency shall ensure that a reevaluation of each child with a disability is conducted in accordance with 14 **DE Admin. Code** 925.4.0 through 925.12.0 if the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or if the child's parent or teacher requests a reevaluation.
- 3.2 **Limitation:** A reevaluation conducted under 3.1 may occur not more than once a year, unless the parent and the public agency agree otherwise; and shall occur at least once every three (3) years, unless the parent and the public agency agree that a reevaluation is unnecessary.
(Authority: 20 U.S.C. 1414(a)(2); 14 **Del.C.** §3110)

4.0 Evaluation Procedures

- 4.1 **Notice:** The public agency shall provide notice to the parents of a child with a disability, in accordance with 14 **DE Admin. Code** 926.3.0, that describes any evaluation procedures the agency proposes to conduct.
- 4.2 **Conduct of evaluation:** In conducting the evaluation, the public agency shall use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability as defined under 14 **DE Admin. Code** 922.3.0, and the content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities); and
- 4.2.1 Not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and
- 4.2.2 Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.
- 4.3 **Other evaluation procedures:** Each public agency shall ensure that:
- 4.3.1 **Assessments and other evaluation materials used to assess a child under these regulations:**
- 4.3.1.1 Are selected and administered so as not to be discriminatory on a racial or cultural basis;
- 4.3.1.2 Are provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer;
- 4.3.1.3 Are used for the purposes for which the assessments or measures are valid and reliable;
- 4.3.1.4 Are administered by trained and knowledgeable personnel, including but not limited to, a qualified evaluation specialist who has met State approval or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which he or she is providing student evaluation services; and
- 4.3.1.5 Are administered in accordance with any instructions provided by the producer of the assessments.
- 4.3.2 Each public agency shall ensure that assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.
- 4.3.3 Each public agency shall ensure that assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

- 4.3.4 The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;
- 4.3.5 Assessments of children with disabilities who transfer from one public agency to another public agency in the same school year are coordinated with those children's prior and subsequent schools, as necessary and as expeditiously as possible, consistent with 2.4, to ensure prompt completion of full evaluations.
- 4.3.6 In evaluating each child with a disability under 4.0 through 6.0, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.
- 4.3.7 Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

(Authority: 20 U.S.C. 1414(b)(1)-(3), 1412(a)(6)(B); 14 Del.C. §3110)

14 DE Reg. 1060 (04/01/11)

5.0 Additional Requirements for Evaluations and Reevaluations

- 5.1 Review of existing evaluation data: As part of an initial evaluation (if appropriate) and as part of any reevaluation under these regulations, the IEP Team and other qualified professionals, as appropriate, shall review existing evaluation data on the child, including:
 - 5.1.1 Evaluations and information provided by the parents of the child;
 - 5.1.2 Current classroom based, local, or State assessments, and classroom based observations; and
 - 5.1.3 Observations by teachers and related services providers; and
 - 5.1.4 On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine:
 - 5.1.4.1 Whether the child is a child with a disability, as defined in 14 DE Admin. Code 922.3.0, and the educational needs of the child; or
 - 5.1.4.2 In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child; the present levels of academic achievement and related developmental needs of the child; whether the child needs special education and related services; or
 - 5.1.4.3 In the case of a reevaluation of a child, whether the child continues to need special education and related services; and whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.
 - 5.2 Conduct of review: The group described in 5.1 may conduct its review without a meeting.
 - 5.3 Source of data: The public agency shall administer such assessments and other evaluation measures as may be needed to produce the data identified under 5.1 of this section.
 - 5.4 Requirements if additional data are not needed: If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, and to determine the child's educational needs, the public agency shall notify the child's parents of that determination and the reasons for the determination; and notify the parents of their right to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child's educational needs.
 - 5.4.1 The public agency is not required to conduct the assessment described in 5.4 unless requested to do so by the child's parents.
 - 5.5 Evaluations before change in eligibility: Except as provided in 5.5.1, a public agency shall evaluate a child with a disability in accordance with 4.0 through 12.0 before determining that the child is no longer a child with a disability.
 - 5.5.1 The evaluation described in 5.5 is not required before the termination of a child's eligibility under these regulations due to graduation from secondary school with a regular diploma, or due to the child reaching his or her 21st birthday.
 - 5.5.2 For a child whose eligibility terminates under circumstances described in 5.5.1, a public agency shall provide the child with a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's postsecondary goals.
- (Authority: 20 U.S.C. 1414(c); 14 Del.C. §3110)

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 6.2 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 Elementary and Secondary Education Act of 1965 (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 If, prior to the effective date of 6.11, a child has been identified as a child with a learning disability or a mild intellectual 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 child with a learning disability or mild intellectual disability 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 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, 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. *A child with a disability who reaches his or her 21st birthday after August 31 may continue to receive special education and related services until the end of the school year, including appropriate summer services through August 31; 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 6.6.2.1; 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 until the receipt of a regular high school diploma or the end of the school year in which the student attains the age of twenty-one (21), whichever occurs first.
- 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 until the receipt of a regular high school diploma or the end of the school year in which the student attains the age of twenty-one (21), whichever occurs first.
- 6.9 Eligibility Criteria for Emotional Disability: The IEP team shall consider documentation of the manifestation of the clusters or patterns of behavior associated with emotional disability 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 until the receipt of a regular high school diploma or the end of the school year in which the student attains the age of twenty-one (21), whichever occurs first.

- 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 until the receipt of a regular high school diploma or the end of the school year in which the student attains the age of twenty-one (21), whichever occurs first.
- 6.11 Eligibility Criteria for Learning Disability:
 - 6.11.1 Elimination of discrepancy model: 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 Existence of a learning disability: 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 Phase in of response to intervention procedures:
 - 6.11.3.1 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 in reading. In the case of mathematics, implementation shall be on a timeline and schedule as defined by the DOE.
 - 6.11.3.2 Other students: Public agencies shall use the standards and procedures in 7.0 to 12.0, including the response to intervention process for other students on a timeline and schedule as defined by DOE, to determine whether a student is eligible for special education and related services under the learning disability category.
 - 6.11.4 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 until the receipt of a regular high school diploma or the end of the school year in which the student attains the age of twenty-one (21), whichever occurs first.
- 6.12 Eligibility Criteria for intellectual Disability: Eligibility Criteria for intellectual Disability: In order for the IEP team to determine eligibility for special education services under the intellectual Disability category, the following is required:
 - 6.12.1 A level of intellectual functioning, as indicated below:
 - 6.12.1.1 Mild Intellectual Disability: IQ 50 to 70 +/- 5 points;
 - 6.12.1.2 Moderate Intellectual Disability: IQ 35 to 50 +/- 5 points;
 - 6.12.1.3 Severe Intellectual 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 Additional requirements for eligibility for Mild Intellectual Disability: In addition to the other requirements of 6.12, eligibility for special education services under the Mild Intellectual 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 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). In the case of mathematics for elementary school and all other students, implementation shall be on a timeline and schedule as defined by the DOE.

- 6.12.3.2 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 Mild Intellectual Disability category.
- 6.12.4 Age of Eligibility: The age of eligibility for children identified as under Moderate Intellectual Disability and Severe Intellectual Disability Categories shall be from the third birthday until the receipt of a regular high school diploma or the end of the school year in which the student attains the age of twenty-one (21), whichever occurs first. Children identified as Mild Intellectual Disability shall be from the fourth birthday until the receipt of a regular high school diploma or the end of the school year in which the student attains the age of twenty-one (21), whichever occurs first. 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 until the receipt of a regular high school diploma or the end of the school year in which the student attains the age of twenty-one (21), whichever occurs first.
- 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 instructional 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 re evaluation, 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 until the receipt of a regular high school diploma or the end of the school year in which the student attains the age of twenty-one (21), whichever occurs first.
- 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 until the receipt of a regular high school diploma or the end of the school year in which the student attains the age of twenty-one (21), whichever occurs first, 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 until the receipt of a regular high school diploma or the end of the school year in which the student attains the age of twenty-one (21), whichever occurs first.
- 6.17 Eligibility Criteria for Visual Impairment including Blindness:
 - 6.17.1 ~~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, condition or impairment 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 a 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 (for blindness), legally blind, or a visual acuity of 20/70 or less in the better eye after all correction, (for partially sighted), or a degenerative eye disease, or has a disease, condition or impairment of the eye or visual system that seriously affects visual function directly, not perceptually.~~

~~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 until the receipt of a regular high school diploma or the end of the school year in which the student attains the age of twenty-one (21), whichever occurs first.~~

6.17.1 Visual impairment including blindness means an impairment in vision that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness.

6.17.2 This eligibility determination requires a thorough and rigorous evaluation with a data-based media assessment which is based on a range of learning modalities and includes a functional visual assessment.

[6.17.3 The age of eligibility for children identified under this section shall be from birth until the receipt of a regular high school diploma or the end of the school year in which the student attains the age of twenty-one (21), whichever occurs first.]

(Authority: 34 C.F.R. § 300.8(c)(13))

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)

11 DE Reg. 184 (08/01/07)

11 DE Reg. 1629 (06/01/08)

15 DE Reg. 352 (09/01/11)

18 DE Reg. 564 (01/01/15)

20 DE Reg. 172 (09/01/16)

7.1 General: 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 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 an intellectual disability or where an instructional 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)

11 DE Reg. 184 (08/01/07)

11 DE Reg. 1629 (06/01/08)

15 DE Reg. 352 (09/01/11)

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 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 9.1.1 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 Intellectual Disability;

9.1.4.3 Emotional disability;

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 time frames 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)

11 DE Reg. 184 (08/01/07)

15 DE Reg. 352 (09/01/11)

20 DE Reg. 172 (09/01/16)

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 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;

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

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

- 11.1.7.1 The instructional strategies used and the student centered data collected; and
- 11.1.7.2 The documentation that the child's parents were notified about:
 - 11.1.7.2.1 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;
 - 11.1.7.2.2 Strategies for increasing the child's rate of learning; and
 - 11.1.7.2.3 The parents' right to request an evaluation.

11.2 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)

14 DE Reg. 1060 (04/01/11)

15 DE Reg. 352 (09/01/11)

20 DE Reg. 172 (09/01/16)

12.0 Response to Intervention Procedures

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 instruments used as part of RTI procedures shall be norm referenced or curriculum based 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 at the elementary level shall be conducted at least 3 times each regular school year at routine and fairly spaced intervals. For students at risk of academic failure, 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. Tier 1 instructional screenings for reading and mathematics at the secondary level shall be conducted for students at risk of academic failure at least three (3) times each regular school year at routine and fairly spaced intervals. The first screening shall be conducted with two (2) weeks of the beginning of the regular school year, or within two (2) weeks of the child's entry into school.

12.6.2 Children who score at or below the 25th percentile on a norm referenced test or the designated cut point on a curriculum based measure for any instructional screening, 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 on a norm referenced test or the designated cut point on a curriculum based measure, 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 be monitored 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 a minimum of ninety (90) minutes per week in session periods appropriate to age and development, but not less than two (2) sessions per week. In the case of a student identified in need of intervention in both reading and math, the intervention shall be designed by the instructional support team proportionate to student need, but not less than one hundred twenty (120) minutes per week.
- 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 instructional support team 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 instructional support team's review shall include fidelity of program implementation, pacing, and appropriateness of instructional groupings. Based on its review, the instructional support team 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 instructional support team.
- 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 groups smaller than those for intervention delivered in Tier 2, at a minimum of one hundred and fifty (150) minutes per week in session periods appropriate to age and development, but not less than four (4) sessions per week. In the case of a student identified in need of intervention in both reading and math, the intervention shall be designed by the instructional support team proportionate to student need, but not less than one hundred eighty (180) minutes per week.
- 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 instructional support team 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 instructional support team shall meet to review the child's program and progress, to assure that the child is receiving differentiated needs-based instruction. In addition, the instructional support team's review shall include fidelity of program implementation, pacing, and appropriateness of instructional groupings. Based on its review, the instructional support team 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 not made sufficient progress toward end-of-year benchmarks, the instructional support team 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 20% of students in a classroom are not meeting 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 time frame established in 2.3. However, a child may be determined ineligible for services under the learning disability or mild intellectual disability 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 instructional support team 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 instructional support team.

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

11 DE Reg. 184 (08/01/07)

11 DE Reg. 1629 (06/01/08)

14 DE Reg. 1060 (04/01/11)

15 DE Reg. 352 (09/01/11)

13.0 to 19.0 Reserved

20.0 Definition of Individualized Education Program

- 20.1 General: Each child who is determined eligible for special education and related services shall have a single IEP. As used in these regulations, the term individualized education program or IEP means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with 20.0 through 24.0, and that shall include:
- 20.1.1 A statement of the child's present levels of academic achievement and functional performance, including:
- 20.1.1.1 How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for non disabled children); or
- 20.1.1.2 For preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;
- 20.1.2 A statement of measurable annual goals, including academic and functional goals designed to:
- 20.1.2.1 Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and meet each of the child's other educational needs that result from the child's disability;
- 20.1.2.2 For children with disabilities who participate in the Alternate Assessment based on Alternate Achievement Standards (AA-AAS), a description of benchmarks or short term objectives.
- 20.1.3 A description of how the child's progress toward meeting the annual goals described in 20.1.2 will be measured; and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;
- 20.1.4 A statement of the special education and related services and supplementary aids and services, based on peer reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child:
- 20.1.4.1 To advance appropriately toward attaining the annual goals;
- 20.1.4.2 To be involved in and make progress in the general education curriculum in accordance with 20.1.1, and to participate in extracurricular and other nonacademic activities; and
- 20.1.4.3 To be educated and participate with other children with disabilities and non disabled children in the activities described in this section;

- 20.1.5 An explanation of the extent, if any, to which the child will not participate with non disabled children in the regular class and in the activities described in 20.1.4;
 - 20.1.6 A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district wide assessments consistent with section 612(a)(16) of the Act; and if the IEP Team determines that the child shall take an alternate assessment, instead of a particular regular State or district wide assessment of student achievement, a statement of why the child cannot participate in the regular assessment; and the particular alternate assessment selected is appropriate for the child;
 - 20.1.7 The projected date for the beginning of the services and modifications described in 20.1.4, and the anticipated frequency, location, and duration of those services and modifications; and
 - 20.1.8 *A statement designating whether or not it is necessary to place the child who is transported from school by bus into the charge of a parent other authorized responsible person.*
 - 20.2 Transition services: *Beginning with the earlier of the first IEP to be in effect when the child turns fourteen (14) or enters the eighth (8th) grade, or younger if determined appropriate by the IEP Team, and updated annually thereafter, the IEP must include:*
 - 20.2.1 Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and
 - 20.2.2 The transition services *and activities* (including courses of study) needed to assist the child in reaching those goals.
 - 20.2.2.1 *The IEP team shall discuss employment options with children and parents consistent with Delaware's Employment First Policy articulated by 19 Del.C. §743.*
 - 20.2.2.2 *Progress made on activities and services that reasonably enable the child to reach the child's postsecondary goals in transition IEPs shall be reported with the same frequency as academic goals.*
 - 20.2.3 *The child's strengths, interests, and postsecondary preferences, and plans to make application to high school and career technical educational programs.*
 - 20.3 Transfer of rights at age of majority: Beginning not later than one year before the child reaches the age of 18, the IEP shall include a statement that the child has been informed that the child's rights under 14 **Del.C. §3132** will transfer to the child, *or an educational representative or educational surrogate parent* on reaching the age of 18 under 14 **DE Admin. Code 926.20.0**.
(Authority: 20 U.S.C. 1415(m); 14 **Del.C. §3132**)
 - 20.4 *IEP Forms: Each public agency shall use the IEP forms as developed and required by the DOE. The requirement that public agencies use the DOE's IEP forms does not prohibit or prevent an IEP team from including on an IEP any information, service or other notation the team determines necessary to provide FAPE to a child with a disability.* This section shall not be construed to require an IEP Team to include information under one component of a child's IEP that is already contained under another component of the child's IEP.
 - 20.5 Extended school year services: A student's need for extended school year services shall be determined in accordance with 14 **DE Admin. Code 923.6.0**.
(Authority: 20 U.S.C. 1414(d)(1)(A) and (d)(6); 14 **Del.C. §3110**)
 - 20.6 Twelve month program eligibility: The DOE shall include a parental notice and acknowledgment section in IEP forms described in 20.4 which both identifies students eligible for a 12-month program pursuant to Title 14 **Del.C. §1703** and documents the parental option to accept a 12-month program. [Authority: Title 14 **Del.C. §§1703(e), 1703(f)**]
- 12 DE Reg. 1084 (02/01/09)**
14 DE Reg. 1060 (04/01/11)
15 DE Reg. 352 (09/01/11)
20 DE Reg. 172 (09/01/16)
20 DE Reg. 549 (01/01/17)

21.0 IEP Team

- 21.1 General: The public agency shall ensure that the IEP Team for each child with a disability includes:
 - 21.1.1 The parents of the child;
 - 21.1.2 Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
 - 21.1.3 Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;

- 21.1.4 A representative of the public agency who:
- 21.1.4.1 Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
 - 21.1.4.2 Is knowledgeable about the general education curriculum;
 - 21.1.4.3 Is knowledgeable about the availability of resources of the public agency; *and*
 - 21.1.4.4 *Has authority to commit agency resources and be able to ensure that whatever services are set out in the IEP will actually be provided.*
- 21.1.5 An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in 21.1.2 through 21.1.6 of this section;
- 21.1.6 At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate;
- 21.1.7 Whenever appropriate, the child with a disability; *and*
- 21.1.8 *Whenever the child is, or may be, participating in a career and technical education program, a career technical education teacher of the child, or career technical teacher coordinator.*
- 21.2 Transition services participants: In accordance with 21.1.7, the public agency shall, *in writing*, invite a child with a disability to attend the child's IEP Team meeting if a purpose of the meeting will be the consideration of the postsecondary goals for the child and the transition services needed to assist the child in reaching those goals.
- 21.2.1 If the child does not attend the IEP Team meeting, the public agency shall take other steps to ensure that the child's preferences and interests are considered.
 - 21.2.2 To the extent appropriate, with the consent of the parents or a child who has reached the age of 18, in implementing the requirements of 21.2, the public agency shall invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services.
- 21.3 Determination of knowledge and special expertise: The determination of the knowledge or special expertise of any individual described in 21.1.6 shall be made by the party (parents or public agency) who invited the individual to be a member of the IEP Team.
- 21.4 Designating a public agency representative: A public agency may designate a public agency member of the IEP Team to also serve as the agency representative, if the criteria in 21.1.4.4 are satisfied.
- 21.4.1 At the beginning of each school year, the public agency shall identify its agency representatives, and any person designated to serve as an agency representative at each or any of its schools, in writing.
 - 21.4.2 The agency's written list of representatives and designees shall be supplied to each school of the public agency. It shall be available to the DOE upon request. The agency's representative and designee list shall be updated and redistributed to schools throughout the school year to the extent staffing and personnel changes alter the original list.
- 21.5 IEP Team attendance: A member of the IEP Team described in 21.1.2 through 21.1.5 of this section is not required to attend an IEP Team meeting, in whole or in part, if the parent of a child with a disability and the public agency agree, in writing, that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.
- 21.5.1 A member of the IEP Team described in 21.5 may be excused from attending an IEP Team meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if:
 - 21.5.1.1 The parent, in writing, and the public agency consent to the excusal; *and*
 - 21.5.1.2 The member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.
- 21.6 Initial IEP Team meeting for child under Part C: In the case of a child who was previously served under Part C of the Act, an invitation to the initial IEP Team meeting shall, at the request of the parent, be sent to the Part C service coordinator or other representatives of the Part C system to assist with the smooth transition of services.
- (Authority: 20 U.S.C. 1414(d)(1)(B)-(d)(1)(D); 14 **Del.C.** §3110)
- 21.7 *No public agency, or any person acting under the authority of a public agency, shall discriminate or take any adverse employment or contract action against any person based upon statements that the person makes while advocating for a student in connection with an IEP, including statements made in preparation for or at a meeting, review, or conference concerning a child with a disability's free and appropriate public education.*
- 21.7.1 *Entities or persons who violate this subsection shall be subject to the same sanctions as persons or entities that engage in unlawful employment practices under 19 **Del.C.** Ch. 7.*

22.0 Parent Participation

- 22.1 Public agency responsibility, General: Each public agency shall take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including:
- 22.1.1 Notifying parents of the meeting, *in writing, no less than ten (10) school days prior to the IEP Team meeting (unless mutually agreed otherwise) to ensure that they will have an opportunity to attend, and no less than five (5) school days prior to a meeting to conduct a manifestation determination under 14 DE Admin. Code 926.30*; and
 - 22.1.2 Scheduling the meeting at a mutually agreed on time and place.
- 22.2 Information provided to parents: The notice required under 22.1 shall:
- 22.2.1 Indicate the purpose, time, and location of the meeting and who will be in attendance; and
 - 22.2.2 Inform the parents of the provisions in 21.1.6 and 21.3 (relating to the participation of other individuals on the IEP Team who have knowledge or special expertise about the child), and 21.6 (relating to the participation of the Part C service coordinator or other representatives of the Part C system at the initial IEP Team meeting for a child previously served under Part C of the Act).
 - 22.2.2.1 *The IEP Team shall provide notice to the parent, and if appropriate, the child, that they may request the presence of any teacher, paraprofessional, and any additional staff members at an IEP meeting.*
 - 22.2.3 *A summary of the procedural safeguards shall be included with the notice of meeting and a full copy of the procedural safeguards shall be provided to the parents at the IEP meeting.*
 - 22.2.4 *The IEP Team shall provide notice to the parent, and if appropriate, the child, that they may request any data (e.g. classroom assessments, formative assessments, behavior data, related service reports, Response to Intervention data) in the agency's possession relevant to the child's needs or disability prior to the IEP meeting.*
- 22.3 *The IEP team will ensure parent input through the following:*
- 22.3.1 *The IEP team shall provide a questionnaire requesting the input of a child's parent, and where appropriate, the input of the child, with respect to the child's progress to date and additional proposed steps that should be taken to adjust the child's goals, curriculum, services, aids, modifications, and/or other elements of the child's IEP.*
 - 22.3.1.1 *The questionnaire shall be sent with or prior to the written meeting notice inviting the parent to attend the IEP meeting.*
 - 22.3.2 *If the IEP Team prepares a draft of the IEP prior to the date of the IEP meeting, the IEP Team shall provide the parent, and if appropriate, the child, with a copy of the draft IEP accompanied by a letter clearly indicating that the document is a draft for discussion purposes only and is therefore subject to revisions.*
 - 22.3.3 *The Department in collaboration with the Governor's Advisory Council for Exceptional Citizens shall create and provide a draft letter and associated guidance to assist public agencies with the content and application of the letter referred to in subsection 22.3.2 in 14 DE Admin. Code 925.*
- 22.4 *For a child with a disability beginning with the earlier of the first IEP to be in effect when the child turns fourteen (14) or enters the eighth (8th) grade, or younger if determined appropriate by the IEP Team, the notice shall also indicate that a purpose of the meeting will be the consideration of the postsecondary goals and transition services for the child, in accordance with 20.2 and that the agency will invite the student; and identify any other agency that will be invited to send a representative. The invitation to the child shall be in writing.*
- 22.5 Other methods to ensure parent participation: If neither parent can attend an IEP Team meeting, the public agency shall use other methods to ensure parent participation, including individual or conference telephone calls, consistent with 28.0 (related to alternative means of meeting participation).
- 22.6 Conducting an IEP Team meeting without a parent in attendance: A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency shall keep a record of its attempts to arrange a mutually agreed on time and place, such as:
- 22.6.1 Detailed records of telephone calls made or attempted and the results of those calls;
 - 22.6.2 Copies of correspondence sent to the parents and any responses received; and
 - 22.6.3 Detailed records of visits made to the parent's home or place of employment and the results of those visits.
 - 22.6.4 Use of interpreters or other action, as appropriate. The public agency shall take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English.

22.7 Parent copy of child's IEP: The public agency shall give the parent a copy of the child's IEP at no cost to the parent.

(Authority: 20 U.S.C. 1414(d)(1)(B)(i); 14 Del.C. §3110)

22.8 *The Department of Education, in conjunction with the Department of Justice, shall annually survey a random and representative sample of parents and their children who have Individualized Education Programs with respect to the parents' and children's satisfaction with the IEP process. Information gathered through this survey shall be used by the Department of Education and Department of Justice to conduct follow-up examinations with school districts and charter schools as to their good faith compliance with state and federal laws and regulations.*

22.8.1 *Information gathered through this survey shall also be used by the Department of Education in carrying out monitoring duties as outlined in 14 DE Admin. Code 927 to ensure compliance with state and federal laws and regulations.*

22.8.2 *A summary of the survey results will be made available on the Department of Education's website.*

14 DE Reg. 1060 (04/01/11)

15 DE Reg. 352 (09/01/11)

20 DE Reg. 172 (09/01/16)

23.0 When IEPs Shall be in Effect

23.1 General: At the beginning of each school year, each public agency shall have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in 2.0.

23.2 Initial IEPs; provision of services: Each public agency shall ensure that a meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services; and as soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

23.3 Accessibility of child's IEP to teachers and others. Each public agency shall ensure that the child's IEP is accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation; and each teacher and provider described in this paragraph is informed of:

23.3.1 His or her specific responsibilities related to implementing the child's IEP; and

23.3.2 The specific accommodations, modifications, and supports that shall be provided for the child in accordance with the IEP.

23.4 IEPs for children who transfer from and to public agencies within Delaware: If a child with a disability (who had an IEP that was in effect in a previous public agency in Delaware) transfers to a new public agency in Delaware, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) shall provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency).

23.4.1 A child with a disability who transfers from one Delaware public agency to another shall be temporarily placed in an educational setting which appears to be most suited to the child's needs based on a mutual agreement of the parents and the receiving public agency. This agreement shall be documented by the signatures of a parent and the receiving public agency on a temporary placement form or the cover page of the IEP. Within 60 days of the child's initial attendance in the receiving public agency, the receiving public agency must either:

23.4.1.1 Adopt the child's IEP from the previous public agency at an IEP meeting convened for that purpose, or develop, adopt, and implement a new IEP that meets the applicable requirements in 20.0 through 24.0.

23.5 IEPs for children who transfer from out of state public agencies: If a child with a disability (who had an IEP that was in effect in a previous public agency in another state) transfers to a public agency in Delaware, and enrolls in a new school in Delaware within the same school year, the new public agency (in consultation with the parents) shall provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency).

23.5.1 A child with a disability who transfers from an out of state public agency shall be temporarily placed in an educational setting which appears to be most suited to the child's needs based on a mutual agreement of the parents and the receiving public agency. This agreement shall be documented by the signatures of a parent and the receiving public agency on a temporary placement form or the cover page of the IEP. Within 60 days of the child's initial attendance in the receiving public agency, the receiving public agency must:

- 23.5.1.1 Conduct an evaluation pursuant to 4.0 through 6.0 (if determined to be necessary by the new public agency); and develop, adopt, and implement a new IEP, if appropriate, that meets the applicable requirements in 20.0 through 24.0.
- 23.6 Transmittal of records and public agency duties: To facilitate the transition for a child described in 23.4 and 23.5:
 - 23.6.1 *The receiving public agency shall ensure that all requirements concerning evaluation, IEP development, placement, and procedural safeguards are applied in determining the provision of special education and related services.* The receiving public agency in which the child enrolls shall take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous public agency in which the child was enrolled, pursuant to 34 CFR 99.31(a)(2); and
 - 23.6.2 The previous public agency in which the child was enrolled shall take reasonable steps to promptly respond to the request from the new public agency.
(Authority: 20 U.S.C. 1414(d)(2)(A)-(C); 14 **Del.C.** §3110)

24.0 Development, Review, and Revision of IEP

- 24.1 Development of IEP, General: In developing each child's IEP, the IEP Team shall consider:
 - 24.1.1 The strengths of the child;
 - 24.1.2 The concerns of the parents for enhancing the education of their child;
 - 24.1.3 The results of the initial or most recent evaluation of the child; and
 - 24.1.4 The academic, developmental, and functional needs of the child.
- 24.2 Consideration of special factors: The IEP Team shall:
 - 24.2.1 In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;
 - 24.2.2 In the case of a child with limited English proficiency, consider the language needs of the child as those needs relate to the child's IEP;
 - 24.2.3 In the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;
 - 24.2.4 Consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode;
 - 24.2.5 Consider whether the child needs assistive technology devices and services; and
 - 24.2.6 *In the case of a child who is blind, visually impaired, and/or has a physical or print disability, consider whether the child needs accessible instructional materials.*
 - 24.2.7 *In the case of any child with limited reading proficiency, consider the reading services, supports and evidence-based interventions as those relate to the child's IEP;*
 - 24.2.7.1 *For a child who is not beginning to read by age seven, or who is beyond age seven and is not yet beginning to read, enumerate the specific, evidence-based interventions that are being provided to that child to address the child's inability to read. Eligibility for reading-based extended school year services shall be determined in accordance with 14 **DE Admin. Code** 923.6.0.*
- 24.3 Requirement with respect to regular education teacher: A regular education teacher of a child with a disability, as a member of the IEP Team, shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports and other strategies for the child; and supplementary aids and services, program modifications, and support for school personnel consistent with 20.1.4.
- 24.4 Agreement: In making changes to a child's IEP after the annual IEP Team meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP Team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP. If changes are made to the child's IEP in accordance with this section, the public agency shall ensure that the child's IEP Team is informed of those changes.
- 24.5 Consolidation of IEP Team meetings: To the extent possible, the public agency shall encourage the consolidation of reevaluation meetings for the child and other IEP Team meetings for the child.

- 24.6 Amendments: Changes to the IEP may be made either by the entire IEP Team at an IEP Team meeting, or as provided in 24.4, by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent shall be provided with a revised copy of the IEP with the amendments incorporated.
- 24.7 Review and revision of IEPs, General: Each public agency shall ensure that, subject to 24.8 and 24.9, the IEP Team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and revises the IEP, as appropriate, to address:
- 24.7.1 Any lack of expected progress toward the annual goals described in 20.1.2, and in the general education curriculum, if appropriate;
 - 24.7.2 The results of any reevaluation conducted under 3.0;
 - 24.7.3 Information about the child provided to, or by, the parents, as described under 5.1.4;
 - 24.7.4 The child's anticipated needs; or
 - 24.7.5 Other matters.
- 24.8 Consideration of special factors: In conducting a review of the child's IEP, the IEP Team shall consider the special factors described in 24.2.
- 24.9 Requirement with respect to regular education teacher: A regular education teacher of the child, as a member of the IEP Team, shall, consistent with 24.3, participate in the review and revision of the IEP of the child.
- 24.10 Failure to meet transition objectives, participating agency failure: If a participating agency, other than the public agency, fails to provide the transition services described in the IEP in accordance with 20.2, the public agency shall reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in the IEP.
- 24.11 Construction. Nothing in these regulations relieves any participating agency, including a State vocational rehabilitation agency, of the responsibility to provide or pay for any transition service that the agency would otherwise provide to children with disabilities who meet the eligibility criteria of that agency.
- 24.12 Children with disabilities in adult prisons, requirements that do not apply: The following requirements do not apply to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons:
- 24.12.1 The requirements contained in section 612(a)(16) of the Act and 20.1.6 (relating to participation of children with disabilities in general assessments).
 - 24.12.2 The requirements in 20.2 (relating to transition planning and transition services) do not apply with respect to the children whose eligibility under Part B of the Act will end, because of their age, before they will be eligible to be released from prison based on consideration of their sentence and eligibility for early release.
- 24.13 Modifications of IEP or placement: Subject to 24.13.1, the IEP Team of a child with a disability who is convicted as an adult under State law and incarcerated in an adult prison may modify the child's IEP or placement if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.
- 24.13.1 The requirements of 20.0 (relating to IEPs), and 14 **DE Admin. Code** 923.14.0 (relating to LRE) do not apply with respect to the modifications described in 24.13 of this section.
(Authority: 20 U.S.C. 1412(a)(1), 1412(a)(12)(A)(i), 1414(d)(3), (4)(B), and (7); and 1414(e); 14 **Del.C.** §3110)

14 DE Reg. 1060 (04/01/11)

18 DE Reg. 564 (01/01/15)

18 DE Reg. 861 (05/01/15)

25.0 Private School Placements by Public Agencies

- 25.1 Developing IEPs: Before a public agency places a child with a disability in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an IEP for the child in accordance with 20.0 and 24.0.
- 25.1.1 The agency shall ensure that a representative of the private school or facility attends the meeting. If the representative cannot attend, the agency shall use other methods to ensure participation by the private school or facility, including individual or conference telephone calls.
- 25.2 Reviewing and revising IEPs: After a child with a disability enters a private school or facility, any meetings to review and revise the child's IEP may be initiated and conducted by the private school or facility at the discretion of the public agency.
- 25.2.1 If the private school or facility initiates and conducts these meetings, the public agency shall ensure that the parents and an agency representative are involved in any decision about the child's IEP; and agree to any proposed changes in the IEP before those changes are implemented.

- 25.3 Responsibility: Even if a private school or facility implements a child's IEP, responsibility for compliance with these regulations remains with the public agency and the DOE.
(Authority: 20 U.S.C. 1412(a)(10)(B); 14 **Del.C.** §3110)

26.0 Reserved

27.0 Educational Placements in the Least Restrictive Environment

- 27.1 Educational Placement Options. Following the development of a child's IEP, the team shall determine the child's educational placement in the least restrictive environment based on the child's individual needs and the services identified in the IEP. Educational placement options shall include, but not be limited to, the following:
- 27.1.1 Inside Regular Education Class ≥ 80 percent of the day: Children with disabilities receiving special education and related services outside the regular classroom less than 21 percent of the day. This may include children with disabilities placed in: regular class with special education related service provided within regular classes; regular class with special education related services provided outside regular classes; or regular class with special education services provided in resource rooms.
 - 27.1.2 Inside Regular Class ≤ 79 percent of the day and ≥ 40 percent of the day: Children with disabilities receiving special education and related services outside the regular classroom for at least 21 percent of the day and no more than 60 percent of the day. This may include children placed in: resource rooms with special education related service provided within the resource room; or resource rooms with part time instruction in a regular class.
 - 27.1.3 Inside Regular Class < 40 percent of the Day: Children with disabilities receiving special education and related services outside the regular classroom for more than 60 percent of the day. This may include children placed in: self-contained special classrooms with part time instruction in a regular class; or self-contained special classrooms with full time education instruction on a regular school campus.
 - 27.1.4 Separate school: Children with disabilities receiving education programs in public or private separate day school facilities. This includes children with disabilities receiving special education and related services, at public expense, for greater than 50 percent of the school day in public or private separate schools. This may include children placed in: public and private day schools for children with disabilities; public and private day schools for children with disabilities for a portion of the day (greater than 50 percent) and in regular school buildings for the remainder of the day; or public and private residential facilities if the student does not live at the facility.
 - 27.1.5 Residential Facility: Receives education programs in public or private residential facilities during the school week. Includes children with disabilities receiving special education and related services, at public expense, for greater than 50 percent of school day in public or private residential facilities. May include children placed in: public and private residential schools for children with disabilities; or public and private residential schools for children with disabilities for a portion of the day (greater than 50 percent) and in separate day schools or regular schools buildings for the remainder of the day if the students.
 - 27.1.6 Homebound and Hospital: Receives education programs in homebound hospital placement. Includes children with disabilities placed in and receiving special education and related services in: hospital programs, or homebound programs.
 - 27.1.7 Correctional Facilities: Children receiving special education in: short-term detention facilities (community based or residential); or correctional facilities.
 - 27.1.8 Parentally Placed Private Schools: Children enrolled by their parents or guardians in regular parochial or other private schools and whose basic education is paid through private resources and who receive special education and related services at public expense from the local education agency or intermediate unit under a service plan.
- 27.2 Each public agency shall ensure a child with a disability is placed in a chronologically age appropriate placement.
- 27.3 *If a child with a disability is a danger to himself or to herself, or is so disruptive that his or her behavior substantially interferes with the learning of other students in the class, the IEP team may provide the child with supportive instruction and related services at home in lieu of the child's present educational placement.*
- 27.3.1 *Services provided under these conditions shall be considered a change in placement on an emergency basis and shall require IEP team documentation that such placement is both necessary and temporary and is consistent with the requirements for the provision of a free, appropriate public education.*
 - 27.3.2 *In instances of parental objection to such home instruction, parents may exercise any of the applicable procedural safeguards in these regulations.*
 - 27.3.3 *To be eligible for supportive instruction and related services, the following criteria shall be met:*

- 27.3.3.1 *The child shall be identified as disabled and in need of special education and related services and enrolled in the LEA or other public educational program; and*
- 27.3.3.2 *If the absence is due to a medical condition, be documented by a physician's statement where the absence will be for two weeks or longer; or*
- 27.3.3.3 *If the absence is due to severe adjustment problem, be documented by an IEP team that includes a licensed or certified school psychologist or psychiatrist, and the such placement is both necessary and temporary; or if for transitional in school program, be documented by the IEP team that it is necessary for an orderly return to the educational program.*
- 27.3.4 *IEPs specifying supportive instruction services shall be reviewed at intervals determined by the IEP team, sufficient to ensure appropriateness of instruction and continued placement.*
- 27.3.5 *Supportive instruction, related services and necessary materials shall be made available as soon as possible, but in no case longer than 30 days following the IEP meeting. Such instruction and related services may continue upon return to school when it is determined by the IEP team the child needs a transitional program to facilitate his or her return to the school program*
(Authority: 14 **Del.C.** §3110)

28.0 Alternative Means of Meeting Participation

When conducting IEP Team meetings and placement meetings pursuant to these regulations, the parent of a child with a disability and a public agency may agree to use alternative means of meeting participation, such as video conferences and conference calls.

(Authority: 20 U.S.C. 1414(f); 14 **Del.C.** §3110)

14 DE Reg. 1060 (04/01/11)

29.0 High School Graduation

Students with disabilities who are unable to meet the requirements for a diploma shall be given the option to complete those requirements by continuing their education, at public agency expense, until their 21st birthday. Regardless of the document received at graduation by the student, whether a diploma or a certificate of performance, the student shall not be discriminated against during the graduation ceremonies. Specifically, a student with disabilities shall be allowed to participate in graduation exercises without reference to his or her disability, educational placement or the type of document conferred.

(Authority: 14 **Del.C.** §3110)

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

11 DE Reg. 184 (08/01/07)

11 DE Reg. 1629 (06/01/08)

12 DE Reg. 1084 (02/01/09)

14 DE Reg. 1060 (04/01/11)

15 DE Reg. 352 (09/01/11)

18 DE Reg. 564 (01/01/15)

18 DE Reg. 861 (05/01/15)

20 DE Reg. 172 (09/01/16)

20 DE Reg. 549 (01/01/17)

21 DE Reg. 626 (02/01/18) (Final)