

DEPARTMENT OF EDUCATION

OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(a) and 29 Delaware Code 7528 (14 **Del.C.** §122(a) & 29 **Del.C.** §7528)
14 **DE Admin. Code** 401

FINAL

REGULATORY IMPLEMENTING ORDER

401 Major Capital Improvement Program

I. SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED

Pursuant to 14 **Del.C.** §122(a) and 29 **Del.C.** §7528, the Secretary of Education intends to amend 14 **DE Admin. Code** 401 Major Capital Improvement Program. This amendment is needed to comply with a court order that directs the Department of Education to amend 14 **DE Admin. Code** 401 Major Capital Improvement Program to require school districts to provide an Equity Statement in connection with a request for Issuance of a Certificate of Necessity. It is also being amended to make grammatical changes per the *Delaware Administrative Code Drafting and Style Manual*.

Notice of the proposed regulation was published in the *Delaware Register of Regulations* on January 1, 2021. In addition, notice was published in *The News Journal* and the *Delaware State News* on January 1, 2021, in the form hereto attached as *Exhibit "A"*. One comment was received which was pertinent to the proposed amendments and suggested the Department consider including language on the newly required Equity Statement (in connection with the Issuance of a Certificate of Necessity) requiring school districts to provide demographic information on all students, including early childhood students and students age 18-21 years who are not given a graded designation. The Department is unable to include such language as this regulation only covers grades K-12 within public schools as outlined in 14 **Delaware Code** and 29 **Delaware Code**.

II. FINDINGS OF FACTS

The Secretary finds that it is appropriate to amend 14 **DE Admin. Code** 401 Major Capital Improvement Program to comply with a court order that directs the Department of Education to amend 14 **DE Admin. Code** 401 Major Capital Improvement Program to require school districts to provide an Equity Statement in connection with a request for Issuance of a Certificate of Necessity. It is also being amended to make grammatical changes per the *Delaware Administrative Code Drafting and Style Manual*.

III. DECISION TO AMEND THE REGULATION

For the foregoing reasons, the Secretary concludes that it is appropriate to amend 14 **DE Admin. Code** 401 Major Capital Improvement Program. Therefore, pursuant to 14 **Del.C.** §122, 14 **DE Admin. Code** 401 Major Capital Improvement Program attached hereto as *Exhibit "B"* is hereby amended. Pursuant to the provision of 14 **Del.C.** §122(e), 14 **DE Admin. Code** 401 Major Capital Improvement Program 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** 401 Major Capital Improvement Program amended hereby shall be in the form attached hereto as *Exhibit "B"*, and said regulation shall be cited as 14 **DE Admin. Code** 401 Major Capital Improvement Program 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 February 10, 2021. 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 10th day of February 2021.

Department of Education

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

Approved this 10th day of February 2021

401 Major Capital Improvement Program

1.0 Purpose and Definitions

- 1.1 The Major Capital Improvement Program consists of one or more construction projects having a cost of \$750,000 or more.
 - 1.1.1 The Secretary of Education may annually review the current cost per square foot for construction and make necessary adjustments as required.
 - 1.1.2 Multiple projects may be considered together to form a single Major Capital Improvement Program project. The consolidation of Major Capital Improvement Program projects should be for one location.
 - 1.1.3 All Major Capital Improvement Program projects shall use standard bid and contract documents as developed by the Office of Management and Budget, Division of Facilities Management.
 - 1.1.3.1 Local school districts may enhance the standard bid and contract documents with additional contractual or project specific requirements as long as the enhancements do not diminish and are not in conflict with the provisions of the standard documents.
 - 1.1.3.2 The Department of Education, in consultation with the Office of Management and Budget, Division of Facilities Management shall approve any modifications or changes to the provisions of the standard bid and contract documents before a local school district may use or enhance the modified documents.

1.2 Definitions

The following words and terms, when used in this regulation, have the following meaning unless the context clearly indicates otherwise:

“Certificate of Necessity” means a document issued by the Department of Education which certifies that a construction project is necessary and sets the scope and cost limits for that project. The Certificate of Necessity authorizes the local school district to hold a referendum for the Major Capital Improvement Program identified, if required.

“Certificate of Occupancy” means a document issued by a local code enforcement official or office attesting that a Facility meets building codes and is fit for human occupancy.

“Change Orders” means documents that change the construction contract and are negotiated between the owner and contractor to correct design omissions, address unforeseen circumstances which arise during the construction process, and improve upon designs based on project progress.

“Completion of Construction” means the local school district, with the concurrence of the architect, accepts the facility as complete, meaning that all punch list items are resolved, release of liens has been received, and funds held in retainage have been released.

“Design Development Plans” means documents that denote mechanical functions, placement of windows and doors, pedestrian traffic circulation both interior and exterior, utilities, service areas and structure. Design Development Plans are at a 40% to 60% completion stage.

“Educational Specifications” means documents which explain how the educational spaces relate to the educational programs as well as the requirements of an educational Facility to house and implement the educational philosophy and institutional program.

“Facility” means a long-lived capital asset including, but not limited to, school buildings; athletic buildings; athletic fields and appurtenances; playgrounds; maintenance, operations and storage structures; office buildings and all other buildings and capital assets associated with the operation and management of a local school district or school system.

“Final Construction Plans” means documents that show the complete Facility design including mechanical, electrical, water, sewer, site plans, storm water conveyance and structural systems, complete bid documents and specifications.

“Schematic Design Plans” means documents that present a proposed Facility in its earliest stages denoting the approximate size and relationship of areas to each other. Detailed utilities or mechanical functions are not typically shown at this stage.

“Signed and Sealed Plans” means design documents that have the architect's or engineer's professional seal and signature affixed.

13 DE Reg. 1300 (04/01/10)
18 DE Reg. 300 (10/01/14)
24 DE Reg. 137 (08/01/20)

2.0 Certificates of Necessity

- 2.1 Local school districts shall submit local school board approved projects to the Department of Education by August 31 of each fiscal year to be considered for a Certificate of Necessity and capital funding in the following fiscal year.
- 2.2 Local school district submissions for a Certificate of Necessity shall provide an equity statement that identifies the demographic information (e.g. race, Low Income, English Learner) of the students who are expected to attend the new school, use a new facility, or benefit from an approved Major Capital Project and how the Major Capital Project impacts equitable distributions of new and renovated buildings throughout the school district.
- ~~2.2.3~~ The Certificate of Necessity shall be quoted in the advertisement for the referendum.
- ~~2.3.2.4~~ Projects proposing the construction of a new Facility or for an addition to an existing Facility shall be issued a separate Certificate of Necessity. Funds issued for the construction of a new Facility or for an addition to an existing Facility shall not be transferred to projects in a separate Certificate of Necessity.
- ~~2.4.2.5~~ Additions and renovations to existing Facilities that are done in connection with other renovations may be issued a single Certificate of Necessity. However, when such a multiple project Certificate of Necessity is issued, it shall identify each Facility in the program and describe the work to be done at that Facility including the state and local share of the total cost for that work. Funds may be transferred between projects issued under the same Certificate of Necessity in accordance with Section 8.0 of this regulation.
- ~~2.5.2.6~~ The Department of Education will complete and forward the Certificate of Necessity to the local school district superintendent for that superintendent's signature.
- ~~2.6.2.7~~ A copy of the final Certificate of Necessity will be returned to the local school district within ten (10) working days following final approval by the Department of Education.

13 DE Reg. 1300 (04/01/10)
18 DE Reg. 300 (10/01/14)
24 DE Reg. 137 (08/01/20)

3.0 Procedures for Approval of a Site for School Construction

- 3.1 The local school board shall forward all prospective sites to the Office of State Planning Coordination for consideration and comment through the Planning Land Use Service (PLUS) review process.
- 3.2 Local school districts shall notify the Department of Education in writing to schedule a site review when they propose to purchase a site for school purposes; when they propose to use a currently owned site for school purposes; or when they propose to obtain a site through donation, gift or condemnation. Depending on the outcome of the PLUS review process, the Department of Education may conduct a site review.
- 3.3 The acquisition of lands for school construction shall comply with 29 **Del.C.** §7525.

13 DE Reg. 1300 (04/01/10)
18 DE Reg. 300 (10/01/14)
24 DE Reg. 137 (08/01/20)

4.0 Approval of Educational Specifications, Schematic Design Plans, Design Development Plans, and Construction Drawings

- 4.1 Educational Specifications shall be approved by the local school board and forwarded to the Department of Education for informational purposes. The Department of Education may provide comments on Educational Specifications at its discretion.
- 4.2 All Schematic Design Plans, Design Development Plans and Final Construction Drawings shall be approved by the local school board and the Department of Education. The Department of Education requires one (1) set of each, including a signed and sealed Final Construction Drawings and specifications.
- 4.3 The local school district must involve all applicable state, local and municipal regulatory agencies in reviewing Final Construction Drawings before the start of construction. Copies of all applicable state, local and municipal agency approvals shall be maintained in the local school district construction files. Required state agency approvals are noted in the *State of Delaware School Construction Technical Assistance Manual*, which is available on the Department of Education's website.
- 4.4 Major ~~Capitol~~ Capital Improvement Program projects that do not include structural changes or wall modifications such as, but not limited to, window replacement, HVAC, electrical or plumbing infrastructure upgrades do not require submission of construction specifications or plans to the Department of Education.

13 DE Reg. 1300 (04/01/10)
18 DE Reg. 300 (10/01/14)
24 DE Reg. 137 (08/01/20)

5.0 Notification, Start and Completion of Construction, and Certificate of Occupancy

- 5.1 The local school district shall submit to the Department of Education and the Office of Management and Budget a construction schedule, showing start dates, intermediate ~~stages~~ stages, and final completion dates.
- 5.2 The local school district shall notify the Department of Education, Office of Management and Budget and Insurance Coverage Office at the completion of construction.
- 5.3 The local school district shall record capital assets in accordance with the *State of Delaware Budget and Accounting Manual*.
- 5.4 The local school district shall notify the Department of Education, Division of Accounting, State Auditor, and Office of Management and Budget upon approval of occupancy.
- 5.5 Local school districts shall submit to the Department of Education a copy of the electronic files in a format approved by the Department of Education. Electronic files shall be submitted no later than thirty (30) calendar days after the completion of any major renovation, addition to an existing Facility, new school or replacement school.

13 DE Reg. 1300 (04/01/10)
18 DE Reg. 300 (10/01/14)
24 DE Reg. 137 (08/01/20)

6.0 Purchase Orders

All purchase orders for Major Capital Improvement Program projects shall be approved by the Department of Education and Office of Management and Budget before submission to the Division of Accounting.

13 DE Reg. 1300 (04/01/10)
18 DE Reg. 300 (10/01/14)
24 DE Reg. 137 (08/01/20)

7.0 Change Orders

- 7.1 All Change Orders must be agreed upon by the architect, local school district and contractor, and shall be forwarded to the Department of Education.
 - 7.1.1 Submission of a Change Order must include the following documents:
 - 7.1.1.1 A completed purchase order as applicable and following the local school board approved change order approval and authorization process and procedure;
 - 7.1.1.2 Local school board of education minutes identifying and approving the changes;
 - 7.1.1.3 American Institute of Architects (AIA) document G701-Change Order Form; and
 - 7.1.1.4 Correspondence which gives a breakdown in materials, mark-up, and other expenses.

13 DE Reg. 1300 (04/01/10)
18 DE Reg. 300 (10/01/14)
24 DE Reg. 137 (08/01/20)

8.0 Percentage of Funds Transferable Between Projects within a Certificate of Necessity

- 8.1 Local school districts may request the transfer of funds between projects during the bidding and construction process in writing to the Department of Education. Acceptability of the transfer of funds will meet the following criteria:
 - 8.1.1 No project may have any portion of its funding moved to another project without the approval of the Secretary of the Department of Education, the Director of the Office of Management and Budget and the Controller General.
 - 8.1.2 No project may have any funding added to its initial funding without the approval of the Secretary of the Department of Education, the Director of the Office of Management and Budget and the Controller General.
 - 8.1.3 No transfer of funds shall be executed between projects authorized through and by separate Certificates of Necessity.

13 DE Reg. 1300 (04/01/10)
18 DE Reg. 300 (10/01/14)
24 DE Reg. 137 (08/01/20)

9.0 Educational Technology

All school facilities being constructed or renovated under the Major Capital Improvement Program shall include wiring for technology that meets the current Department of Technology and Information Wiring Standards, and is appropriate to the grade level and educational requirements of the Facility type, such as high school, administration, etc. The cost of such wiring shall be borne by project funds when no other technology funds are available.

13 DE Reg. 1300 (04/01/10)

24 DE Reg. 137 (08/01/20)

10.0 Playground Construction

All playgrounds constructed or renovated pursuant to a Major Capital Improvement Program project shall comply with the most current editions of the American Society of Testing Materials (ASTM) Designation F-1487 and the Consumer Products Safety Commission (CPSC) Publication Number 325.

13 DE Reg. 1300 (04/01/10)

18 DE Reg. 300 (10/01/14)

24 DE Reg. 137 (08/01/20)

11.0 Administration of the New School

An administrator of a new school may be hired for up to one (1) year prior to student occupancy to organize and hire staff. The state portion of salary and benefits may be paid from Major Capital Improvement Program funding.

2 DE Reg. 1380 (02/01/99)

4 DE Reg. 1252 (02/01/01)

4 De Reg. 1949 (06/01/01)

6 DE Reg. 1669 (06/01/03)

8 DE Reg. 1295 (03/01/05)

13 DE Reg. 1300 (04/01/10)

18 DE Reg. 300 (10/01/14)

24 DE Reg. 137 (08/01/20)

24 DE Reg. 863 (03/01/21) (Final)