

Special Education Regulations Delaware's Administrative Code

Title 14 Education 900 Special Populations

922 Children with Disabilities Subpart A, Purposes and Definitions

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

1.0 Purposes

1.1 *Regulations 922 to 929 (14 DE Admin. Code 922 to 929) implement, complement and supplement the Individuals with Disabilities Education Act, as amended (20 U.S.C. 1400 et seq.), its implementing regulations (34 CFR part 300), and 14 Del.C. Ch. 31 (with the exception of Subchapter IV). They are designed and intended to insure compliance with state and federal laws concerning the education of children with disabilities. To the extent these regulations conflict with the federal regulations implementing Part B of the Individuals with Disabilities Education Act, the federal regulations shall prevail. Further, the purposes of these regulations are:*

1.1.1 To ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

1.1.2 To ensure that the rights of children with disabilities and their parents are protected;

1.1.3 To assist local educational agencies, educational service agencies, and *public* agencies to provide for the education of all children with disabilities; and

1.1.4 To assess and ensure the effectiveness of efforts to educate children with disabilities.

(Authority: 20 U.S.C. 1400(d); 14 Del.C. §3110)

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

2.0 Applicability of These Regulations to State and Local Agencies

2.1 These regulations apply to the State of Delaware as a recipient of payments under Part B of the Individuals with Disabilities Education Act, as amended.

2.2 Public agencies within the State of Delaware. The provisions of these regulations apply to all political subdivisions of the State of Delaware that are involved in the education of children with disabilities, including:

2.2.1 The Delaware Department of Education.

2.2.2 Local educational agencies (“LEAs”), educational service agencies (“ESAs”), and public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA.

2.2.3 *Any other State agency or school involved in the education of children with disabilities, including but not limited to, the Delaware School for the Deaf, the Delaware Autism Program, the Department of Services for Children, Youth and Their Families, and its divisions, programs, or schools, and the Department of Health and Social Services, and its divisions, units, or programs.*

2.2.4 *Any juvenile or adult correctional facility involved in the education of children with disabilities, including but not limited to, facilities operated by the Department of Services for Children, Youth and Their Families and its divisions, and the Department of Corrections (through “the Prison Education Program”) and are binding on each public agency in Delaware that provides special education and related services to children with disabilities, regardless of whether that agency is receiving funds under Part B of the Act.*

2.2.5 Private Schools and Facilities: Each public agency in the State of Delaware is responsible for ensuring that the rights and protections under Part B of the Act are given to children with disabilities referred to or placed in private schools and facilities by that public agency; or placed in private schools by their parents under the provisions of 14 **DE Admin. Code** 923.48.0.

(Authority: 20 U.S.C. 1412; 14 **Del.C.** §3110)

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

3.0 Definitions Applicable to Regulations 922 to 929:

“**Act**” means the Individuals with Disabilities Education Act, as amended.

(Authority: 20 U.S.C. 1400(a); 14 **Del.C.** §3110)

“**Assistive Technology Device**” means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. The term does not include a medical device that is surgically implanted, or the replacement of such device.

(Authority: 20 U.S.C. 1401(1); 14 **Del.C.** §3110)

“**Assistive Technology Service**” means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. The term includes:

The evaluation of the needs of a child with a disability, including a functional evaluation of the child in the child's customary environment;

Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by children with disabilities;

Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;

Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

Training or technical assistance for a child with a disability or, if appropriate, that child's family; and

Training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of that child.

(Authority: 20 U.S.C. 1401(2); 14 **Del.C.** §3110)

“Charter School” means given the term in section 5210(1) of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. 6301 et seq. (ESEA).

(Authority: 20 U.S.C.7221i(1); 14 **Del.C.** §§3110 and 505(a))

“Child with a Disability” means a child evaluated in accordance with 14 **DE Admin. Code** 925.4.0 through 925.12.0 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in these regulations as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

Except as further provided in this paragraph, if it is determined, through an appropriate evaluation under 14 **DE Admin. Code** 925.4.0 through 925.12.0, that a child has one of the disabilities identified in the definitions of disability terms below, but only needs a related service and not special education the child is not a child with a disability under these regulations. If, consistent with the definition of Special Education in this section, the related service required by the child is considered special education rather than a related service, the child would be determined to be a child with a disability.

Child with a disability for children aged three (3) through nine (9), subject to the conditions described in 14 **DE Admin. Code** 923.11.0, includes a child who is experiencing developmental delays, as defined in the eligibility requirements for 14 **DE Admin. Code** 925, measured by appropriate diagnostic instruments and procedures, in one (1) or more of the following areas: Physical development, cognitive development, communication development, social or emotional development, or adaptive development; and who, by reason thereof, needs special education and related services.

Definitions of Disability Terms: The specific disability terms used in this definition of a child with a disability are defined as follows:

“Autism” means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three (3), that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. A child who manifests the characteristics of autism

after age three (3) could be identified as having autism if the other criteria in this definition are satisfied.

Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in this section.

“Deaf-blindness” means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational needs that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.

“Deafness” means a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification that adversely affects a child's educational performance.

“Emotional Disturbance” means a condition exhibiting one (1) or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: an inability to learn that cannot be explained by intellectual, sensory, or health factors; an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; inappropriate types of behavior or feelings under normal circumstances; a general pervasive mood of unhappiness or depression; or a tendency to develop physical symptoms or fears associated with personal or school problems.

Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance as defined in this section.

“Hearing Impairment” means an impairment in hearing, whether permanent or fluctuating, that adversely affects a child's educational performance but that is not included under the definition of deafness in this section.

“Mental Retardation” means significantly sub average general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period that adversely affects a child's educational performance.

“Multiple Disabilities” means concomitant impairments (such as mental retardation-blindness or mental retardation-orthopedic impairment), the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments. Multiple disabilities does not include deaf-blindness. *Nothing in these regulations shall be construed to require that a child with a disability be identified or classified as having multiple disabilities so long as the child receives the special education and related services the child needs to receive a free appropriate public education.*

“Orthopedic Impairment” means a severe orthopedic impairment that adversely affects a child's educational performance. The term includes impairments caused by a congenital anomaly, impairments caused by disease (e.g., poliomyelitis, bone tuberculosis), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures).

“Other Health Impairment” means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute

health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome, and adversely affects a child's educational performance.

“Specific Learning Disability” means a disorder in one (1) or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Specific Learning Disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, or mental retardation.

“Speech or Language Impairment” means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance.

“Traumatic Brain Injury” means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. Traumatic brain injury applies to open or closed head injuries resulting in impairments in one (1) or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. Traumatic brain injury does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma.

“Visual Impairment Including Blindness” means impairment in vision that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness.

(Authority: 20 U.S.C. 1401(3); 1401(30); 14 Del.C. 3110)

“Consent” means that the parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication; the parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought; the consent describes that activity and lists the records (if any) that will be released and to whom; and the parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at anytime.

If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).

(Authority: 20 U.S.C. 1414(a)(1)(D); 14 Del.C. §3110)

“Core Academic Subjects” means English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography.

(Authority: 20 U.S.C. 1401(4); 14 Del.C. §3110)

“Day” means calendar day unless otherwise indicated as business day or school day.

(Authority: 20 U.S.C. 1221e-3; 14 **Del.C.** §3110)

“Business Day” means Monday through Friday, except for Federal and State holidays (unless holidays are specifically included in the designation of business day).

(Authority: 20 U.S.C. 1221e-3; 14 **Del.C.** §3110)

“School Day” means any day, including a partial day that children are in attendance at school for instructional purposes. School day has the same meaning for all children in school, including children with and without disabilities.

(Authority: 20 U.S.C. 1221e-3; 14 **Del.C.** §3110)

“Department of Education” or **“DOE”** means the Delaware Department of Education

“Educational Service Agency” means a regional public multi service agency authorized by the State of Delaware to develop, manage, and provide services or programs to LEAs; and is recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary schools and secondary schools of the State of Delaware. The term includes any other public institution or agency having administrative control and direction over a public elementary school or secondary school and includes entities that meet the definition of intermediate educational unit in section 602(23) of the Act as in effect prior to June 4, 1997.

(Authority: 20 U.S.C. 1401(5); 14 **Del.C.** §3110)

“Elementary School” means a nonprofit institutional day or residential school (including a public elementary charter school) that provides elementary education, as determined under Delaware law.

(Authority: 20 U.S.C. 1401(6); 14 **Del.C.** §3110)

“Equipment” means machinery, utilities, and built in equipment, and any necessary enclosures or structures to house the machinery, utilities, or equipment; and all other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture; printed, published and audio visual instructional materials; telecommunications, sensory, and other technological aids and devices; and books, periodicals, documents, and other related materials.

(Authority: 20 U.S.C. 1401(7); 14 **Del.C.** §3110)

“Evaluation” means procedures used in accordance with 14 **DE Admin. Code** 925.4.0 through 925.12.0 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.

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

“Excess Costs” means those costs that are in excess of the average annual per-student expenditure in an LEA during the preceding school year for an elementary school or secondary school student, as may be appropriate, and that must be computed after deducting amounts received under Part B of the Act; under Part A of Title I of the ESEA; under Parts A and B of Title III of the ESEA; and any State or local funds expended for programs that would qualify for assistance under any of the foregoing federal programs, but excluding any amounts for capital outlay or debt service.

(Authority: 20 U.S.C. 1401(8); 14 **Del.C.** §3110)

“Free Appropriate Public Education” or “FAPE” means special education and related services that: are provided at public expense, under public supervision and direction, and without charge; meet the standards of the DOE, including the requirements of these regulations; include an appropriate preschool, elementary school, or secondary school education in Delaware; and are provided in conformity with an individualized education program (IEP) that meets the requirements of 14 **DE Admin. Code** 925.20 through 925.24.0.

(Authority: 20 U.S.C. 1401(9); 14 **Del.C.** §3110)

“Highly Qualified Special Education Teachers” means:

1.0 Requirements for special education teachers teaching core academic subjects. For any public elementary or secondary school special education teacher teaching core academic subjects, the term “highly qualified” has the meaning given the term in section 9101 of the ESEA and 34 CFR 200.56, except that the requirements for highly qualified also include the requirements described in 2.0 of this definition, and the option for teachers to meet the requirements of section 9101 of the ESEA by meeting the requirements of paragraphs 3.0 and 4.0 of this definition.

2.0 Requirements for special education teachers in general. When used with respect to any public elementary school or secondary school special education teacher teaching in Delaware, highly qualified requires that the teacher has obtained full State certification as a special education teacher (including certification obtained through alternative routes to certification), or passed the State special education teacher licensing examination, and holds a license to teach in Delaware as a special education teacher, (except that when used with respect to any teacher teaching in a public charter school, “highly qualified” means that the teacher meets the certification or licensing requirements set forth in Delaware’s charter school law (14 **Del.C.** Ch. 5)). In addition, the teacher must not have had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis and must hold at least a bachelor's degree.

2.1 A teacher will be considered to meet the standard in 2.0 of this definition if the teacher is participating in an alternative route to special education certification program under 14 **Del.C.** Ch. 12, Subch. VI.

2.2 Any public elementary school or secondary school special education teacher who is not teaching a core academic subject is highly qualified if the teacher meets the requirements in 2.0 of this definition or the teacher holds at least a bachelor's degree and meets the requirements in 2.1 of this definition.

3.0 Requirements for special education teachers teaching to alternate achievement standards. When used with respect to a special education teacher who teaches core academic subjects exclusively to children who are assessed against alternate achievement standards established under 34 CFR 200.1(d), “highly qualified” means the teacher, whether new or not new to the profession, must either: meet the applicable requirements of section 9101 of the ESEA and 34 CFR 200.56 for any elementary, middle, or secondary school teacher who is new or not new to the profession; or meet the requirements of paragraph (B) or (C) of section 9101(23) of the ESEA as applied to an elementary school teacher, or, in the case of instruction above the

elementary level, meet the requirements of paragraph (B) or (C) of section 9101(23) of the ESEA as applied to an elementary school teacher and have subject matter knowledge appropriate to the level of instruction being provided and needed to effectively teach to those standards.

4.0 Requirements for special education teachers teaching multiple subjects. When used with respect to a special education teacher who teaches two or more core academic subjects exclusively to children with disabilities, “highly qualified” means that the teacher must either: meet the applicable requirements of section 9101 of the ESEA and 34 CFR 200.56(b) or (c); or, in the case of a teacher who is not new to the profession, demonstrate competence in all the core academic subjects in which the teacher teaches in the same manner as is required for an elementary, middle, or secondary school teacher who is not new to the profession under 34 CFR 200.56(c); or, in the case of a new special education teacher who teaches multiple subjects and who is highly qualified in mathematics, language arts, or science, demonstrate, not later than two (2) years after the date of employment, competence in the other core academic subjects in which the teacher teaches in the same manner as is required for an elementary, middle, or secondary school teacher under 34 CFR 200.56(c).

5.0 Rule of construction: Notwithstanding any other individual right of action that a parent or student may maintain under these regulations, nothing in these regulations shall be construed to create a right of action on behalf of an individual student or class of students for the failure of a particular DOE or LEA employee to be highly qualified, or to prevent a parent from filing a complaint under 14 **DE Admin. Code** 923.51.0 through 923.53.0 about staff qualifications with the DOE.

6.0 Applicability of definition to ESEA; and clarification of new special education teacher. A teacher who is highly qualified under this section is considered highly qualified for purposes of the ESEA. For purposes of 4.0 of this definition, a fully certified regular education teacher who subsequently becomes fully certified or licensed as a special education teacher is a new special education teacher when first hired as a special education teacher.

7.0 Private school teachers not covered. The requirements in this definition do not apply to private school teachers hired or contracted by local education agencies to provide equitable services to parentally placed private school children with disabilities under 14 **DE Admin. Code** 923.38.

(Authority: 20 U.S.C. 1401(10); 14 **Del.C.** §3110)

“**Homeless Children**” has the meaning given the term homeless children and youths in section 725 (42 U.S.C. 11434a) of the McKinney-Vento Homeless Assistance Act, as amended, 42 U.S.C. 11431 et seq.

(Authority: 20 U.S.C. 1401(11); 14 **Del.C.** §3110)

“**Include**” means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

Authority: 20 U.S.C. 1221e-3; 14 **Del.C.** §3110)

“**Individualized Education Program**” or “**IEP**” means a written statement for a child with a disability that is developed, reviewed, and revised in accordance with 14 **DE Admin. Code** 925.20.0 through 925.24.0.

(Authority: 20 U.S.C. 1401(14); 14 **Del.C.** §3110)

“Individualized Education Program Team” or **“IEP Team”** means a group of individuals described in 14 **DE Admin. Code** 925.21.0 that is responsible for developing, reviewing, or revising an IEP for a child with a disability

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

“Institution of Higher Education” has the meaning given the term in section 101 of the Higher Education Act of 1965, as amended, 20 U.S.C. 1021 et seq. (HEA); an also includes any community college receiving funds from the Secretary of the Interior under the Tribally Controlled Community College or University Assistance Act of 1978, 25 U.S.C. 1801, et seq.

(Authority: 20 U.S.C. 1401(17); 14 **Del.C.** §3110)

“Limited English Proficient” has the meaning given the term in section 9101(25) of the ESEA.

(Authority: 20 U.S.C. 1401(18); 14 **Del.C.** §3110)

“Local Educational Agency” or **“LEA”** means a public board of education or other public authority legally constituted within Delaware for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a school district, or for a combination of school districts. The term includes an educational service agency, as defined in this section, and any other public institution or agency having administrative control and direction of a public elementary school or secondary school.

(Authority: 20 U.S.C. 1401(19); 14 **Del.C.** §3110)

“Native Language” means, when used with respect to an individual who is limited English proficient, the language normally used by that individual, or, in the case of a child, the language normally used by the parents of the child, except that when used in reference to direct contact with a child (including evaluation of the child), the language normally used by the child in the home or learning environment. For an individual with deafness or blindness, or for an individual with no written language, “native language” means the mode of communication that is normally used by the individual (such as sign language, Braille, or oral communication).

(Authority: 20 U.S.C.1401(20); 14 **Del.C.** §3110)

“Parent” means a biological or adoptive parent of a child; a guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State); an individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives and for whom a Relative Caregiver’s School Authorization executed in compliance with 14 **Del.C.** §202(f)(1) is on file; an individual who is otherwise legally responsible for the child's welfare; or a surrogate parent who has been appointed in accordance with 14 **DE Admin. Code** 926.19.0 or section 639(a)(5) of the Act.

The biological or adoptive parent, when attempting to act as the parent under these regulations, and when more than one party is qualified under this definition to act as a parent, must be presumed to be the parent for purposes of this definition unless the biological or adoptive parent does not have legal authority to make educational decisions for the child.

If a judicial decree or order identifies a specific person or persons to act as the "parent" of a child, or to make educational decisions on behalf of a child, then such person or persons shall be determined to be the "parent" for purposes of this definition. (Authority: 20 U.S.C. 1401(23); 14 Del.C. §3110)

"Parent Training and Information Center" means a center assisted under sections 671 or 672 of the Act, *and includes the Parent Information Center of Delaware, Inc.*

(Authority: 20 U.S.C. 1401(25); 14 Del.C. §3110)

"Personally Identifiable" means information that contains the name of the child, the child's parent, or other family member; the address of the child; a personal identifier (such as the child's social security number or student number); or a list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

(Authority: 20 U.S.C. 1415(a); 14 Del. C. §3110)

"Public Agency" means the Department of Education, LEAs, ESAs, and any other political subdivisions of the State that are responsible for providing education to children with disabilities.

(Authority: 20 U.S.C. 1412(a)(11); 14 Del.C. §3110)

"Related Services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.

Related services do not include a medical device that is surgically implanted, the optimization of that device's functioning (e.g., mapping), maintenance of that device, or the replacement of that device. However, nothing in this exception limits the right of a child with a surgically implanted device (e.g., cochlear implant) to receive related services (as listed in the preceding paragraph) that are determined by the IEP Team to be necessary for the child to receive FAPE; or limits the responsibility of a public agency to appropriately monitor and maintain medical devices that are needed to maintain the health and safety of the child, including breathing, nutrition, or operation of other bodily functions, while the child is transported to and from school or is at school; or prevents the routine checking of an external component of a surgically implanted device to make sure it is functioning properly, as required in 14 DE Admin. Code 923.13.2.

Definitions of Related Services Terms: The specific related services terms used in this definition are defined as follows:

"Audiology" includes the identification of children with hearing loss, and determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing; provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-

reading), hearing evaluation, and speech conservation; creation and administration of programs for prevention of hearing loss; counseling and guidance of children, parents, and teachers regarding hearing loss; and determination of children's needs for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

“Counseling Services” includes services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

“Early identification and Assessment of Disabilities in Children” means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

“Interpreting Services” means the following when used with respect to children who are deaf or hard of hearing: Oral transliteration services; cued language transliteration services; sign language transliteration and interpreting services and transcription services such as communication access real time translation (CART), C Print, and Type Well; and special interpreting services for children who are deaf blind.

“Medical Services” includes services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

“Occupational Therapy” means services provided by a qualified occupational therapist; and includes: improving, developing, or restoring functions impaired or lost through illness, injury, or deprivation; improving ability to perform tasks for independent functioning if functions are impaired or lost; and preventing, through early intervention, initial or further impairment or loss of function.

“Orientation and Mobility Services” means services provided to blind or visually impaired children by qualified personnel to enable those students to attain systematic orientation to and safe movement within their environments in school, home, and community; and includes teaching children the following, as appropriate:

Spatial and environmental concepts and use of information received by the senses (such as sound, temperature and vibrations) to establish, maintain, or regain orientation and line of travel (e.g., using sound at a traffic light to cross the street);

The use of a long cane or a service animal to supplement visual travel skills or as a tool for safely negotiating the environment for children with no available travel vision;

To understand and use remaining vision and distance low vision aids; and

Other concepts, techniques, and tools.

“Parent Counseling and Training” means assisting parents in understanding the special needs of their child, providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP.

“Physical Therapy” means services provided by a qualified physical therapist.

“Psychological Services” includes administering psychological and educational tests and other assessment procedures; interpreting assessment results;

obtaining, integrating, and interpreting information about child behavior and conditions relating to learning; consulting with other staff members in planning school programs to meet the special educational needs of children as indicated by psychological tests, interviews, direct observation, and behavioral evaluations; planning and managing a program of psychological services, including psychological counseling for children and parents; and assisting in developing positive behavioral intervention strategies.

“Recreation” includes assessment of leisure function, therapeutic recreation services recreation programs in schools and community agencies and leisure education.

“Rehabilitation Counseling Services” means services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to a student with a disability by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 et seq.

“School Health Services” and “School Nurse Services” means health services designed to enable a child with a disability to receive FAPE as described in the child's IEP. School nurse services are services provided by a qualified school nurse. School health services are services that may be provided by either a qualified school nurse or other qualified person.

“Social Work Services” in schools includes preparing a social or developmental history on a child with a disability; group and individual counseling with the child and family; working in partnership with parents and others on those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school; mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program; and assisting in developing positive behavioral intervention strategies.

“Speech language Pathology Services” includes identifying children with speech or language impairments; diagnosis and appraisal of specific speech or language impairments; referral for medical or other professional attention necessary for the habilitation of speech or language impairments; provision of speech and language services for the habilitation or prevention of communicative impairments; and counseling and guidance of parents, children, and teachers regarding speech and language impairments.

“Transportation” includes travel to and from school and between schools, travel in and around school buildings; and specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.

(Authority: 20 U.S.C. 1401(26); 14 Del.C. §3110)

“Scientifically Based Research” has the meaning given the term in section 9101(37) of the ESEA.

(Authority: 20 U.S.C. 1411(e)(2)(C)(xi); 14 Del.C. §3110)

“Secondary School” means a nonprofit institutional day or residential school, (including a public secondary charter school) that provides secondary education, as

determined under Delaware law, except that it does not include any education beyond grade twelve (12).

(Authority: 20 U.S.C. 1401(27); 14 **Del.C.** §3110)

“Services Plan” means a written statement that describes the special education and related services the LEA will provide to a parentally-placed child with a disability enrolled in a private school who has been designated to receive services, including the location of the services and any transportation necessary, consistent with 14 **DE Admin. Code** 923.32.0, and is developed and implemented in accordance with 14 **DE Admin. Code** 923.32.0 through 923.39.0.

(Authority: 20 U.S.C. 1412(a)(10)(A); 14 **Del.C.** §3110)

“Secretary” means the Secretary of Education of the Delaware Department of Education unless otherwise indicated in the text of these regulations.

(Authority: 14 **Del.C.** §3110)

“Special Education” means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings, and instruction in physical education.

Special education includes each of the following, if the services otherwise meet the requirements of the preceding paragraph: Speech-language pathology services, travel training and vocational education.

Definitions of Special Education Terms: The specific terms used in the definition of special education are defined as follows:

“At No Cost” means that all specially designed instruction is provided without charge, but does not preclude incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program.

“Physical Education” means the development of physical and motor fitness, fundamental motor skills and patterns; and skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports) and includes special physical education, adapted physical education, movement education, and motor development.

“Specially Designed Instruction” means adapting, as appropriate to the needs of an eligible child under these regulations, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

“Travel Training” means providing instruction, as appropriate, to children with significant cognitive disabilities, and any other children with disabilities who require this instruction, to enable them to develop an awareness of the environment in which they live; and learn the skills necessary to move effectively and safely from place to place within that environment (e.g., in school, in the home, at work, and in the community).

“Vocational Education” means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career not requiring a baccalaureate or advanced degree.

(Authority: 20 U.S.C. 1401(29); 14 **Del.C.** §3110)

“State” means the State of Delaware

(Authority: 20 U.S.C. 1401(31); 14 **Del.C.** §3110)

“State Educational Agency” or **“SEA”** means the Delaware Department of Education.

(Authority: 20 U.S.C. 1401(32); 14 **Del.C.** §3110)

“Supplementary Aids and Services” means aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with 14 **DE Admin. Code** 923.14 through 923.16.0.

(Authority: 20 U.S.C. 1401(33); 14 **Del.C.** §3110)

“These Regulations” means 14 **DE Admin. Code** 922 through 929, *Children with Disabilities, Sub Parts A through I* (14 **DE Admin. Code** 922 to 929) unless the context clearly indicates otherwise.

(Authority: 14 **Del.C.** §3110)

“Transition Services” means a coordinated set of activities for a child with a disability that is designed to be within a results oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation; and is based on the individual child's needs, taking into account the child's strengths, preferences, and interests.

Transition services include instruction, related services, community experiences, the development of employment and other post school adult living objectives and, if appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.

Transition services for children with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education.

(Authority: 20 U.S.C. 1401(34); 14 **Del.C.** §3110)

“Universal Design” has the meaning given the term in section 3 of the Assistive Technology Act of 1998, as amended, 29 U.S.C. 3002.

(Authority: 20 U.S.C. 1401(35); 14 **Del.C.** §3110)

“Ward of the State” means a child who, as determined by the state where the child resides, is a foster child, a ward of the state; or in the custody of a public child welfare agency, including, but not limited to, the Delaware Department of Services for Children, Youth, and Their Families.

(Authority: 20 U.S.C. 1401(36); 14 **Del.C.** §3110)

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

923 Children with Disabilities Subpart B General Duties and Eligibility of Agencies

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

1.0 Eligibility for Assistance and Free Appropriate Public Education (FAPE) Requirements

1.1 Eligibility for assistance: To maintain eligibility for assistance under Part B of the Act, the DOE shall submit a plan that provides assurances to the Secretary of the U.S. Department of Education that the State has in effect policies and procedures to ensure that the State meets the conditions in 1.2 through 75.0.

(Authority: 20 U.S.C. 1412(a); 14 **Del.C.** §3110)

1.2 Free appropriate public education: A free appropriate public education (FAPE) shall be available to all children with disabilities residing in Delaware between the ages of 3 and 20, inclusive, including children with disabilities who have been suspended or expelled from school, as provided for in 14 **DE Admin. Code** 926.30.4.

1.2.1 Each public agency receiving funds under part of the Act, or receiving state funding for the education of children, shall ensure that FAPE is made available to each eligible child beginning no later than the child's third (3rd) birthday; and that an IEP is in effect for the child by that date, in accordance with 14 **DE Admin. Code** 925.23.1

1.2.2 If a child's third (3rd) birthday occurs during the summer, the child's IEP Team shall determine the date when services under the IEP will begin.

1.2.3 Children advancing from grade to grade: Each public agency shall ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.

1.2.4 The determination that a child described in 1.1 is eligible under these regulations, shall be made on an individual basis by the group responsible within the child's LEA for making eligibility determinations.

(Authority: 20 U.S.C. 1412(a)(1)(A); 14 **Del.C.** §3110)

2.0 Limitation Exception to FAPE for Certain Ages

2.1 General: The obligation to make FAPE available to all children with disabilities does not apply with respect to the following:

2.1.1 Reserved

2.1.2 Reserved

2.1.3 Children with disabilities who have graduated from high school with a regular high school diploma.

2.1.3.1 The exception in 2.1.3 does not apply to children who have graduated from high school but have not been awarded a regular high school diploma.

2.1.3.2 Graduation from high school with a regular high school diploma constitutes a change in placement, requiring written prior notice in accordance with 14 **DE Admin. Code** 926.3.0.

2.1.3.3 As used in 2.1.3, 2.1.3.1 and 2.1.3.2, the term regular high school diploma does not include an alternative degree that is not fully aligned with the State's academic standards, such as a certificate or a general educational development credential (GED).

2.1.4 Children with disabilities who are eligible under 34 CFR §§300.800 through 300.818 (preschool grants), but who receive early intervention services under Part C of the Act.

2.1.5 Documents relating to exceptions. The State shall assure that the information it has provided to the Secretary of the United States Department of Education regarding the exceptions in this section, as required by 34 CFR §300.700 (for purposes of making grants to States under these regulations), is current and accurate.

(Authority: 20 U.S.C. 1412(a)(1)(B)-(C); 14 **Del.C.** §3110)

3.0 FAPE, Methods and Payments

3.1 The State may use whatever State, local, Federal, and private sources of support are available to it to meet the requirements of these regulations. For example, if it is necessary to place a child with a disability in a residential facility, the State may use joint agreements between the agencies involved for sharing the cost of that placement.

3.2 Nothing in these regulations relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a child with a disability.

3.3 Consistent with 14 **DE Admin. Code** 925.23.2, each public agency shall ensure that there is no delay in implementing a child's IEP, including any case in which the payment source for providing or paying for special education and related services to the child is being determined.

(Authority: 20 U.S.C. 1401(8), 1412(a)(1); 14 **Del.C.** §3110).

4.0 Residential Placement

4.1 If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, shall be at no cost to the parents of the child.

(Authority: 20 U.S.C. 1412(a)(1), 1412(a)(10)(B); 14 **Del.C.** §3110)

5.0 Assistive Technology

5.1 Each public agency shall ensure that assistive technology devices or assistive technology services, or both, as those terms are defined in 14 **DE Admin. Code**

922.3.0, are made available to a child with a disability if required as a part of the child's special education, related services, or supplementary aids and services.

5.1.1 On a case by case basis, the use of school purchased assistive technology devices in a child's home or in other settings is required if the child's IEP Team determines that the child needs access to those devices in order to receive FAPE. (Authority: 20 U.S.C. 1412(a)(1), 1412(a)(12)(B)(i); 14 **Del.C.** §3110)

6.0 Extended School Year Services

6.1 General: Each public agency shall ensure that extended school year services are available as necessary to provide FAPE, consistent with 6.2.

6.2 Extended school year services shall be provided only if a child's IEP Team determines, on an individual basis, in accordance with 14 **DE Admin. Code** 925.20.0 through 925.24.0, that the services are necessary for the provision of FAPE to the child.

6.3 In implementing the requirements of this section, a public agency may not limit extended school year services to particular categories of disability; or unilaterally limit the type, amount, or duration of those services.

6.4 Definition, as used in this section:

“Extended School Year Services” means special education and related services that are provided to a child with a disability beyond the normal school year of the public agency in accordance with the child's IEP and at no cost to the parents of the child; and meets the standards of the DOE.

6.5 Determining need for Extended School Year Services: Full consideration must be given to the educational needs of each child. The following factors are to be considered by the IEP team in making a decision that, without extended school year services over the summer months, the child would not receive a free appropriate public education during the regular school year.

6.5.1 Degree of Impairment: The team should determine whether, without extended school year services, appropriate and meaningful progress on IEP goals and objectives will not be achieved, given the nature or severity of the child's disability.

6.5.2 Regression and recoupment: Regression refers to a decline in skills specified on the IEP which results from an interruption in programming. Recoupment period is the amount of time required to relearn the skills following the interruption. In making a determination as to whether extended school year services are required, the team should consider that this criterion focuses on children who have a consistent pattern of substantial regression in critical skill areas and for whom the amount of time needed to relearn the skills becomes so significant as to preclude educational progress. The team may utilize predictive data for children in their initial year of programming.

6.5.3 Breakthrough opportunities: The team should determine whether, without extended school year services, the attainment of a nearly acquired critical skill would be significantly jeopardized over the summer break

6.5.4 Vocational: For children ages 16-20 whose IEPs contain vocational or employment goals and objectives, the team should determine whether paid employment

opportunities will be significantly jeopardized if training and job coaching are not provided during the summer break.

6.5.5 Other rare and unusual extenuating circumstances: The team should determine whether any special or extenuating circumstances exist which justify provision of extended school year services to meet FAPE requirements.

6.6 Extended school year services are to be based on needs and goals or objectives found within the child's IEP of the school year, though activities may be different.

6.7 This regulation does not diminish a child's entitlement to participate, with or without accommodations, in summer school programs. Normally scheduled summer school programs may be an option for providing extended school year services if such programs can meet the individual needs of each child, as identified on the child's IEP.

6.8 The decision of the setting for the delivery of extended school year services shall be an IEP team decision. The team shall document that the Least Restrictive Environment (LRE) was considered in making a decision. Districts are not required to establish school programs for non-disabled children for the sole purpose of satisfying the LRE requirements for children receiving extended school year services.

6.9 Transportation shall be provided to children except for service provided in the home or hospital. Mileage reimbursement to the family may be used as a transportation option if the parent voluntarily transports the student.

6.10 Written notice shall be provided to parents advising them that the IEP team shall document that extended school year services were considered, and indicate the basis for a decision on the IEP. In cases where parents do not attend the IEP meeting, they would be advised of the decision on extended school year services through the usual IEP follow-up procedures used by the district.

6.11 In cases where parents do not agree with the decision on extended school year services, the use of normal procedural safeguards shall be followed. The process shall begin early enough to ensure settlement of the issue prior to the end of the school year.

Non-regulatory Note: Districts are encouraged to complete this process by May 1 so that appropriate planning and preparation can occur.

(Authority: 20 U.S.C. 1412(a)(1); 14 Del.C. §3110)

11 DE Reg. 181 (08/01/07)

7.0 Non Academic Services; Transportation

7.1 Each public agency shall take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP Team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities.

7.2 Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that

provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available.

7.3 Transportation: *Transportation of all children to and from school shall be provided in accordance with 14 Del.C. Ch. 29.*

7.3.1 *When special transportation needs are identified in the IEP of a child with a disability, transportation shall be deemed a related service. Transportation provided to accommodate a related service shall be at the expense of the LEA or other public agency, including, but not limited to, the costs of travel to and from school and between schools, and any required specialized equipment.*

7.3.2 *Transportation incidental to the educational program of a child with a disability shall not be at the expense of the public agency, including, but not limited to work study arrangements, cooperative work arrangements, and extracurricular activities.*

7.3.3 *Travel arrangements shall be made in consultation with the public agency's transportation representative when unusual requirements are necessary for a child with a disability.*

(Authority: 20 U.S.C. 1412(a)(1); 14 Del.C. §3110)

8.0 Physical Education

Each public agency shall comply with the following:

8.1 General: Physical education services, specially designed if necessary, shall be made available to every child with a disability receiving FAPE, unless the public agency enrolls children without disabilities and does not provide physical education to children without disabilities in the same grades.

8.2 Regular physical education: Each child with a disability shall be afforded the opportunity to participate in the regular physical education program available to non disabled children unless:

8.2.1 The child is enrolled full time in a separate facility; or the child needs specially designed physical education, as prescribed in the child's IEP.

8.3 Special physical education: If specially designed physical education is prescribed in the child's IEP, the public agency responsible for the education of that child shall provide the services directly or make arrangements for those services to be provided through other public or private programs.

8.4 Education in separate facilities. The public agency responsible for the education of a child with a disability who is enrolled in a separate facility shall ensure that the child receives appropriate physical education services in compliance with this section.

(Authority: 20 U.S.C. 1412(a)(5)(A); 14 Del.C. §3110)

9.0 Full Educational Opportunity; Length of School Day; Compulsory School Attendance

9.1 *Full educational opportunity: Each public agency shall ensure full educational opportunity is offered to its eligible children with disabilities.*

9.2 *Length of school day: The minimum length of the instructional school day for a child with a disability in Kindergarten through grade twelve (12) shall be the same as it is for non-disabled children in those grades. The minimum length of the school day for disabled pre kindergarten children shall approximate that of non-disabled pre-Kindergarten children, except in a program for the hearing impaired in which the parent is involved in the educational program. In such a program, the school and the parent together shall determine the schedule for at least 5 hours per week of instruction.*

9.2.1 Provision of fewer hours of instructional time than required by these regulations is authorized only in unusual circumstances where a child is medically unable to endure the required length of school day, and then only by decision of the IEP team after disclosure of the above standards to the child's parents, guardian, and/or Relative Caregiver.

9.3 *Compulsory school attendance: Compulsory school attendance requirements shall be in accordance with 14 Del.C. §2702 and §705, and shall apply to children with disabilities between the ages of five (5) and sixteen (16). Attendance of children with disabilities under or over the compulsory school attendance age range, as provided in 14 Del.C. §2702, shall be determined by the IEP team and subject to the eligibility criteria and procedural safeguards provided in these regulations.*

(Authority: 20 U.S.C. 1412(a)(2); 14 Del.C. §3110)

10.0 Program Options; Vocational and Career Technical Programs and Services

10.1 Each public agency shall ensure children with disabilities have available to them the variety of educational programs and services available to nondisabled children in the area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education. *Each public agency shall provide assurances to the DOE it will assist in fulfilling the transitional service requirement of these regulations.*

10.2 Vocational Education and Career Technical Programs and Services: *Vocational and career technical programs and services shall be provided to children with disabilities as determined appropriate by each child's IEP team. Each public agency shall ensure the provision of a vocational and career technical program in the least restrictive environment permitting children with disabilities equal access to:*

10.2.1 *Recruitment, enrollment and placement activities and the full range of vocational programs available to all students including occupational specific courses of study, cooperative education, apprenticeship programs and to the extent practicable, comprehensive career guidance and counseling services.*

10.2.2 *Supplementary services to children with disabilities, including:*

10.2.2.1 *Codification of curriculum, equipment and facilities as needed;*

10.2.2.2 *Supportive personnel;*

10.2.2.3 *Instructional aids and devices;*

10.2.2.4 *Guidance, counseling and career development staff who are associated with the provision of such special services*

10.2.2.5 *Counseling services designed to facilitate the transition from school to post school employment and career opportunities;*

10.2.2.6 *Regular career technical programs with supportive services as identified by the IEP team; and*

10.2.2.7 *Special education career technical programs.*

10.2.3 *An appropriate career technical education to children with disabilities, including access to Career Pathways, through the availability of a continuum of career technical education programs, including, but not limited to:*

10.2.3.1 *Regular career technical programs with no supportive services;*

10.2.3.2 *Regular career technical programs with supportive services as identified by the IEP team;*

10.2.3.3 *Special education career technical programs;*

10.2.3.4 *Self contained career technical programs; and*

10.2.3.5 *Community based job training programs.*

(Authority: 20 U.S.C. 1412(a)(2), 1413(a)(1); 14 **Del.C.** §3110)

11.0 Child Find and Identification of Eligible Individuals

11.1 General: As used in these regulations, identification has two (2) purposes: to identify those individuals who require special education; and to identify individuals who need general education interventions. Each LEA and any other public agency responsible for the education of children with disabilities shall establish and implement ongoing evaluation procedures consistent with this section to identify, locate and evaluate all children residing within the confines of the LEA or other public agency, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services.

11.2 Children with developmental delay: The following provisions apply with respect to implementing the child find requirements of this section:

11.3 The definition of developmental delay adopted by the State under 14 **DE Admin. Code** 925.6.7 applies to children aged three (3) through nine (9).

11.4 An LEA is not required to adopt and use the term developmental delay for children within its boundaries.

11.5 If an LEA uses the term developmental delay for children, the LEA shall conform to both the State's definition of that term and to the age range that has been adopted by the State (i.e., ages three (3) through nine (9)).

11.6 Other children in child find: Child find also shall include children who are suspected of being a child with a disability as defined in 14 **DE Admin. Code** 922.3.0 and in need of special education, even though they are advancing from grade to grade; and highly mobile children, including migrant children.

11.7 Health, hearing, vision and orthopedic screening shall be conducted as specified in 14 **DE Admin. Code** 815.

11.8 Rule of Construction. Nothing in these regulations requires that children be classified by their disability so long as each child who has a disability that is listed in 14 **DE Admin. Code** 922.3.0 (in the definition of child with a disability) and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under Part B of the Act.

11.9 Problem Solving in General Education and Intervention Support Teams

11.9.1 Problem solving in general education classroom and Intervention Support Teams: *The identification and child find procedures required in 11.0, shall include a systematic problem solving process to examine the nature and severity of an educationally related problem. These procedures shall primarily focus on variables related to developing effective educationally related interventions. Active parent participation is an integral aspect of the process and is solicited throughout. At a minimum, the process shall include:*

11.9.1.1 *Description of problem: The presenting problem or behavioral concern is described in objective, measurable terms that focus on alterable characteristics of the individual and the environment. The individual and environment are examined through systematic data collection. The presenting problem or behavioral concern are defined in a problem statement that describes the differences between the demands of the educational setting and the individual's performance.*

11.9.1.2 *Data collection and problem analysis: A systematic, data-based process for examining all that is known about the presenting problem or behaviors of concern is used to identify interventions that have a high likelihood of success. Data collected on the presenting problem or behaviors of concern are used to plan and monitor interventions. Data collected are relevant to the presenting problem or behaviors of concern and are collected in multiple settings using multiple sources of information and multiple data collection methods. Data collection procedures are individually tailored, valid for the concern addressed, and reliable, and allow for frequent and repeated measurement of intervention effectiveness.*

11.9.1.3 *Intervention design and implementation: Interventions are designed based on the preceding analysis, the defined problem, parent input, and professional judgments about the potential effectiveness of interventions. The interventions are described in an intervention plan that includes goals and strategies, a progress monitoring plan, a decision making plan for summarizing and analyzing progress monitoring data, and responsible parties. Interventions are implemented as developed and modified on the basis of objective data and with the agreement of the responsible parties.*

11.9.1.4 *Progress monitoring: Systematic progress monitoring is conducted which includes regular and frequent data collection, analysis of individual performance across time, and modification of interventions as frequently as necessary based on systematic progress monitoring data.*

11.9.1.5 *Evaluation of intervention effects: The effectiveness of interventions is evaluated through a systematic procedure in which patterns of individual performance are analyzed and summarized. Decisions regarding the effectiveness of interventions focus on comparisons with initial levels of performance.*

11.9.2 *The identification and child find procedures required in 11.0, shall also include procedures to establish, and to refer students to, school or program based intervention support teams. The agency's procedures shall include the following requirements:*

11.9.2.1 *The intervention support team shall include members collectively qualified to assist in the identification of instructional and behavioral intervention strategies for learning and behavioral problems and needs.*

11.9.2.2 *The intervention support team process shall ensure that a student's learning and behavioral needs are comprehensively assessed. It shall include consideration, as appropriate, of curriculum based assessment measures, analyses of instructional variables, systematic observations, functional assessments and current health information.*

11.9.2.3 *Baseline and outcome data shall be collected and used to inform intervention strategies.*

11.9.2.4 *All initial referrals to the intervention support team shall be in writing. Written documentation of the intervention support team process shall be maintained for each student.*

11.9.2.5 *The intervention support team process may or may not lead to referral for initial evaluation to determine eligibility for special education services.*

11.9.2.5.1 *When the intervention support team determines the student should be evaluated to determine eligibility for special education services, the team shall forward a written recommendation to an appropriate, designated staff member within ten (10) school days.*

11.9.2.5.2 *Within ten (10) school days of the recommendation, the student's parents shall be notified in writing of the team's recommendation that the student be evaluated for special education services. The notification shall include a request for parental consent for initial evaluation.*

11.9.2.5.3 *Referrals for an individual student that do not contain all required information and documentation, including the data and other evidence described in 11.9.2.2 and 11.9.2.3, may be returned to the intervention support team with a request that they be supplemented. Parental notification of the team's recommendation, and the request for consent for initial evaluation, shall still occur within ten (10) school days of the initial team recommendation.*

(Authority: 20 U.S.C. 1401(3)); 1412(a)(3); 14 **Del.C.** §3110)

12.0 Individualized Education Programs (IEP):

Each public agency shall ensure that an IEP that meets the requirements of section 636(d) of the Act, is developed, reviewed, and revised for each child with a disability in accordance with 14 **DE Admin. Code** 925.20.0 through 925.24.0, except as provided in 14 **DE Admin. Code** 925.1.2.3.

(Authority: 20 U.S.C. 1412(a)(4); 14 **Del.C.** §3110)

13.0 Routine Checking of Hearing Aids and External Components of Surgically Implanted Medical Devices

13.1 Hearing aids: Each public agency shall ensure that hearing aids worn in school by children with hearing impairments, including deafness, are functioning properly.

13.2 External components of surgically implanted medical devices: Subject to 13.2.1, each public agency shall ensure that the external components of surgically implanted medical devices are functioning properly.

13.2.1 For a child with a surgically implanted medical device who is receiving special education and related services under these regulations, a public agency shall not be responsible for the post surgical maintenance, programming, or replacement of the medical device that has been surgically implanted (or of an external component of the surgically implanted medical device).

(Authority: 20 U.S.C. 1401(1), 1401(26)(B); 14 **Del.C.** §3110)

14.0 Least Restrictive Environment (LRE) Requirement

14.1 General: Except as provided in 14 **DE Admin. Code** 925.24.12 (regarding children with disabilities in adult prisons), each public agency shall meet the LRE requirements of 15.0 through 20.0.

14.2 Each public agency shall ensure that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

14.2.1 Additional requirement: No public agency shall make educational placement decisions on the basis of funding sources or amount of funding. Placement decisions shall be based on the unique needs of a child with a disability regardless of the manner or amount of funding available.

14.3 Interagency and Special Programs: *When a child's IEP Team determines the child's needs cannot be met appropriately in the LEA of residence or other public agency, inter-LEA or interagency programs shall be considered within least restrictive environment requirements.*

14.4 Interagency agreements: *A written Interagency Agreement shall be developed between or among LEAs or other public agencies when special education and related services for children with disabilities are provided in whole, or in part, by an LEA or LEAs, other than the LEA of residence.*

14.4.1 *The agreement may be initiated by the LEA, public agency, or the DOE.*

14.4.2 *The DOE shall be a party to the agreement when the services are provided through a special school or program approved by the State Board of Education.*

14.4.3 *Each Interagency Agreement shall include the:*

14.4.3.1 *Title of the agreement;*

14.4.3.2 *Parties involved and their authority to provide special education and related services;*

14.4.3.3 *Purpose of the agreement;*

14.4.3.4 *Roles and responsibilities of each agency, including access to records and record transfer procedures, program implementation, dissemination, training activities, funding amounts and sources;*

14.4.3.5 *End dates and Reauthorization schedule;*

14.4.3.6 *Procedures to resolve disputes regarding program and fiscal issues; and*

14.4.3.7 *Signature and title of each party's authorized administrator.*

14.5 Responsibility for Placement in Interagency Programs: For initial placement, the child's LEA of residence shall be responsible for identification, evaluation, and placement procedures including:

14.5.1 *Setting the date, time, and place of all meetings;*

14.5.2 *Chairing, designating, or agreeing upon a chairperson for all meetings;*

14.5.3 *Communicating the name of the child to be discussed; the date and place of meeting to individuals involved; and*

14.5.4 *Communicating recommendations of staffing to all appropriate staff.*

14.6 *When it is suspected the child's need for special education can only be met in an inter-LEA or interagency program, then an IEP meeting shall be arranged by the LEA of residence. The following procedures for an IEP meeting shall be followed:*

14.6.1 *Representatives of the inter-LEA or interagency program shall participate in the IEP meeting;*

14.6.2 *A representative of the LEA of residence shall be a member of the child's IEP team; and*

14.6.3 *Arrangements for all evaluation and diagnosis, whether initial or reevaluation, shall be the responsibility of the child's LEA of residence.*

(Authority: 20 U.S.C. 1412(a)(5); 14 **Del.C.** §3110)

15.0 Continuum of Alternative Placements

15.1 Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

15.2 The continuum required in 15.1 shall include the alternative placements listed in the definition of special education under 14 **DE Admin. Code** 922.3.0 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

(Authority: 20 U.S.C. 1412(a)(5); 14 **Del.C.** §3110)

16.0 Placements

16.1 In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency shall ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the LRE provisions of this regulation, including 14.0 through 18.0.

16.2 The child's placement shall be determined at least annually; shall be based on the child's IEP; and shall be as close as possible to the child's home.

16.3 Unless the IEP of a child with a disability requires some other arrangement, the child shall be educated in the school that he or she would attend if nondisabled.

16.4 In selecting the LRE, consideration shall be given to any potential harmful effect on the child or on the quality of services that he or she needs.

16.5 A child with a disability shall not be removed from education in age appropriate regular classrooms solely because of needed modifications in the general education curriculum.

(Authority: 20 U.S.C. 1412(a)(5); 14 **Del.C.** §3110)

17.0 Non Academic Settings

17.1 In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in 7.1 and 7.2, each public agency shall ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. The public agency shall ensure that each child with a disability has the supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings.

(Authority: 20 U.S.C. 1412(a)(5); 14 **Del.C.** §3110)

18.0 Children in Public or Private Institutions

18.1 Each public agency shall ensure that 14.0 (LRE requirement) is effectively implemented, including, if necessary, making arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures).

(Authority: 20 U.S.C. 1412(a)(5); 14 **Del.C.** §3110)

19.0 Technical Assistance and Training Activities

19.1 Each public agency shall ensure that teachers and administrators are fully informed about their responsibilities for implementing 14.0 (LRE requirement); and are provided with technical assistance and training necessary to assist them in this effort.

(Authority: 20 U.S.C. 1412(a)(5); 14 **Del.C.** §3110)

20.0 Monitoring Activities

20.1 The DOE shall monitor public agencies to ensure that 14.0 (LRE requirement) is implemented by each public agency.

20.2 If there is evidence that a public agency makes placements that are inconsistent with 14.0 (LRE requirement), the DOE shall review the public agency's justification for its actions; and assist in planning and implementing any necessary corrective action.

(Authority: 20 U.S.C. 1412(a)(5); 14 **Del.C.** §3110)

21.0 Procedural Safeguards

21.1 General: Each public agency shall ensure compliance with the requirements of 14 **DE Admin. Code** 926 to the extent applicable to the agency.

21.2 Procedural safeguards identified: Children with disabilities and their parents shall be afforded the procedural safeguards identified in 21.1 of this section.

(Authority: 20 U.S.C. 1412(a)(6)(A); 14 **Del.C.** §3110)

22.0 Evaluation

Each public agency shall ensure children with disabilities are evaluated in accordance with 14 **DE Admin. Code** 925.1.0 through 925.12.0.

(Authority: 20 U.S.C. 1412(a)(7); 14 **Del.C.** §3110)

23.0 Confidentiality of Personally Identifiable Information

23.1 Each public agency shall take reasonable steps to ensure the confidentiality of personally identifiable information consistent with 14 **DE Admin. Code** 927.10.0 through 927.26.0.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c); 14 **Del.C.** §3110)

24.0 Transition of Children from the Part C Program to Preschool Programs

24.1 Each public agency shall ensure that children participating in early intervention programs assisted under Part C of the Act, and who will participate in preschool programs assisted under Part B of the Act, experience a smooth and effective transition to those preschool programs in a manner consistent with section 637(a)(9) of the Act; and

24.2 By the third (3rd) birthday of a child described in 24.1, an IEP has been developed and is being implemented for the child consistent with 1.2.1; and each affected LEA will participate in transition planning conferences arranged by the designated lead agency under section 635(a)(10) of the Act.

(Authority: 20 U.S.C. 1412(a)(9); 14 **Del.C.** §3110)

25.0 to 28.0 Reserved

29.0 State Responsibility Regarding Children in Private Schools

29.1 LEAs, and the DOE as appropriate, shall meet the private school requirements in 30.0 through 48.0.

(Authority: 20 U.S.C. 1412(a)(10); 14 **Del.C.** §3110)

30.0 Definition of Parentally Placed Private School Children with Disabilities

30.1 Definition: “**Parentally Placed Private School Children with Disabilities**” means children with disabilities enrolled by their parents in private, including religious, schools or facilities that meet the definition of elementary school or secondary school in 14 **DE Admin. Code** 922.3.0, other than children with disabilities covered in 45.0 through 47.0.

(Authority: 20 U.S.C. 1412(a)(10)(A); 14 **Del.C.** §3110)

31.0 Child find for Parentally Placed Private School Children with Disabilities

31.1 General: Each LEA shall locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA, in accordance with 31.2 through 31.5, and 11.0 and with 14 **DE Admin. Code** 924.1.2.

31.2 Child find design: The child find process shall be designed to ensure the equitable participation of parentally placed private school children; and an accurate count of those children.

31.3 Activities: In carrying out the requirements of this section, the LEA shall undertake activities similar to the activities undertaken for the agency's public school children.

31.4 Cost: The cost of carrying out the child find requirements in this section, including individual evaluations, may not be considered in determining if an LEA has met its obligation under 33.0.

31.5 Completion period: The child find process shall be completed in a time period comparable to that for students attending public schools in the LEA consistent with 14 **DE Admin. Code** 925.2.0.

31.6 Out of State children: Each LEA in which private, including religious, elementary schools and secondary schools are located shall, in carrying out the child find requirements in this section, include parentally placed private school children who reside in a State other than the State of Delaware in which the private schools that they attend are located.

(Authority: 20 U.S.C. 1412(a)(10)(A)(ii); 14 **Del.C.** §3110)

32.0 Provision of Services for Parentally Placed Private School Children with Disabilities, Basic Requirement

32.1 General: To the extent consistent with the number and location of children with disabilities who are enrolled by their parents in private, including religious, elementary

schools and secondary schools located in the school district served by the LEA, provision is made for the participation of those children in the program assisted or carried out under Part B of the Act by providing them with special education and related services, including direct services determined in accordance with 37.0.

32.2 Services plan for parentally placed private school children with disabilities: In accordance with 32.1 and 37.0 through 39.0, a services plan shall be developed and implemented for each private school child with a disability who has been designated by the LEA in which the private school is located to receive special education and related services under these regulations.

32.3 Record keeping: Each LEA shall maintain in its records, and provide to the DOE, the following information related to parentally placed private school children covered in 30.0 through 44.0: the number of children evaluated; the number of children determined to be children with disabilities; and the number of children served.

(Authority: 20 U.S.C. 1412(a)(10)(A)(i); 14 **Del.C.** §3110)

33.0 Expenditures

33.1 Formula: To meet the requirement of 32.1, each LEA shall spend the following on providing special education and related services (including direct services) to parentally placed private school children with disabilities:

33.1.1 For children aged three (3) through twenty-one (21), an amount that is the same proportion of the LEA's total sub grant under section 611(f) of the Act as the number of private school children with disabilities aged three (3) through twenty-one (21) who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA, is to the total number of children with disabilities in its jurisdiction aged three (3) through twenty-one (21).

33.1.2 For children aged (3) through five (5), an amount that is the same proportion of the LEA's total sub grant under section 619(g) of the Act as the number of parentally placed private school children with disabilities aged (3) through five (5) who are enrolled by their parents in a private, including religious, elementary school located in the school district served by the LEA, is to the total number of children with disabilities in its jurisdiction aged (3) through five (5).

33.1.3 As described in 33.1.2 of this section, children aged three (3) through five (5) are considered to be parentally placed private school children with disabilities enrolled by their parents in private, including religious, elementary schools, if they are enrolled in a private school that meets the definition of elementary school in 14 **DE Admin. Code** 922.3.0.

33.1.4 If an LEA has not expended for equitable services all of the funds described in 33.1.1, 33.1.2 and 33.1.3 by the end of the fiscal year for which Congress appropriated the funds, the LEA shall obligate the remaining funds for special education and related services (including direct services) to parentally placed private school children with disabilities during a carry over period of one (1) additional year.

33.2 Calculating proportionate amount: In calculating the proportionate amount of Federal funds to be provided for parentally placed private school children with disabilities,

the LEA, after timely and meaningful consultation with representatives of private schools in 34.0 shall conduct a thorough and complete child find process to determine the number of parentally placed children with disabilities attending private schools located in the LEA.

33.3 Annual count of the number of parentally placed private school children with disabilities: Each LEA shall after timely and meaningful consultation with representatives of parentally placed private school children with disabilities (consistent with 34.0), determine the number of parentally placed private school children with disabilities attending private schools located in the LEA; and ensure that the count is conducted on any date between October 1 and December 1, inclusive, of each year.

33.3.1 The count shall be used to determine the amount that the LEA shall spend on providing special education and related services to parentally placed private school children with disabilities in the next subsequent fiscal year.

33.4 Supplement, not supplant: State and local funds may supplement and in no case supplant the proportionate amount of Federal funds required to be expended for parentally placed private school children with disabilities under these regulations.

(Authority: 20 U.S.C. 1412(a)(10)(A); 14 Del.C. §3110)

34.0 Consultation

34.1 To ensure timely and meaningful consultation, an LEA shall consult with private school representatives and representatives of parents of parentally placed private school children with disabilities during the design and development of special education and related services for the children regarding the following:

34.1.1 Child find: The child find process, including how parentally placed private school children suspected of having a disability can participate equitably; and how parents, teachers, and private school officials will be informed of the process.

34.1.2 Proportionate share of funds: The determination of the proportionate share of Federal funds available to serve parentally placed private school children with disabilities in 33.2 including the determination of how the proportionate share of those funds was calculated.

34.1.3 Consultation process: The consultation process among the LEA, private school officials, and representatives of parents of parentally placed private school children with disabilities, including how the process will operate throughout the school year to ensure that parentally placed children with disabilities identified through the child find process can meaningfully participate in special education and related services.

34.1.4 Provision of special education and related services: How, where, and by whom special education and related services will be provided for parentally placed private school children with disabilities, including a discussion of:

34.1.4.1 The types of services, including direct services and alternate service delivery mechanisms; and

34.1.4.2 How special education and related services will be apportioned if funds are insufficient to serve all parentally placed private school children; and

34.1.4.3 How and when those decisions will be made;

34.1.4.4 Written explanation by LEA regarding services: How, if the LEA disagrees with the views of the private school officials on the provision of services or the types of services (whether provided directly or through a contract), the LEA will provide to the private school officials a written explanation of the reasons why the LEA chose not to provide services directly or through a contract.
(Authority: 20 U.S.C. 1412(a)(10)(A)(iii); 14 Del.C. §3110)

35.0 Written Affirmation

35.1 When timely and meaningful consultation, as required by 34.0, has occurred, the LEA shall obtain a written affirmation signed by the representatives of participating private schools.

35.2 If the representatives do not provide the affirmation within a reasonable period of time, the LEA shall forward the documentation of the consultation process to the DOE.

(Authority: 20 U.S.C. 1412(a)(10)(A)(iv); 14 Del.C. §3110)

36.0 Compliance

36.1 General: A private school official has the right to submit a complaint to the DOE that the LEA did not engage in consultation that was meaningful and timely; or did not give due consideration to the views of the private school official.

36.2 Procedure: If the private school official wishes to submit a complaint, the official shall provide to the DOE the basis of the noncompliance by the LEA with the applicable private school provisions in these regulations; and the LEA shall forward the appropriate documentation to the DOE.

36.2.1 If the private school official is dissatisfied with the decision of the DOE, the official may submit a complaint to the Secretary of the United States Department of Education by providing the information on noncompliance described in 36.2 and the DOE shall forward the appropriate documentation to the Secretary of the United States Department of Education.

(Authority: 20 U.S.C. 1412(a)(10)(A)(v); 14 Del.C. §3110)

37.0 Equitable Services Determined

37.1 No individual right to special education and related services. No parentally placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school.

37.2 Decisions: Decisions about the services that will be provided to parentally placed private school children with disabilities in 30.0 through 44.0 shall be made in accordance with 37.4 and 34.1.3.

37.3 The LEA shall make the final decisions with respect to the services to be provided to eligible parentally placed private school children with disabilities.

37.4 Services plan for each child served in 30.0 through 44.0: If a child with a disability is enrolled in a religious or other private school by the child's parents and will receive special education or related services from an LEA, the LEA shall:

37.4.1 Initiate and conduct meetings to develop, review, and revise a services plan for the child, in accordance with 38.3; and

37.4.2 Ensure that a representative of the religious or other private school attends each meeting. If the representative cannot attend, the LEA shall use other methods to ensure participation by the religious or other private school, including individual or conference telephone calls.

(Authority: 20 U.S.C. 1412(a)(10)(A); 14 **Del.C.** §3110)

38.0 Equitable Services Provided

38.1 General: The services provided to parentally placed private school children with disabilities shall be provided by personnel meeting the same standards as personnel providing services in the public schools, except that private elementary school and secondary school teachers who are providing equitable services to parentally placed private school children with disabilities do not have to meet the highly qualified special education teacher requirements under the definition in 14 **DE Admin. Code** 922.3.0.

38.2 Parentally placed private school children with disabilities may receive a different amount of services than children with disabilities in public schools.

38.3 Services provided in accordance with a services plan: Each parentally placed private school child with a disability who has been designated to receive services in 32.0 shall have a services plan that describes the specific special education and related services that the LEA will provide to the child in light of the services that the LEA has determined, through the process described in 34.0 and 37.0, it will make available to parentally placed private school children with disabilities.

38.3.1 The services plan shall, to the extent appropriate meet the requirements of 14 **DE Admin. Code** 925.20.0 (or for a child ages three (3) through five (5), meet the requirements of 14 **DE Admin. Code** 925.23.0) with respect to the services provided; and be developed, reviewed, and revised consistent with 14 **DE Admin. Code** 925.21.0 through 925.24.0.

38.4 Provision of equitable services: The provision of services pursuant to this section and 39.0 through 43.0 shall be provided by employees of a public agency; or through contract by the public agency with an individual, association, agency, organization, or other entity.

38.5 Special education and related services provided to parentally placed private school children with disabilities, including materials and equipment, shall be secular, neutral, and non ideological.

(Authority: 20 U.S.C. 1412(a)(10)(A)(vi); 14 **Del.C.** §3110)

39.0 Location of Services and Transportation

39.1 Services on private school premises: Services to parentally placed private school children with disabilities may be provided on the premises of private, including religious, schools, to the extent consistent with law.

39.2 Transportation, General: If necessary for the child to benefit from or participate in the services provided under these regulations, a parentally placed private school child with a disability shall be provided transportation from the child's school or the child's home to a site other than the private school; and from the service site to the private school, or to the child's home, depending on the timing of the services.

39.2.1 LEAs are not required to provide transportation from the child's home to the private school.

39.3 Cost of transportation: The cost of the transportation described in 39.2 may be included in calculating whether the LEA has met the requirement of 33.0.

(Authority: 20 U.S.C. 1412(a)(10)(A);) 14 **Del.C.** §3110

40.0 Due Process Complaints and State Complaints

40.1 Due process not applicable, except for child find: Except as provided in 40.2 of this section, the procedures in 14 Del. Admin. Code 926.4.0 through 926.19.0 do not apply to complaints that an LEA has failed to meet the requirements of 32.0 through 39.0 of this Subpart, including the provision of services indicated on the child's services plan.

40.2 Child find complaints to be filed with the LEA in which the private school is located: The procedures in 14 **DE Admin. Code** 926.4.0 through 926.19.0 apply to complaints that an LEA has failed to meet the child find requirements in 31.0, including the requirements in 14 **DE Admin. Code** 925.1.0 through 925.12.0.

40.2.1 Any due process complaint regarding the child find requirements (as described in 40.2) shall be filed with the LEA in which the private school is located and a copy shall be forwarded to the DOE.

40.3 State complaints: Any complaint that an LEA has failed to meet the requirements in 32.0 through 35.0 and 37.0 through 44.0 shall be filed in accordance with the procedures described in 51.0 through 53.0.

40.3.1 A complaint filed by a private school official under 36.1 shall be filed with the DOE in accordance with the procedures in 36.2.

(Authority: 20 U.S.C. 1412(a)(10)(A);14 **Del.C.** §3110))

41.0 Requirement that Funds not Benefit a Private School

41.1 An LEA may not use funds provided under section 611 or 619 of the Act to finance the existing level of instruction in a private school or to otherwise benefit the private school.

41.2 The LEA shall use funds provided under Part B of the Act to meet the special education and related services needs of parentally placed private school children with disabilities, but not for meeting the needs of a private school; or the general needs of the students enrolled in the private school.

(Authority: 20 U.S.C. 1412(a)(10)(A); 14 **Del.C.** §3110)

42.0 Use of Personnel

42.1 Use of public school personnel: An LEA may use funds available under sections 611 and 619 of the Act to make public school personnel available in other than public facilities to the extent necessary to provide services under 30.0 through 44.0 for parentally placed private school children with disabilities; and if those services are not normally provided by the private school.

42.2 Use of private school personnel: An LEA may use funds available under sections 611 and 619 of the Act to pay for the services of an employee of a private school to provide services in 30.0 through 44.0 if the employee performs the services outside of his or her regular hours of duty; and the employee performs the services under public supervision and control.

(Authority: 20 U.S.C. 1412(a)(10)(A); 14 **Del.C.** §3110)

43.0 Separate Classes Prohibited

43.1 An LEA may not use funds available under section 611 or 619 of the Act for classes that are organized separately on the basis of school enrollment or religion of the children if the classes are at the same site; and the classes include children enrolled in public schools and children enrolled in private schools.

(Authority: 20 U.S.C. 1412(a)(10)(A); 14 **Del.C.** §3110)

44.0 Property, Equipment, and Supplies

44.1 A public agency shall control and administer the funds used to provide special education and related services in 37.0 through 39.0, and hold title to and administer materials, equipment, and property purchased with those funds for the uses and purposes provided in the Act.

44.2 The public agency may place equipment and supplies in a private school for the period of time needed for the Part B program.

44.3 The public agency shall ensure that the equipment and supplies placed in a private school are used only for Part B purposes; and can be removed from the private school without remodeling the private school facility.

44.4 The public agency shall remove equipment and supplies from a private school if the equipment and supplies are no longer needed for Part B purposes; or removal is necessary to avoid unauthorized use of the equipment and supplies for other than Part B of the Act purposes.

44.5 No funds under Part B of the Act may be used for repairs, minor remodeling, or construction of private school facilities.

(Authority: 20 U.S.C. 1412(a)(10)(A)(vii); 14 **Del.C.** §3110)

45.0 Children with Disabilities in Private Schools Placed or Referred By Public Agencies

45.1 Applicability: Sections 46.0 through 47.0 apply only to children with disabilities who are or have been placed in or referred to a private school or facility by a public agency as a means of providing special education and related services.

(Authority: 20 U.S.C. 1412(a)(10)(B); 14 **Del.C.** §3110)

46.0 Responsibility of Public Agencies

46.1 Each public agency that places a child with a disability at a private school or facility shall ensure the child is provided special education and related services in conformance with an IEP that meets the requirements of 14 **DE Admin. Code** 925.20.0 through 925.25.0; and at no cost to the parents; is provided a FAPE; and has all of the rights of a child with a disability who is served by a public agency.

(Authority: 20 U.S.C. 1412(a)(10)(B); 14 **Del.C.** §3110)

47.0 Monitoring by DOE

47.1 To monitor compliance of the requirements in 46.0 by public agencies, DOE shall use procedures such as written reports, on site visits, and parent questionnaires; disseminate copies of applicable standards to each private school and facility to which a public agency has referred or placed a child with a disability; and provide an opportunity for those private schools and facilities to participate in the development and revision of State standards that apply to them.

(Authority: 20 U.S.C. 1412(a)(10)(B); 14 **Del.C.** §3110)

48.0 Placement of Children by Parents when FAPE is at Issue.

48.1 General: These regulations do not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. However, the public agency shall include that child in the population whose needs are addressed consistent with 31.0 through 44.0.

48.2 Disagreements about FAPE: Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures in 14 **DE Admin. Code** 926.4.0 through 926.20.0.

48.3 Reimbursement for private school placement: If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing panel finds that the agency had not made FAPE

available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing panel or a court even if it does not meet the State standards that apply to education provided by the DOE and LEAs.

48.4 Limitation on reimbursement: The cost of reimbursement described in 48.3 of this section may be reduced or denied if:

48.4.1 At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

48.4.2 At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in 48.4.1;

48.4.2.1 If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in 14 **DE Admin. Code** 926.3.1.1, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or upon a judicial finding of unreasonableness with respect to actions taken by the parents.

48.5 Exception: Notwithstanding the notice requirement in 48.4.1 and 48.4.2 the cost of reimbursement shall not be reduced or denied for failure to provide the notice if: the school prevented the parents from providing the notice; the parents had not received notice, 14 **DE Admin. Code** 926.4.0, of the notice requirement in 48.4.1 and 48.4.2 or compliance with 48.4.1 and 48.4.2 would likely result in physical harm to the child; and

48.5.1 May, in the discretion of the court or a hearing officer, not be reduced or denied for failure to provide this notice if the parents are not literate or cannot write in English; or compliance with 48.4.1 and 48.4.2 would likely result in serious emotional harm to the child.

(Authority: 20 U.S.C. 1412(a)(10)(C); 14 **Del.C.** §3110)

49.0 DOE Responsibility for General Supervision of Procedural Safeguards

49.1 The DOE shall ensure that the requirements of these regulations are carried out; and that each educational program for children with disabilities administered within the State, including each program administered by any other State or local agency is under the general supervision of the DOE; and meets the educational standards of the DOE (including the requirements of these regulations).

49.2 In carrying out these regulations with respect to homeless children, the DOE shall ensure that the requirements of subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.) are met.

49.3 The State may carry out its General Supervisory responsibilities through any mechanism or procedure provided in these regulations or other applicable State or federal law, including, but not limited to, 49.5 and 14 **DE Admin. Code** 927 and 928.

49.4 Part B of the Act and these regulations do not limit the responsibility of agencies other than educational agencies for providing or paying some or all of the costs of FAPE to children with disabilities in the State.

49.5 *In addition to any other authority available under these regulations or State law, DOE may use any of the following activities and mechanisms to identify and correct noncompliance and to document and exercise its general supervisory responsibilities: interagency agreements; compliance monitoring; dispute resolution systems (due process hearings, state complaints and mediation); general project coordination and contracting; specific program evaluations; personnel systems; public dissemination of information; and financial and administrative audits and reporting.*

49.5.1 *Compliance monitoring: DOE may use any reasonable method to collect, analyze and verify information to monitor compliance with Part B and these regulations.*

49.5.1.1 *Monitoring methods may include, but are not limited to, use of offsite review, on site review, letters of inquiry, and follow up and verification of specific activities.*

49.5.1.2 *Potential noncompliance may be identified from any generally reliable source of information, including but not limited to, complaints, hearings and court decisions, evaluation and performance reports, and other formally submitted documents to determine if agencies and programs are in need of specific compliance interventions.*

49.5.1.3 *DOE shall document its monitoring activity through correspondence and reports.*

49.5.1.4 *DOE shall notify a public agency in writing when it identifies noncompliance. The notice shall describe each corrective action which shall be taken, including a reasonable time frame for submission of a corrective action plan, and require that the corrective action plan provide for: the immediate discontinuance of the violation; the prevention of the occurrence of any future violation; documentation of the initiation and completion of actions to achieve current and future compliance; the timeframe for achieving full compliance; and the description of actions the agency shall take to remedy the identified areas of noncompliance.*

49.5.1.5 *Within sixty (60) days of receiving a corrective action plan, DOE shall determine whether the plan meets each of the requirements of the preceding paragraph, or if additional information is required from the agency, and notify the agency accordingly*

49.5.1.6 *In all events, noncompliance shall be corrected within one (1) year of the date DOE informs the agency of the noncompliance.*

49.5.2 *Enforcement: DOE shall have the authority to enforce legal obligations under these regulations, and to compel the correction of deficiencies in program operations and other identified noncompliance. DOE may enforce its authority by any mechanism available under State or federal law and these regulations, including but not limited to, directing public agencies to correct noncompliance; imposing specific conditions on funding; imposing appropriate sanctions for failing or refusing to correct noncompliance; and withholding funding in whole or part.*

49.5.3 *DOE shall distribute these regulations, required and model forms, guidance, and letters of general notification to all public and private agencies providing services to children with disabilities. DOE shall determine the method of dissemination, which may include regular mail, electronic mail, website postings and distribution at State or county meetings.*

(Authority: 20 U.S.C. 1412(a)(11); 1416; 14 **Del.C.** §3110)

50.0 Implementation of Procedural Safeguards

50.1 Each public agency is responsible for ensuring effective implementation of procedural safeguards for the children with disabilities served by that public agency.

(Authority: 20 U.S.C. 1412(a)(11); 1415(a); 14 **Del.C.** §3110)

51.0 State Complaint Procedures

51.1 General: The DOE shall resolve any complaint, including a complaint filed by an organization or individual from another State, that meets the requirements of 53.0 by implementing the State complaint procedures under 51.0 through 53.0; and widely disseminate to parents and other interested individuals, including parent training and information centers, protection and advocacy agencies, independent living centers, and other appropriate entities, the State complaint procedures.

51.2 Remedies for denial of appropriate services: In resolving a complaint in which the DOE has found a failure to provide appropriate services, the DOE, pursuant to its general supervisory authority under Part B of the Act, shall address the failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement); and appropriate future provision of services for all children with disabilities.

51.3 Public agency compliance and noncompliance:

51.3.1 A report of the DOE's findings shall be sent to the Chief Administrative Officer of the public agency, the Secretary, and the complaining party.

51.3.2 When the findings of the DOE indicate a public agency's full compliance with Part B of the Act and these regulations, no further action by the DOE shall be taken.

51.3.3 When the findings of the DOE indicate non compliance with Part B of the Act or these regulations, the public agency shall be presented with the DOE's findings and a time frame for corrective action as specified by the DOE. If the public agency completes the specified corrective action within the time frame determined by the DOE, the DOE may nonetheless continue to monitor the public agency and request additional action to ensure full compliance with these regulations.

(Authority: 20 U.S.C. 1221e-3; 14 **Del.C.** §3110)

52.0 Time Limit and Extension for State Complaint, Final Decision, and Implementation

52.1 Time limit; minimum procedures: Within Sixty (60) days following the DOE's receipt of an adequately detailed complaint under 53.0 the DOE shall:

52.1.1 Carry out an independent on site investigation, if the DOE determines that an investigation is necessary;

52.1.2 Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;

52.1.3 Provide the public agency with the opportunity to respond to the complaint, including, at a minimum at the discretion of the public agency, a proposal to resolve the complaint; and an opportunity for a parent who has filed a complaint and the public agency to voluntarily engage in mediation consistent with 14 **DE Admin. Code** 926.6.0;

52.1.4 Review all relevant information and make an independent determination as to whether the public agency is violating a requirement of Part B of the Act or these regulations; and

52.1.5 Issue a written decision to the complainant that addresses each allegation in the complaint and contains findings of fact and conclusions; and the reasons for the DOE's final decision.

52.2 Time extension; final decision; implementation: The DOE shall permit an extension of the time limit in 52.1 only if:

52.2.1 Exceptional circumstances exist with respect to a particular complaint; or

52.2.2 The parent, individual, or organization and the public agency involved agree to extend the time to engage in mediation or in other alternative means of dispute resolution; and

52.3 **DOE shall** provide procedures for effective implementation of the DOE's final decision, if needed, including technical assistance activities; negotiations; and corrective actions to achieve compliance.

52.4 Complaints filed under this section and due process hearings.

52.4.1 If a written complaint is received that is also the subject of a due process hearing in 14 **DE Admin. Code** 926.7.0, or 926.30.0 through 926.32.0, or contains multiple issues of which one or more are part of that hearing, the DOE shall set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing. However, any issue in the complaint that is not a part of the due process action shall be resolved using the time limit and procedures described in 52.1 and 52.2.

54.4.2 If an issue that was raised in a complaint filed under this section has previously been decided in a due process hearing involving the same parties the due process hearing decision is binding on that issue; and the DOE shall inform the complainant to that effect.

54.4.3 A complaint alleging a public agency's failure to implement a due process hearing decision shall be resolved by the DOE.

(Authority: 20U.S.C.1221e-3; 14 Del.C. §3110)

53.0 Filing a Complaint

53.1 An organization or individual may file a signed written complaint under the procedures described in 51.0 through 52.0.

53.2 The complaint shall include:

53.2.1 A statement that a public agency has violated a requirement of Part B of the Act or of these regulations;

53.2.2 The facts on which the statement is based, including the time frame in which the incident(s) occurred;

53.2.3 The signature and contact information for the complainant, and legal representative, if any, or of individuals representing a public agency or private organization filing a complaint; and if alleging violations with respect to a specific child:

53.2.3.1 The name and address of the residence of the child;

53.2.3.2 The name of the school the child is attending;

53.2.3.3 In the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C.11434a(2)), available contact information for the child, and the name of the school the child is attending;

53.2.3.4 A description of the nature of the problem of the child, including facts relating to the problem;

53.2.3.5 A proposed resolution of the problem to the extent known and available to the party at the time the complaint is filed; and

53.2.3.6 *A description of the attempts made to resolve the issue(s) prior to filing the complaint.*

53.2.4 The complaint shall allege a violation that occurred not more than one (1) year prior to the date that the complaint is received in accordance with 51.0.

53.2.5 The party filing the complaint shall forward a copy of the complaint to the LEA or public agency serving the child at the same time the party files the complaint with the DOE.

(Authority: 20 U.S.C.1221e-3; 14 Del.C. §3110)

54.0 Methods of Ensuring Services

54.1 Establishing responsibility for services: The Secretary shall ensure that an interagency agreement or other mechanism for interagency coordination is in effect between each non educational public agency described in 54.2 and the DOE, in order to ensure that all services described in 54.2 that are needed to ensure FAPE are provided, including the provision of these services during the pendency of any dispute in 54.1.3. The agreement or mechanism shall include the following:

54.1.1 An identification of, or a method for defining, the financial responsibility of each agency for providing services described in 54.2 to ensure FAPE to children with disabilities. The financial responsibility of each non educational public

agency, including the State Medicaid agency and other public insurers of children with disabilities, shall precede the financial responsibility of the LEA (or the State agency responsible for developing the child's IEP).

54.1.2 The conditions, terms, and procedures under which an LEA shall be reimbursed by other agencies.

54.1.3 Procedures for resolving interagency disputes (including procedures under which LEAs may initiate proceedings) under the agreement or other mechanism to secure reimbursement from other agencies or otherwise implement the provisions of the agreement or mechanism.

54.1.4 Policies and procedures for agencies to determine and identify the interagency coordination responsibilities of each agency to promote the coordination and timely and appropriate delivery of services described in 54.2.

54.2 Obligation of non educational public agencies: If any public agency other than an educational agency is otherwise obligated under Federal or State law, or assigned responsibility under State policy or pursuant to 54.1, to provide or pay for any services that are also considered special education or related services (such as, but not limited to, services relating to assistive technology devices, assistive technology services, related services, supplementary aids and services, and transition services) that are necessary for ensuring FAPE to children with disabilities within the State, the public agency shall fulfill that obligation or responsibility, either directly or through contract or other arrangement pursuant to 54.1 or an agreement pursuant to 54.4.

54.2.1 A non educational public agency described in 54.2 may not disqualify an eligible service for Medicaid reimbursement because that service is provided in a school context.

54.3 If a public agency other than an educational agency fails to provide or pay for the special education and related services described in 54.2, the LEA (or State agency responsible for developing the child's IEP) shall provide or pay for these services to the child in a timely manner. The LEA or State agency is authorized to claim reimbursement for the services from the non educational public agency that failed to provide or pay for these services and that agency shall reimburse the LEA or State agency in accordance with the terms of the interagency agreement or other mechanism described in 54.1.

54.4 Special rule: The requirements of 54.1 may be met through State statute or regulation; signed agreements between respective agency officials that clearly identify the responsibilities of each agency relating to the provision of services; or other appropriate written methods as determined by the Secretary and approved by the Secretary of the United States Department of Education.

54.5 Children with disabilities who are covered by public benefits or insurance: A public agency may use the Medicaid or other public benefits or insurance programs in which a child participates to provide or pay for services required under these regulations, as permitted under the public benefits or insurance program, except as further provided in this section. With regard to services required to provide FAPE to an eligible child under these regulations, the public agency:

54.5.1 May not require parents to sign up for or enroll in public benefits or insurance programs in order for their child to receive FAPE under Part B of the Act;

54.5.2 May not require parents to incur an out of pocket expense such as the payment of a deductible or co pay amount incurred in filing a claim for services provided pursuant to these regulations, but pursuant to 54.7, may pay the cost that the parents otherwise would be required to pay;

54.5.3 May not use a child's benefits under a public benefits or insurance program if that use would:

54.5.3.1 Decrease available lifetime coverage or any other insured benefit;

54.5.3.2 Result in the family paying for services that would otherwise be covered by the public benefits or insurance program and that are required for the child outside of the time the child is in school;

54.5.3.3 Increase premiums or lead to the discontinuation of benefits or insurance; or

54.5.3.3 Risk loss of eligibility for home and community based waivers, based on aggregate health related expenditures; and

54.5.3.4 Shall obtain parental consent each time that access to public benefits or insurance is sought; and notify parents that the parents' refusal to allow access to their public benefits or insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.

54.5.4 Children with disabilities who are covered by private insurance: With regard to services required to provide FAPE to an eligible child under these regulations, a public agency may access the parents' private insurance proceeds only if the parents provide consent.

54.5.5 Each time the public agency proposes to access the parents' private insurance proceeds, the agency shall obtain parental consent in accordance with 54.5.4; and inform the parents that their refusal to permit the public agency to access their private insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.

54.6 Use of Part B funds: If a public agency is unable to obtain parental consent to use the parents' private insurance, or public benefits or insurance when the parents would incur a cost for a specified service required under these regulations, to ensure FAPE the public agency may use its Part B funds to pay for the service.

54.6.1 To avoid financial cost to parents who otherwise would consent to use private insurance, or public benefits or insurance if the parents would incur a cost, the public agency may use its Part B funds to pay the cost that the parents otherwise would have to pay to use the parents' benefits or insurance (e.g., the deductible or co pay amounts).

54.7 Proceeds from public benefits or insurance or private insurance: Proceeds from public benefits or insurance or private insurance will not be treated as program income for purposes of 34 CFR 80.25.

54.7.1 If a public agency spends reimbursements from Federal funds (e.g., Medicaid) for services under these regulations, those funds will not be considered "State or local" funds for purposes of the maintenance of effort provisions in 63.0 and 14 **DE Admin. Code** 924.3.0.

54.8 Construction: Nothing in these regulations should be construed to alter the requirements imposed on a State Medicaid agency, or any other agency administering a public benefits or insurance program by Federal statute, regulations or policy under title XIX, or title XXI of the Social Security Act, 42 U.S.C. 1396 through 1396v and 42 U.S.C. 1397aa through 1397jj, or any other public benefits or insurance program. (Authority: 20 U.S.C. 1412(a)(12) and (e); 14 **Del.C.** §3110)

55.0 Hearings Relating to LEA eligibility

55.1 The DOE shall not make any final determination that an LEA is not eligible for assistance under Part B of the Act without first giving the LEA reasonable notice and an opportunity for a hearing under 34 CFR 76.401(d) as more fully provided in 14 **DE Admin. Code** 928.5.

(Authority: 20 U.S.C. 1412(a)(13); 14 **Del.C.** §3110)

56.0 Personnel Qualifications

56.1 General: Personnel necessary to carry out the purposes of these regulations shall be appropriately and adequately prepared and trained, and shall have the content knowledge and skills to serve children with disabilities, all as established in DOE certification regulations and requirements.

56.2 Related services personnel and paraprofessionals: The requirements in 56.1 include qualifications for related services personnel and paraprofessionals. Such requirements shall be interpreted consistent with any State approved or State recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services; and ensure that related services personnel who deliver services in their discipline or profession:

56.2.1 Meet the requirements of 56.2; and

56.2.2 Have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

56.2.3 Allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulation, or written policy, in meeting the requirements of these regulations to be used to assist in the provision of special education and related services under these regulations to children with disabilities.

56.3 Qualifications for special education teachers: The qualifications described in 56.1 shall ensure that each person employed as a public school special education teacher in the State who teaches in an elementary school, middle school, or secondary school is highly qualified as a special education teacher by the deadline established in section 1119(a)(2) of the EDOE.

56.4 Policy: In implementing this section, LEAs shall take measurable steps to recruit, hire, train, and retain highly qualified personnel to provide special education and related services under these regulations to children with disabilities.

56.5 Rule of construction: Notwithstanding any other individual right of action that a parent or student may maintain under these regulations, nothing in these regulations shall be construed to create a right of action on behalf of an individual student or a class of students for the failure of a public agency or LEA employee to be highly qualified, or to prevent a parent from filing a complaint about staff qualifications with the DOE as provided for under these regulations.

(Authority: 20 U.S.C. 1412(a)(14); 14 Del.C. §3110)

57.0 to 66.0 Reserved

67.0 State Advisory Panel

67.1 The Governor's Advisory Council for Exceptional Citizens shall provide policy guidance with respect to special education and related services for children with disabilities in the State.

(Authority: 20 U.S.C. 1412(a)(21)(A); 14 Del.C. §§3110, 3111)

68.0 Membership

68.1 General: The Governor's Advisory Council for Exceptional Citizens shall consist of members appointed by the Governor, be representative of the State population and be composed of individuals involved in, or concerned with the education of children with disabilities, including:

68.1.1 Parents of children with disabilities (ages birth through twenty-six (26));

68.1.2 Individuals with disabilities;

68.1.3 Teachers;

68.1.4 Representatives of institutions of higher education that prepare special education and related services personnel;

68.1.5 State and local education officials, including officials who carry out activities under subtitle B of title VII of the McKinney-Vento Homeless Assistance Act, (42 U.S.C. 11431 et seq.);

68.1.6 Administrators of programs for children with disabilities;

68.1.7 Representatives of other State agencies involved in the financing or delivery of related services to children with disabilities;

68.1.8 Representatives of private schools and public charter schools;

68.1.9 Not less than one representative of a vocational, community, or business organization concerned with the provision of transition services to children with disabilities;

68.1.10 A representative from the Department of Services for Children, Youth and Their Families (DSCYF), Division of Family Services; and

68.1.11 Representatives from the Department of Corrections and the DSCYF's Division of Youth Rehabilitative Services.

68.2 Special rule: A majority of the members of the panel shall be individuals with disabilities or parents of children with disabilities (age birth through twenty-six (26)).

(Authority: 20 U.S.C. 1412(a)(21)(B) and (C); 14 **Del.C.** §§3110, 3111)

69.0 Duties

69.1 The Governor's Advisory Council for Exceptional Citizens shall:

69.1.1 Advise the DOE of unmet needs within the State in the education of children with disabilities;

69.1.2 Comment publicly on any rules or regulations proposed by the State regarding the education of children with disabilities;

69.1.3 Advise the DOE in developing evaluations and reporting on data to the Secretary of the U.S. Department of Education;

69.1.4 Advise the DOE in developing corrective action plans to address findings identified in Federal monitoring reports under Part B of the Act; and

69.1.5 Advise the DOE in developing and implementing policies relating to the coordination of services for children with disabilities.

(Authority: 20 U.S.C. 1412(a)(21)(D); 14 **Del.C.** §3110)

70.0 Suspension and Expulsion Rates

70.1 General: The DOE shall examine data, including data disaggregated by race and ethnicity, to determine if significant discrepancies are occurring in the rate of long term suspensions and expulsions of children with disabilities among LEAs in the State; or compared to the rates for nondisabled children within those agencies.

70.2 Review and revision of policies: If the discrepancies described in 70.1 of this section are occurring, the DOE shall review and, if appropriate, revise (or require the affected State agency or LEA to revise) its policies, procedures, and practices relating to the development and implementation of IEPs, the use of positive behavioral interventions and supports, and procedural safeguards, to ensure that these policies, procedures, and practices comply with the Act.

(Authority: 20 U.S.C. 1412(a)(22); 14 **Del.C.** §3110)

71.0 Annual Description of Use of Part B Funds.

71.1 On an annual basis, the State shall describe how amounts retained for State administration and State level activities in 14 **DE Admin. Code** 928.4.0 will be used to meet the requirements of these regulations; and how those amounts will be allocated among the activities described in 14 **DE Admin. Code** 928.4.0 to meet State priorities based on input from LEAs.

(Authority: 20 U.S.C. 1411(e)(5); 14 **Del.C.** §3110)

72.0 Access to Instructional Materials

72.1 General: The DOE adopts the National Instructional Materials Accessibility Standard (NIMAS) for the purposes of providing instructional materials to blind persons or other persons with print disabilities.

72.1.1 Rights and responsibilities: The DOE shall coordinate with the National Instructional Materials Access Center (NIMAC) to provide instructional materials to blind persons or other persons with print disabilities in a timely manner.

72.1.2 Children with disabilities who need instructional materials in accessible formats, but are not included under the definition of blind or other persons with print disabilities in 72.4, or who need materials that cannot be produced from NIMAS files, shall receive those instructional materials in a timely manner.

72.1.3 In order to assist the DOE in meeting its responsibility in 72.1.2, each public agency shall take reasonable steps to provide instructional materials in accessible formats to children with disabilities who need those instructional materials at the same time as other children receive instructional materials.

72.2 Preparation and delivery of files: As part of any print instructional materials adoption process, procurement contract, or other practice or instrument used for purchase of print instructional materials, the DOE shall enter into a written contract with the publisher of the print instructional materials to:

72.2.1 Require the publisher to prepare and, on or before delivery of the print instructional materials, provide to NIMAC electronic files containing the contents of the print instructional materials using the NIMAS; or

72.2.2 Purchase instructional materials from the publisher that are produced in, or may be rendered in, specialized formats.

72.2.3 Provide instructional materials to blind persons or other persons with print disabilities in a timely manner.

72.3 Assistive technology: In carrying out this section, the DOE, to the maximum extent possible, shall work collaboratively with the State agency responsible for assistive technology programs.

72.4 Definitions: In this section and in 14 DE Admin. Code 924.10.0:

“Blind Persons or Other Persons with Print Disabilities” means children served under these regulations who may qualify to receive books and other publications produced in specialized formats in accordance with the Act entitled “An Act to provide books for adult blind,” approved March 3, 1931, 2 U.S.C 135a;

“National Instructional Materials Access Center (NIMAC)” means the center established pursuant to section 674(e) of the Act;

“National Instructional Materials Accessibility Standard (NIMAS)” has the meaning given the term in section 674(e)(3)(B) of the Act;

“Specialized” formats has the meaning given the term in section 674(e)(3)(D) of the Act.

(Authority: 20 U.S.C. 1412(a)(23), 1474(e); 14 Del.C. §3110)

73.0 Overidentification and Disproportionality

73.1 The State shall have in effect, consistent with the purposes of these regulations and with section 618(d) of the Act, policies and procedures designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a

particular impairment described in the definition of child with a disability in 14 **DE Admin. Code** 922.3.0.

(Authority: 20 U.S.C. 1412(a)(24); 14 **Del.C.** §3110)

74.0 Prohibition on Mandatory Medication

74.1 General: All public agency and LEA personnel are prohibited from requiring parents to obtain a prescription for substances identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)) for a child as a condition of attending school, receiving an evaluation, or receiving services under these regulations.

74.2 Rule of construction: Nothing in 74.1 shall be construed to create a Federal prohibition against teachers and other school personnel consulting or sharing classroom based observations with parents or guardians regarding a student's academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services in 11.0 (related to child find).

(Authority: 20 U.S.C. 1412(a)(25); 14 **Del.C.** §3110)

75.0 DOE as Provider of FAPE or Direct Services

75.1 In any program or circumstances in which DOE provides FAPE to children with disabilities, or provides direct services to these children, the DOE shall comply with any additional requirements of 14 **DE Admin. Code** 924.1.2, 924.2.0, and 924.6.0 through 924.26.0, as if the DOE were an LEA; and may use amounts that are otherwise available to the DOE under Part B of the Act to serve those children without regard to 14 **DE Admin. Code** 924.2 (relating to excess costs).

(Authority: 20 U.S.C. 1412(b); 14 **Del.C.** §3110)

76.0 to 98.0 Reserved.

99.0 State Administration

99.1 Rulemaking. The DOE shall ensure that its rules, regulations, and policies conform to Part B of the Act.

99.2 The DOE shall identify in writing to LEAs located in the State and the Secretary of the United States Department of Education any such rule, regulation, or policy as a State imposed requirement that is not required by Part B of the Act and Federal regulations. The Secretary shall also minimize the number of rules, regulations, and policies to which the LEAs and schools located in Delaware are subject under Part B of the Act. Italicized materials in these State regulations identify State statutory or regulatory requirements not otherwise required by Part B of the Act and federal regulations.

99.3 Support and facilitation: The DOE's rules, regulations, and policies under Part B of the Act shall support and facilitate LEA and school level system improvement

designed to enable children with disabilities to meet the challenging State student academic achievement standards.

(Authority: 20 U.S.C. 1407; 14 **Del.C.** §3110)

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

924 Children with Disabilities Subpart C Local Educational Agency Eligibility

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

1.0 Condition of Assistance and Consistency with State Policies

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

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

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

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

2.0 Use of Amounts

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

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

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

requirements of these regulations in providing the education and services for these children.

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

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

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

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

3.0 Maintenance of Effort.

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

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

3.2.1 Local funds only.

3.2.2 The combination of State and local funds.

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

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

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

4.0 Exception to Maintenance of Effort

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

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

4.1.2 A decrease in the enrollment of children with disabilities.

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

4.1.3.1 Has left the jurisdiction of the agency;

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

4.1.3.3 No longer needs the program of special education.

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

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

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

5.0 Adjustment to Local Fiscal Efforts in Certain Fiscal Years

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

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

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

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

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

6.0 School Wide Programs under Title I of the ESEA

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

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

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

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

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

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

7.0 Personnel Development

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

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

8.0 Permissive Use of funds.

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

8.1.1 Services and aids that also benefit nondisabled children: For the costs of special education and related services, and supplementary aids and services, provided in a regular class or other education related setting to a child with a disability in

accordance with the IEP of the child, even if one (1) or more nondisabled children benefit from these services.

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

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

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

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

9.0 Treatment of Charter Schools and their Students.

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

9.2 Charter schools that are public schools of the LEA:

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

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

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

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

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

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

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

9.2.2.2 The LEA shall meet the requirements in 9.2.1.

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

9.4 Reserved

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

10.0 Coordination with NIMAC and Purchase of Instructional Materials

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

10.2 Responsibility of LEA and other public agencies: LEAs and other public agencies shall ensure that children with disabilities who need instructional materials in accessible formats but are not included under the definition of blind or other persons with print disabilities in 14 **DE Admin. Code** 923.72.4 or who need materials that cannot be produced from NIMAS files, receive those instructional materials in a timely manner.
(Authority: 20 U.S.C. 1413(a)(6); 14 **Del.C.** §3110)

11.0 Information for DOE

11.1 LEAs shall provide the DOE, consistent with a format and timetable acceptable to the Department, with information necessary to enable the DOE to carry out its duties under Part B of the Act, including, with respect to information relating to the performance of children with disabilities participating in programs carried out under Part B of the Act.

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

12.0 Public Information

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

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

13.0 Records Regarding Migratory Children with Disabilities

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

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

14.0 to 19.0 Reserved

20.0 Exception for Prior Local Plans

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

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

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

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

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

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

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

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

21.0 Notification of LEA or State Agency in Case of Ineligibility

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

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

22.0 LEA and State Agency Compliance

22.1 General: If the DOE, after reasonable notice and an opportunity for a hearing, finds that an LEA or State agency that has been determined to be eligible under 14 **DE Admin. Code** 924 is failing to comply with any requirement described in 1.0 through 13.0, any further payments to the LEA or State agency shall be reduced or not provided until the DOE is satisfied that the LEA or State agency is complying with that requirement.

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

22.3 Consideration: In carrying out its responsibilities under 22.0, the DOE shall consider any decision resulting from a hearing held under 14 **DE Admin. Code** 926.11.0 through 926.33.0 that is adverse to the LEA or State agency involved in the decision. (Authority: 20 U.S.C. 1413(d); 14 **Del.C.** §3110)

23.0 Joint Establishment of Eligibility

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

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

23.3 Amounts of payments: If the DOE requires the joint establishment of eligibility under 23.1, the total amount of funds made available to the affected LEAs shall be equal to the sum of the payments that each LEA would have received under 14 **DE Admin. Code** 928.5.0, if the agencies were eligible for those payments. (Authority: 20 U.S.C. 1413(e)(1) and (2); 14 **Del.C.** §3110)

24.0 Requirements for Establishing Eligibility

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

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

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

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

25.0 Reserved

26.0 Early Intervening Services

26.1 General: An LEA may not use more than 15 fifteen percent (**15%**) of the amount the LEA receives under Part B of the Act for any fiscal year, less any amount reduced by the LEA pursuant to 5.0, if any, in combination with other amounts (which may include amounts other than education funds), to develop and implement coordinated, early

intervening services, which may include interagency financing structures, for students in kindergarten through grade twelve (12) (with a particular emphasis on students in kindergarten through grade three) who are not currently identified as needing special education or related services, but who need additional academic and behavioral support to succeed in a general education environment.

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

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

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

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

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

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

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

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

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

27.0 Direct Services by the DOE

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

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

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

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

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

27.2 DOE administrative procedures:

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

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

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

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

28.0 State Agency Eligibility

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

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

28.1.2 The agency meets the other conditions of this subpart that apply to LEAs.

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

29.0 Disciplinary Information

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

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

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

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

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

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

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 or refuses to consent to services under 1.2, the public agency 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 If the parent of the child refuses to consent to the initial provision of special education and related services, or the parent fails to respond to a request to provide consent for the initial provision of special education and related services, the public agency:

1.2.3.1 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 public agency requests consent; and

1.2.3.2 Is not required to convene an IEP Team meeting or develop an IEP for the child for the special education and related services for which the public agency requests such consent.

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 22.4. (Authority: 20 U.S.C. 1414(a)(1)(D) and 1414(c); 14 **Del.C.** §3110)

2.0 Initial Evaluations and Revaluations

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 the parent of a child repeatedly fails or refuses to produce the child for the evaluation; or 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.

2.4.1 The exception in 2.4 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.

2.5 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)

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 assessments and other evaluation materials used to assess a child under these regulations:

4.3.1 Are selected and administered so as not to be discriminatory on a racial or cultural basis;

4.3.2 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;

4.3.3 Are used for the purposes for which the assessments or measures are valid and reliable;

4.3.4 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

4.3.5 Are administered in accordance with any instructions provided by the producer of the assessments.

4.4 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.

4.5 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).

4.6 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;

4.7 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.

4.8 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.

4.9 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)

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 6.1.1 and the educational needs of the child; and the public agency shall provide a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent. *The evaluation report shall document the IEP team's discussion of the eligibility determination including, where appropriate, the additional requirements for students with a learning disability.*

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

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

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

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

6.5 Other Eligibility requirements and exit criteria.

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

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

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

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

6.5.4.1 the child reaches his or her 21st birthday. *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 through age 20, inclusive.

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

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

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

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

6.7.1.3 Professional judgment of the IEP team that is based on multiple sources of information used in the assessment process and with justification documented in writing in the evaluation report of a significant difference between the child's chronological age and his or her current level of functioning. A significant difference is defined as a minimum of a 25% delay in comparison to same aged peers.

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

6.7.2.1 Developmental and medical history;

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

6.7.2.3 Behavioral observations;

6.7.2.4 Standardized norm referenced instruments; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6.11 Eligibility Criteria for Learning Disability:

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

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

6.11.3 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.

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

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

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

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

6.12.1 A level of intellectual functioning, as indicated below:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6.14.2.1.5 Often has difficulty organizing tasks and activities;

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

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

6.14.2.1.8 Is often easily distracted by extraneous stimuli;

6.14.2.1.9 Is often forgetful in daily activities; or

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

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

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

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

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

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

6.14.2.2.6 Often talks excessively;

6.14.2.2.7 Often blurts out answers before questions have been completed;

6.14.2.2.8 Often has difficulty waiting turn;

6.14.2.2.9 Often interrupts or intrudes into conversations or games; and

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

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

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

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

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

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

6.14.3.2 Medical records documenting the health impairment or, in the case of students with ADD and ADHD, medical or 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 through 20 years, inclusive.

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

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

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

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

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

6.17 Eligibility Criteria for Visual Impairment including Blindness:

6.17.1 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 through 20 years, inclusive.

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

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

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

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

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

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

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

6.18.2.1.4 Speech fluency, or

6.18.2.1.5 Voice quality

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

6.18.4 The age of eligibility for preschool children identified under this definition shall be from the third birth date until the fifth birth date.

(Authority: 14 **Del.C.** §3110)

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

7.0 Learning Disabilities

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 a mental disability or where an Intervention Support Team, or other group of qualified professionals (see 6.1), and the parent determines such tests are relevant in selecting appropriate instructional or behavioral interventions.

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

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

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 Mental retardation;

9.1.4.3 Emotional disturbance;

9.1.4.4 Cultural factors;

9.1.4.5 Environmental or economic disadvantage; or

9.1.4.6 Limited English proficiency.

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

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

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

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

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

9.3.2 Whenever a child is referred for an evaluation.

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

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

10.0 Observation

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

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

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

11.0 Specific Documentation for the Eligibility Determination

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

11.1.1 Whether the child has a specific learning disability;

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

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

11.1.4 The educationally relevant medical findings, if any;

11.1.5 Whether,

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

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

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

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

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

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

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

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

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

11.4.2.3 The parents' right to request an evaluation.

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

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

12.0 Response to Intervention Procedures.

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

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

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

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

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

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

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

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

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

12.6.3.1 The child's progress toward end of year benchmarks shall 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 least 3 times each school week for at least 30 minutes per session.

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

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

12.7.4 If, after an additional 6 school weeks of Tier 2 intervention (or up to a total of 12 school weeks of intervention) a child has made no progress toward benchmarks, or has made progress, but is not on a trajectory to meet end-of-year benchmarks, the child shall begin receiving Tier 3 intervention as outlined by the IST.

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

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

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

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

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

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

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

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

12.11 Consistent with 1.0 through 5.0, a parent of a child may initiate a request for an initial evaluation at any time, including during the RTI process. The public agency may grant or decline the request. If the public agency declines to conduct the initial evaluation, it must provide written notice consistent with 14 **DE Admin. Code** 926.3.0. If the public agency agrees to conduct an initial evaluation, the evaluation shall be completed, and an eligibility determination made, within the timeframe established in 2.3. However, a child may be determined ineligible for services under the learning disability or educable mentally disabled categories where there are insufficient data to demonstrate

that the child was provided appropriate instruction in the regular education setting, or where there is insufficient data-based documentation of repeated assessments of achievement. If a child is determined ineligible for special education services on these grounds, the child may be referred back to an IST to gather the required documentation and data by completing the RTI process. Eligibility for special education services may then be reconsidered at the request of the parent or a member of the IST.

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

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

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: *By the middle of the 8th grade, the IEP shall include the child's strengths, interests, and preferences, postsecondary goals, high school courses of study needed to assist the child in reaching those goals, and plans to make application to high school and career technical education programs. Full transition services planning will apply by the end of the 9th grade, or prior to the child's 15th birthday, whichever comes first, unless determined appropriate at a younger age by the IEP Team, and the IEP shall be updated annually and 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 (including courses of study) needed to assist the child in reaching those goals.

20.3 Transfer of rights at age of majority: Beginning not later than 1 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 Part B of the Act will transfer to the child on reaching the age of 18 under 14 **DE Admin. Code** 926.20.0.

20.4 *IEP Forms: Each public agency shall use the primary and secondary IEP forms developed by DOE. The primary IEP form shall be used for students beginning with preschool (age 3) and until the Secondary IEP form is used. The Secondary IEP form shall be used beginning in the 8th grade, or earlier, if the IEP team agrees. 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)

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 21.1.3 and 21.1.6;

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 possible participation in a Cooperative Education Program or Diversified Occupations Program is to be discussed, the Career Technical Teacher Coordinator.*

21.2 Transition services participants: In accordance with 21.1.7, the public agency shall 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 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)

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 *no less than 10 business days prior to the meeting (unless mutually agreed otherwise)* to ensure that they will have an opportunity to attend, *and no less than three (3) business days for removal due to disciplinary action*; 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).

22.2.3 For a child with a disability beginning not later than the 8th grade or when the child turns 14, whichever occurs first, 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.

22.3 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).

22.4 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:

22.4.1 Detailed records of telephone calls made or attempted and the results of those calls;

22.4.2 Copies of correspondence sent to the parents and any responses received; and

22.4.3 Detailed records of visits made to the parent's home or place of employment and the results of those visits.

22.4.4 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.

22.5 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)

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; and

24.2.5 Consider whether the child needs assistive technology devices and services.

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 20.1.4, 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)

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

28.1 When conducting IEP Team meetings and placement meetings pursuant to these regulations (scheduling, exchange of witness lists, and status conferences), 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)

29.0 High School Graduation

29.1 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)

926 Children with Disabilities Subpart E Procedural Safeguards for Parents and Children

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

1.0 General Procedural Safeguards and Opportunity to Examine Records and Educational Programs

1.1 Each LEA and other public agency shall establish, maintain, and implement procedural safeguards that meet the requirements of 926.1.2, 926.2.0 through 926.5.0, 926.10.0, 926.18.0, 926.30.0 through 926.31.0, and 926.33.0 through 926.36.0.

(Authority: 20 U.S.C.1415(a); 14 **Del.C.** §3110 and 14 **Del.C.** Ch. 31, Subchapter V)

1.2 Opportunity to Examine Records and Educational Programs

1.2.1 Opportunity to examine records: The parents of a child with a disability, either personally or through representative, shall be afforded an opportunity to inspect and review all relevant education records with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child.

1.2.2 Parents shall have the right to obtain copies of all educational records, except the actual evaluation or examination instrument, either without charge, or, at the discretion of the public agency, at a fee not to exceed actual cost. Under no circumstances shall a fee be assessed which effectively prevents parents from exercising their right to inspect, review and copy records.

1.2.3 *The parents of a student with a disability shall have the right to visit and observe, either personally or through a representative, their child's current or proposed educational program. The public agency may require advance notice when parents or guardians wish to visit a proposed educational program.*

1.3 Parent participation in meetings: The parents of a child with a disability shall be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child.

1.3.1 Each public agency shall provide notice consistent with 14 **DE Admin. Code** 925.22.1.1 and 925.22.2 to ensure that parents of children with disabilities have the opportunity to participate in meetings described in 1.3.

1.3.2 A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

1.4 Parent involvement in placement decisions: Each public agency shall ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child.

1.4.1 In implementing the requirements of 1.4, the public agency shall use procedures consistent with the procedures described in 14 **DE Admin. Code** 925.22.1 through 925.22.2.

1.4.2 If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the public agency shall use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing.

1.4.3 A placement decision may be made by a group without the involvement of a parent, if the public agency is unable to obtain the parent's participation in the decision. In this case, the public agency shall have a record of its attempt to ensure their involvement.

1.5 *Minutes of Meetings.* A parent, a parent's authorized representative, or any public agency conducting a meeting, review or conference may take minutes of the meeting, review or conference. Minutes may be taken by a disclosed recording device or by a stenographer. The cost of recording the minutes is the responsibility of the person or agency electing to take minutes. Once taken, minutes shall be maintained subject to the confidentiality requirements of these regulations and any other applicable Delaware or federal law.

(Authority: 20 U.S.C. 1414(e), 1415(b)(1); 14 **Del. C.** §§3110, 3130 and 3131)

2.0 Independent Educational Evaluation

2.1 General: The parents of a child with a disability have the right to obtain an independent educational evaluation of the child subject to 2.4 through 2.9.

2.2 Each public agency shall provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in 2.9.

2.3 Definitions for the purposes of this subpart:

"Independent Educational Evaluation" means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.

"Public Expense" means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with 14 **DE Admin. Code** 923.3.0.

2.4 Parent right to evaluation at public expense; A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in 2.4.1 through 2.5.

2.4.1 If a parent requests an independent educational evaluation at public expense, the public agency shall, without unnecessary delay, either:

2.4.1.1 File a due process complaint to request a hearing to show that its evaluation is appropriate; or

2.4.1.2 Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to 14 **DE Admin. Code** 926.7.0 through 926.13.0 that the evaluation obtained by the parent did not meet agency criteria.

2.4.2 If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

2.5 If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

2.6 A parent is entitled to only one (1) independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.

2.7 Parent initiated evaluations: If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation shall be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and may be presented by any party as evidence at a hearing on a due process complaint under 14 **DE Admin. Code** 926 regarding that child.

2.8 Requests for evaluations by hearing officers. If a hearing panel or a single hearing officer appointed for expedited appeals under 32.0 requests an independent educational evaluation as part of a hearing on a due process complaint, the cost of the evaluation shall be at public expense.

2.9 Agency criteria: If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, shall be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.

2.10 Except for the criteria described in 2.9, a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

(Authority: 20 U.S.C. 1415(b)(1) and (d)(2)(A); 14 **Del.C.** §3110)

3.0 Prior Notice by the Public Agency: Content of Notice

3.1 Notice: Written notice that meets the requirements of 3.2 shall be given to the parents of a child with a disability no less than ten (10) business days before the public agency:

3.1.1 Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or

3.1.2 Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; and

3.1.3 *In cases involving a change of placement for a disciplinary removal, written notice shall be provided no less than three (3) business days before the public agency proposes to change the child's placement.*

3.2 Content of notice: The notice required in 3.1 shall include:

3.2.1 A description of the action proposed or refused by the agency; and

3.2.2 An explanation of why the agency proposes or refuses to take the action; and

3.2.3 A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; and

3.2.4 A statement that the parents of a child with a disability have protection under the procedural safeguards of these regulations and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and

3.2.5 Sources for parents to contact to obtain assistance in understanding the provisions of these regulations; and

3.2.6 A description of any other options the IEP Team considered and the reasons why those options were rejected; and

3.2.7 A description of other factors which are relevant to the agency's proposal or refusal; *and*

3.2.8 *A full explanation of all the procedural safeguards available to the parents.*

3.3 Notice in understandable language: The notice required in 3.1 shall be:

3.3.1 Written in language understandable to the general public; and

3.3.2 Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

3.4 If the native language or other mode of communication of the parent is not a written language, the public agency shall take steps to ensure that:

3.4.1 The notice is translated orally or by other means to the parent in his or her native language or other mode of communication; and

3.4.2 The parent understands the content of the notice; and

3.4.3 There is written evidence that the requirements in 3.4.1 and 3.4.2 have been met.

(Authority: 20 U.S.C. 1415(b)(3) and (4), 1415(c)(1), 1414(b)(1));14 **Del.C.** §3110)

4.0 Procedural Safeguards Notice

4.1 General: A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents only one (1) time a school year, except that a copy also shall be given to the parents:

4.1.1 Upon initial referral or parent request for evaluation;

4.1.2 Upon receipt of the first State complaint 14 **DE Admin. Code** 923.51.0 through 923.53.0 and upon receipt of the first due process complaint in 7.0 in a school year;

4.1.3 In accordance with the discipline procedures in 30.8; and

4.1.4 Upon request by a parent.

4.1.5 *In addition, a copy of the procedural safeguards notice shall be offered to the parents of a child with a disability at each IEP meeting convened for the child.*

4.2 Internet Web site: A public agency may place a current copy of the procedural safeguards notice on its Internet Web site if a Web site exists.

4.3 Contents: The procedural safeguards notice shall include a full explanation of all of the procedural safeguards available under these regulations relating to:

4.3.1 Independent educational evaluations;

4.3.2 Prior written notice;

4.3.3 Parental consent;

4.3.4 Access to education records;

4.3.5 Opportunity to present and resolve complaints through the due process procedures, including:

4.3.5.1 The time period in which to file a complaint;

4.3.5.2 The opportunity for the agency to resolve the complaint; and

4.3.5.3 The difference between the due process complaint and the State complaint procedures, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures.

4.3.6 The availability of mediation;

4.3.7 Procedures for students who are subject to placement in an interim alternative educational setting;

4.3.8 Requirements for unilateral placement by parents of children in private schools at public expense;

4.3.9 Hearings on due process complaints, including requirements for disclosure of evaluation results and recommendations;

4.3.10 Appeal rights;

4.3.11 Civil actions, including the time period in which to file those actions; and

4.3.12 Attorneys' fees.

4.4 Notice in understandable language: The notice required in 4.1 shall meet the requirements of 3.3.

(Authority: 20 U.S.C. 1415(d))

5.0 Electronic Mail

5.1 A parent of a child with a disability may elect to receive notices required by 3.0, 4.0 and 8.0 by an electronic mail communication, if the public agency makes that option available.

(Authority: 20 U.S.C. 1415(n); 14 **Del.C.** §3110)

6.0 Mediation

6.1 General: The DOE shall offer and ensure that procedures are established and implemented to allow parties to disputes involving any matter under these regulations, including matters arising prior to the filing of a due process complaint, to resolve disputes through a mediation process.

6.2 Requirements: The mediation process offered by the DOE shall be:

6.2.1 Voluntary on the part of the parties;

6.2.2 Not used to deny or delay a parent's right to a hearing on the parent's due process complaint, or to deny any other rights afforded under Part B of the Act; and

6.2.3 Conducted by a qualified and impartial mediator who is trained in effective mediation techniques. *In addition, parents will be permitted to be accompanied and advised at mediation by individuals of their choice. Any public agency involved in mediation shall assure that an individual from the public agency with the authority to make decisions and commit resources to agreed upon services attends the mediation.*

6.3 Any LEA or other public agency may establish procedures to offer to parents and schools that choose not to use the mediation process, an opportunity to meet at a time and location convenient to the parents, with a disinterested party who is under contract with an appropriate alternative dispute resolution entity, or a parent training and information center or community parent resource center in the State established under section 671 or 672 of the Act; and who would explain the benefits of, and encourage the use of, the mediation process to the parents.

6.3.1 The DOE shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services, select mediators on a random, rotational, or other impartial basis and bear the cost of the mediation process, including the costs of meetings described in 6.3.

6.4 Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

6.5 If the parties resolve a dispute through the mediation process, the parties shall execute a legally binding agreement that sets forth that resolution and that:

6.5.1 States that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding; and

6.5.2 Is signed by both the parent and a representative of the agency who has the authority to bind such agency.

6.6 A written, signed mediation agreement in 6.5 is enforceable in any State court of competent jurisdiction or in a district court of the United States. Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any Federal court or Delaware court.

6.7 Impartiality of mediator; An individual who serves as a mediator under these regulations may not be an employee of the DOE or the LEA that is involved in the

education or care of the child; and shall not have a personal or professional interest that conflicts with the person's objectivity.

6.7.1 A person who otherwise qualifies as a mediator is not an employee of an LEA, the DOE or other State agency described in 14 **DE Admin. Code** 924.28.0 solely because he or she is paid by the agency to serve as a mediator.

(Authority: 20 U.S.C. 1415(e); 14 **Del.C.** §3110)

7.0 Filing a Due Process Complaint

7.1 General: A parent or a public agency may file a due process complaint with the Secretary relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child.

7.2 The due process complaint shall allege a violation that occurred not more than two (2) years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint, except as provided in 11.9.

7.3 Information for parents: The public agency shall inform the parent of any free or low cost legal and other relevant services available in the area if the parent requests the information. The DOE shall inform the parent of any such services if the parent or an agency files a due process complaint under this section.

(Authority: 20 U.S.C. 1415(b)(6); 14 **Del.C.** §3135)

8.0 Due Process Complaint

8.1 General: When a party submits a due process complaint to the Secretary, that party, or the attorney representing that party, shall also provide a copy of the complaint (which shall remain confidential) to the opposing party.

8.2 Content of complaint: The due process complaint required in 8.1 shall include:

8.2.1 The name of the child; and

8.2.2 The address of the residence of the child; and

8.2.3 The name of the school the child is attending; and

8.2.4 In the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child, and the name of the school the child is attending;

8.2.5 A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and

8.2.6 A proposed resolution of the problem to the extent known and available to the party at the time.

8.3 Notice required before a hearing on a due process complaint: A party may not have a hearing on a due process complaint until the party, or the attorney representing the party, files a due process complaint that meets the requirements in 8.2.

8.4 Sufficiency of complaint: The due process complaint required by this section shall be deemed sufficient unless the party receiving the due process complaint notifies the hearing panel and the other party in writing, within fifteen (15) days of receipt of the due process complaint, that the receiving party believes the due process complaint does not meet the requirements in 8.2 of this section.

8.5 Within five (5) days of receipt of notification under 8.4, the hearing panel shall make a determination on the face of the due process complaint of whether the due process complaint meets the requirements in 8.2, and shall immediately notify the parties in writing of that determination.

8.6 A party may amend its due process complaint only if:

8.6.1 The other party consents in writing to the amendment and is given the opportunity to resolve the due process complaint through a meeting held pursuant to 10.0 (resolution meeting); or

8.6.2 The hearing panel grants permission, except that the hearing panel may only grant permission to amend at any time not later than five (5) days before the due process hearing begins.

8.7 If a party files an amended due process complaint, the timelines for the resolution meeting in 10.1 and the time period to resolve in 10.4 begin again with the filing of the amended due process complaint.

8.8 LEA response to a due process complaint: If the LEA has not sent a prior written notice under 3.0 to the parent regarding the subject matter contained in the parent's due process complaint, the LEA shall, within ten (10) days of receiving the due process complaint, send to the parent a response that includes:

8.8.1 An explanation of why the agency proposed or refused to take the action raised in the due process complaint; and

8.8.2 A description of other options that the IEP Team considered and the reasons why those options were rejected; and

8.8.3 A description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and

8.8.4 A description of the other factors that are relevant to the agency's proposed or refused action.

8.9 A response by an LEA under 8.8 of this section shall not be construed to preclude the LEA from asserting that the parent's due process complaint was insufficient, where appropriate.

8.10 Other party response to a due process complaint: Except as provided in 8.8 and 8.9, the party receiving a due process complaint shall, within ten (10) days of receiving the due process complaint, send to the other party a response that specifically addresses the issues raised in the due process complaint.

(Authority: 20 U.S.C. 1415(b)(7), 1415(c)(2); 14 Del.C. §3110)

9.0 Model Forms

9.1 The DOE shall provide model forms to assist parents and public agencies in filing a due process complaint in accordance with 7.0 and 8.0 and to assist parents and

other parties in filing a State complaint under 14 **DE Admin. Code** 923.51.0 through 923.53.0. However, the use of the model forms is not required.

9.2 Parents, public agencies, and other parties may use the appropriate model form described in 9.1, or another form or other document, so long as the form or document that is used meets, as appropriate, the content requirements in 7.0 and 8.2 for filing a due process complaint, or the requirements in 14 **DE Admin. Code** 923.53.2 for filing a State complaint.

(Authority: 20 U.S.C. 1415(b)(8); 14 **Del.C.** §3110)

10.0 Resolution Process

10.1 Resolution meeting: Within fifteen (15) days of receiving notice of the parent's due process complaint, and prior to the initiation of a due process hearing under 11.0, the LEA shall convene a meeting with the parent and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the due process complaint that:

10.1.1 Includes a representative of the public agency who has decision-making authority on behalf of that agency; and

10.1.2 May not include an attorney of the LEA unless the parent is accompanied by an attorney.

10.2 The purpose of the meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the LEA has the opportunity to resolve the dispute that is the basis for the due process complaint.

10.3 The meeting described in 10.1 and 10.2 need not be held if the parent and the LEA agree in writing to waive the meeting; or the parent and the LEA agree to use the mediation process described in 6.0.

10.3.1 The parent and the LEA determine the relevant members of the IEP Team to attend the meeting.

10.4 Resolution period:

10.4.1 If the LEA has not resolved the due process complaint to the satisfaction of the parent within thirty (30) days of the receipt of the due process complaint, the due process hearing may occur.

10.4.2 Except as provided in 10.5, the timeline for issuing a final decision under 15.0 begins at the expiration of this thirty (30) day period.

10.4.3 Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding 10.4.1 and 10.4.2, the failure of the parent filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.

10.4.4 If the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made and documented using the procedures in 14 **DE Admin. Code** 925.22.4; the LEA may, at the conclusion of the thirty (30) day period request the hearing panel dismiss the parent's due process complaint.

10.4.5 If the LEA fails to hold the resolution meeting specified in 10.1 within fifteen (15) days of receiving notice of a parent's due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of the hearing panel to begin the due process hearing timeline.

10.5 Adjustments to thirty (30) day resolution period: The forty five (45) day timeline for the due process hearing in 15.1 starts the day after one (1) of the following events:

10.5.1 Both parties agree in writing to waive the resolution meeting;

10.5.2 After either the mediation or resolution meeting starts, but before the end of the thirty (30) day period, the parties agree in writing that no agreement is possible;

10.5.3 If both parties agree in writing to continue the mediation at the end of the thirty (30) day resolution period, but later, the parent or public agency withdraws from the mediation process.

10.6 Written settlement agreement: If a resolution to the dispute is reached at the meeting described in 10.1 and 10.2, the parties shall execute a legally binding agreement that is:

10.6.1 Signed by both the parent and a representative of the agency who has the authority to bind the agency; and

10.6.2 Enforceable in any State court of competent jurisdiction or in a district court of the United States.

10.7 Agreement review period. If the parties execute an agreement pursuant to 10.6, a party may void the agreement within three (3) business days of the agreement's execution.

(Authority: 20 U.S.C. 1415(f)(1)(B); 14 Del.C. §3110)

11.0 Impartial Due Process Hearing

11.1 General: Whenever a due process complaint is received under 7.0 or 32.0 (expedited appeal), the parents or the LEA involved in the dispute shall have an opportunity for an impartial due process hearing, consistent with the procedures in 7.0, 8.0, and 10.0.

11.2 The DOE shall be responsible for conducting the due process hearing as further provided in this section. Upon receipt of a due process complaint, the Secretary shall appoint a three (3) member hearing panel consisting of:

11.2.1 An attorney admitted to practice in Delaware;

11.2.2 An educator knowledgeable in the field of special education and special education programming, and;

11.2.3 A lay person with demonstrated interest in the education of the disabled included on an approved list compiled by the Advisory Council for Exceptional Citizens and submitted to the Secretary.

11.3 Impartial hearing officers: Hearing officers shall not be an employee of the DOE or the LEA that is involved in the education or care of the child or a person having a personal or professional interest that conflicts with the person's objectivity in the hearing.

11.4 The impartial hearing officer shall:

11.4.1 Possess knowledge of, and the ability to understand, the provisions of the Act, Federal and State regulations pertaining to the Act, and legal interpretations of the Act by Federal and State courts;

11.4.2 Possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice, *in cooperation and consultation with other hearing officers appointed to a given hearing panel*;

11.4.3 Possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice, *in cooperation and consultation with other hearing officers appointed to a given hearing panel*; and

11.4.4 *Complete training as required by the Secretary to ensure the adequate knowledge and competent performance of hearing officers.*

11.5 A person who otherwise qualifies to conduct a hearing under 11.3 is not an employee of the DOE solely because he or she is paid by the DOE to serve as a hearing officer.

11.6 The Secretary shall keep a list of the persons eligible to serve as hearing officers. The list shall include a statement of the qualifications of each of those persons.

11.7 Subject matter of due process hearings: The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under 8.2, unless the other party agrees otherwise.

11.8 Timeline for requesting a hearing: A parent or agency shall request an impartial hearing on their due process complaint within two (2) years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint.

11.9 Exceptions to the timeline; The timeline described in 11.8 does not apply to a parent if the parent was prevented from filing a due process complaint due to:

11.9.1 Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or

11.9.2 The LEA's withholding of information from the parent that was required under these regulations to be provided to the parent.

11.10 *Burden of proof: The burden of proof and persuasion in the due process hearing shall be on the public agency which is a party to the proceeding.*

(Authority: 20 U.S.C. 1415(f)(1)(A), 1415(f)(3)(A)-(D); 14 Del.C. §§3110, 3137, 3140)

12.0 Hearing Rights

12.1 General: Any party to a due process hearing conducted pursuant to 7.0 through 13.0, or 30.0 through 34.0, has the right to:

12.1.1 Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

12.1.2 Present evidence and confront and cross examine adverse witness;

12.1.3 Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five (5) business days before the hearing;

12.1.4 Obtain a written, or, at the option of the parents, electronic verbatim record of the hearing at public expense;

12.1.5 Obtain a written, or, at the option of the parents, electronic decision which includes findings of fact and law; and

12.1.6 Compel the attendance of witnesses:

12.1.6.1 *Authority to issue subpoenas rests with the Secretary, or the Secretary's designee.*

12.1.6.2 *Upon the application of any party to the Secretary at least twelve (12) days prior to a hearing, a subpoena shall be issued requiring the attendance of the person or persons listed in the application. A copy of the application for subpoenas shall be provided to the hearing panel and to the other party no later than the time it is provided to the Secretary.*

12.1.6.3 *If a person subpoenaed to attend a hearing fails to obey without reasonable cause, or if such person refuses, without lawful excuse, to be examined or to answer pertinent questions, an application may be filed with the Family Court for an order directing the such person to show cause why he or she should not appear to testify. Upon return of the rule, the Family Court shall examine such person under oath, and if the Family Court shall determine, after giving such person an opportunity to be heard, that he or she refused without legal excuse to attend or testify at the hearing, despite the subpoena, the Family Court may order such person to comply therewith. Any failure to obey the order may be punished as a contempt of the Family Court, pursuant to the Rules of the Family Court.*

12.2 Additional disclosure of information; At least five (5) business days prior to a hearing conducted pursuant to 1.1, each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

12.2.1 The hearing panel may bar any party that fails to comply with paragraph 12.2 of this section from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

12.3 Parental rights at hearings: *Any testimony presented at a due process hearing shall be under oath or affirmation. The hearing panel shall ensure that parents have been advised of their procedural safeguards.* Parents involved in hearings shall also be given the right to:

12.3.1 Have the child who is the subject of the hearing present;

12.3.2 Open the hearing to the public;

12.3.3 Have the record of the hearing and the findings of fact and decisions provided at no cost to parents; and

12.3.4 *Have the hearing conducted at a time and place which is reasonably convenient to the parents and child involved.*

12.4 The due process hearing shall be conducted in accordance with hearing rules and procedures as from time to time developed by the DOE for the conduct of special education due process hearings.

(Authority: 14 **Del.C.** §§3110, 3135, 3137, 3139)

13.0 Hearing Decisions

13.1 Decisions of hearing panel: Subject to 13.2 a hearing panel's determination of whether a child received FAPE shall be based on substantive grounds.

13.2 In matters alleging a procedural violation, a hearing panel may find that a child did not receive a FAPE only if the procedural inadequacies:

13.2.1 Impeded the child's right to a FAPE;

13.2.2 Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or

13.2.3 Caused a deprivation of educational benefit.

13.3 Nothing in 13.1 or 13.2 shall be construed to preclude a hearing officer from ordering an LEA to comply with procedural requirements under 1.0 through 36.0.

13.4 Construction clause: Nothing shall be construed to affect the right of a parent to file an appeal of the due process hearing decision under 16.0.

13.5 Separate request for a due process hearing: Nothing shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

13.6 Findings and decision to Governor's Advisory Council for Exceptional Citizens and general public: The DOE, after deleting any personally identifiable information, shall transmit the findings and decisions referred to in 12.1.5 to the chairperson of the Governor's Advisory Council for Exceptional Citizens and make those findings and decisions available to the public *by placing legal notice annually in newspapers of sufficient circulation in each of the three (3) Delaware counties, that this information may be obtained through the DOE, and by placing the findings and decision on its Website.*

(Authority: 20 U.S.C. 1415(f)(3)(E) and (F), 1415(h)(4), 1415(o); 14 **Del.C.** §§3110, 3137, 3138(f))

14.0 Finality of Decision; Appeal; Impartial Review

14.1 Finality of hearing decision: A decision made in a hearing conducted pursuant to 7.0 through 13.0 or 30.0 through 34.0 is final, except that any party involved in the hearing may file a civil action under 16.0.

(Authority: 20 U.S.C. 1415(g) and (h)(4), 1415(i)(1)(A), 1415(i)(2); 14 **Del.C.** §§3110, 3141 and 3142)

15.0 Timelines and Convenience of Hearings and Reviews

15.1 The Secretary shall ensure that, not later than forty five (45) days after the expiration of the thirty (30) day period in 10.4, or the adjusted time periods described in 10.5, a final decision is reached in the hearing; and a copy of the decision is mailed to each of the parties.

15.2 *The hearing panel, for good cause, may grant specific extensions of time beyond the periods set out in 15.1 at the request of either party; provided however, that a final decision shall be reached and a copy of the decision mailed to each of the parties*

within fifteen (15) days of the date of the hearing, or where applicable, within fifteen (15) days of the completion of post-hearing argument. In granting specific extensions, the panel shall ensure that a party's right to redress is in no way diminished or unnecessarily delayed.

15.3 Each hearing shall be conducted at a time and place that is reasonably convenient to the parents and child involved.

(Authority: 20 U.S.C. 1415(f)(1)(B)(ii), 1415(g), 1415(i)(1) 14 **Del.C.** §§3110, 3136)

16.0 Civil Action

16.1 General: Any party aggrieved by the findings and decision made under 7.0 through 13.0, or 30.0 through 34.0, has the right to bring a civil action with respect to the due process complaint notice requesting a due process hearing under 7.0 or 30.0 through 32.0. The action may be brought in the Family Court or in a district court of the United States without regard to the amount in controversy.

16.2 Time limitation: The party bringing the action shall have ninety (90) days from the date of the decision of the hearing panel to file a civil action.

16.3 Additional requirements: In any action brought under 16.1, the Secretary, or the Secretary's designee, shall certify and file with the court the record of the administrative hearing, which shall include all documents submitted, a transcript of all testimony, and the decision of the hearing panel. The court:

16.3.1 Receives the records of the administrative proceedings;

16.3.2 Hears additional evidence at the request of a party; and

16.3.3 Basing its decision on the preponderance of the evidence, grants the relief that the court determines to be appropriate.

16.4 Jurisdiction of the district counts: The district courts of the United States have jurisdiction of actions brought under section 615 of the Act without regard to the amount in controversy.

16.5 Rules of Construction: Nothing in these regulations restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, Title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under section 615 of the Act, the procedures in 7.0 shall be exhausted to the same extent as would be required had the action been brought under section 615 of the Act.

(Authority: 20 U.S.C. 1415(i)(2) and (3)(A), 1415(l) 14 **Del.C.** §§3110, 3142)

17.0 Attorneys' Fees

17.1 In general: In any action or proceeding brought under section 615 of the Act, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to:

17.1.1 The prevailing party who is the parent of a child with a disability;

17.1.2 To a prevailing party who is an LEA or the DOE against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous,

unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

17.1.3 To a prevailing LEA or the DOE against the attorney of a parent, or against the parent, if the parent's request for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

17.2 Reserved.

17.3 Prohibition on use of funds: Funds under Part B of the Act may not be used to pay attorneys' fees or costs of a party related to any action or proceeding under section 615 of the Act and Subpart E of these regulations.

17.3.1 The prohibition in 17.3 does not preclude a public agency from using funds under Part B of the Act for conducting an action or proceeding under section 615 of the Act.

17.4 Award of fees: A court awards reasonable attorneys' fees under section 615(i)(3) of the Act consistent with the following:

17.4.1 Fees awarded under section 615(i)(3) of the Act shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this paragraph.

17.4.2 Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under section 615 of the Act for services performed subsequent to the time of a written offer of settlement to a parent if:

17.4.2.1 The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten (10) days before the proceeding begins;

17.4.2.2 The offer is not accepted within ten (10) days; and

17.4.2.3 The court or administrative hearing panel finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

17.4.3 Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless the meeting is convened as a result of an administrative proceeding or judicial action.

17.4.3.1 A resolution meeting conducted pursuant to 10.0 shall not be considered a meeting convened as a result of an administrative hearing or judicial action; or an administrative hearing or judicial action for purposes of 17.0.

17.4.4 Notwithstanding paragraph 17.4.2, an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

17.4.4.1 Except as provided in 17.4.5, the court reduces, accordingly, the amount of the attorneys' fees awarded under section 615 of the Act, if the court finds that:

17.4.4.1.1 The parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

17.4.4.1.2 The amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

17.4.4.1.3 The time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

17.4.4.1.4 The attorney representing the parent did not provide to the LEA the appropriate information in the due process request notice in accordance with 8.0.

17.4.5 The provisions of 17.4.4.1 do not apply in any action or proceeding if the court finds that the State or local agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 615 of the Act.

(Authority: 20 U.S.C. 1415(i)(3)(B)-(G).)

18.0 Child's Status During Proceedings

18.1 Except as provided in 33.0, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under 7.0, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint shall remain in his or her current educational placement.

18.2 If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, shall be placed in the public school program until the completion of all the proceedings.

18.3 If the complaint involves an application for initial services under these regulations from a child who is transitioning from Part C of the Act to Part B and is no longer eligible for Part C services because the child has turned three (3), the public agency is not required to provide the Part C services that the child had been receiving. If the child is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services under 14 **DE Admin. Code** 925.1.2 then the public agency shall provide those special education and related services that are not in dispute between the parent and the public agency.

18.4 If the hearing panel in a due process hearing conducted by the DOE agrees with the child's parents that a change of placement is appropriate, that placement shall be treated as an agreement between the State and the parents for purposes of 18.1.

(Authority: 20 U.S.C. 1415(j); 14 **Del.C.** §§3110, 3143)

19.0 Surrogate Parents.

19.1 Definition: As used in this section,

“Educational Surrogate Parent, “Surrogate Parent” and “ESP” all mean a person appointed by the DOE to represent a child who receives, or may be in need of, special education and related services in all educational decision making pertaining to the

identification, evaluation, and educational placement of the student and the provision of FAPE to the child.

19.2 General: The DOE shall determine a child's eligibility for a surrogate parent. The DOE shall appoint a surrogate parent when:

19.2.1 No parent as defined in 14 **DE Admin. Code** 922.3.0 can be identified;

19.2.2 The public agency, after reasonable efforts, cannot locate a parent. Reasonable efforts shall include, but not be limited to, telephone calls, letters, certified letter with return receipt, or visit to the parents' last known address;

19.2.3 The child's parental rights have been terminated and legal responsibility has not been granted by a court of law to an individual, not to include a State agency, and the child has not been adopted;

19.2.4 The child's parent has consented voluntarily, in writing, to the appointment of an educational surrogate parent. Such consent is revocable by the parent at any time by written notice to the DOE; or

19.2.5 The child is an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(6)).

19.3 The DOE shall make reasonable efforts to appoint a surrogate parent within thirty (30) days after a request is submitted by an LEA or other public agency.

19.4 A surrogate parent shall not be required for a child who receives, or may be in need of, special education and related services when the child is living in the home of a relative who agrees to act in the place of the parent and for whom a Caregiver's School Authorization executed in compliance with 14 **Del.C.** §202(f)(10) is on file.

19.5 A child between the ages of eighteen (18) and twenty-one (21) shall remain eligible for the services of a surrogate parent appointed by the DOE, and unless declared incompetent by a court of law, such child shall have the right of access to a surrogate parent; the right to refuse the appointment of a surrogate parent; the right to participate in the selection of a surrogate parent; and the right to terminate the services of the surrogate parent.

19.6 Duties of LEAS and public agencies: All LEAs and public agencies responsible for providing special education and related services to children with disabilities have a duty to:

19.6.1 Identify and locate children who may be in need of surrogate parents;

19.6.2 Develop procedures to identify and locate children who may be in need of surrogate parents; and

19.6.3 Promptly submit a written request to the DOE to appoint a surrogate parent for each child who may be in need of a surrogate parent under these regulations.

19.6.4 For a child in the custody of the Department of Services for Children, Youth and Their Families (DSCYF) who may be in need of a surrogate parent, the DSCYF shall promptly make a written request to the DOE to appoint a surrogate parent. The Family Court may, in the exercise of its proper jurisdiction, order the DSCYF to make a referral.

19.7 Candidacy of surrogate parents: To serve as a surrogate parent, each candidate shall:

19.7.1 Be at least eighteen (18) years of age;

19.7.2 Be a legal resident of the United States;

19.7.3 Be competent to represent the child;

19.7.4 Not be an employee of the DOE, an LEA or any other public or private agency responsible for, or involved in the education or care of the child;

19.7.5 Have no interest that conflicts with the interest of the child he or she may represent, including, but not limited to, any professional or personal interest that might restrict or bias his or her ability to advocate for all of the services required to ensure a free, appropriate public education the child;

19.7.6 Receive training about Delaware and federal law and regulations, including due process procedures, disability conditions, educational programs, and special education services for children with disabilities, as required by the DOE in consultation with the Office of the Educational Surrogate Parent Program.

19.7.7 Be able to converse in the primary communication mode used by the child whenever possible; and

19.7.8 Have knowledge and skills that ensure adequate representation of the child.

19.8 Non employee requirement: compensation: A person otherwise qualified to be a surrogate parent under 19.7 is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent. Nor are foster parents considered employees for purposes of these regulations.

19.9 Unaccompanied homeless youth: In the case of a child who is an unaccompanied homeless youth, appropriate staff of emergency shelters, transitional shelters, independent living programs, and street outreach programs may be appointed as temporary surrogate parents without regard to 19.7.4, until a surrogate parent can be appointed that meets all of the requirements of 19.7.

19.10 Surrogate parent responsibilities: Each surrogate parent shall be responsible for:

19.10.1 Representing the child in all matters relating to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child;

19.10.2 Becoming thoroughly acquainted with the child's educational history and other information contained in school records and reports relating to the child's educational needs;

19.10.3 Granting or denying permission for initial evaluation or placement, and safeguarding the confidentiality of all records and information pertaining to the child to comply with State and federal regulations, including the use of discretion when sharing information with appropriate people for the purpose of furthering the interests of the child;

19.10.4 Participating in the development of an IEP for the child;

19.10.5 Reviewing and evaluating special education programs pertaining to the child and other such programs as may be available;

19.10.6 Initiating mediation, complaint, hearing, or appeal procedures when necessary regarding the identification, evaluation, or educational placement of the

child, and seeking qualified legal assistance when such assistance is in the best interest of the child; and

19.10.7 Participating in training provided or required by the DOE, in consultation with the Office of the Educational Surrogate Parent Program, concerning Delaware and federal laws and regulations related to the education of children with disabilities.

19.11 Termination of Surrogate parent services

19.11.1 Voluntary Termination: If the surrogate parent wishes to terminate his or her services, he or she shall notify the DOE in writing, at least thirty (30) days prior to the termination of such services.

19.11.2 Other Termination: The DOE may terminate a surrogate parent's appointment when it determines that the child no longer qualifies for surrogate parent services under 19.2. The DOE may also terminate a surrogate parent's appointment for cause, including the failure of the surrogate to discharge his or her duties or to maintain the child's confidentiality.

19.12 Compensation

19.12.1 The DOE shall compensate surrogate parents for all reasonable and necessary expenses incurred in performance of their duties, including, but not limited to,

19.12.1.1 Mileage for attendance at meetings concerning the child being represented by the surrogate; long distance telephone calls to the school in which the child is being served; and photocopying of the child's records.

19.13 Liability of the Surrogate Parent

19.13.1 A person appointed by the DOE as surrogate parent shall not be held liable for actions taken in good faith on behalf of the child in protecting the special education rights of the child.

(Authority: 20 U.S.C. 1415(b)(2); 14 Del.C. §§3110, 3132)

20.0 Transfer of Parental Rights at Age of Majority

20.1 Age of majority: When a child with a disability reaches the age of majority (eighteen (18)) years old) (except a child with a disability who has been determined to be incompetent under State law):

20.1.1 All rights accorded to parents under Part B of the Act transfer to the child; and

20.1.2 The public agency shall notify both the child and the parents that all rights accorded to parents under Part B of the Act transfer to the child.

(Authority: 20 U.S.C. 1415(m); 14 Del.C. §3110)

21.0 to 29.0 Reserved

30.0 Discipline Procedures Authority of School Personnel.

30.1 Case by case determination: School personnel may consider any unique circumstances on a case by case basis when determining whether a change in placement,

consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.

30.2 School personnel under 30.0 may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than ten (10) consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than ten (10) consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement 36.0).

30.2.1 After a child with a disability has been removed from his or her current placement for ten (10) school days in the same school year, during any subsequent days of removal the public agency shall provide services to the extent required under 30.4 of this section.

30.3 Additional authority: For disciplinary changes in placement that would exceed ten (10) consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to 30.5, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in 30.4.

30.4 Services:

30.4.1 A child with a disability who is removed from the child's current placement pursuant to 30.3 or 30.7 shall continue to receive educational services, as provided in 14 **DE Admin. Code** 923.1.2 so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

30.4.2 The services required by paragraphs 30.4.1, 30.4.3, 30.4.4, and 30.4.5 may be provided in an interim alternative educational setting.

30.4.3 A public agency is only required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for ten (10) school days or less in that school year, if it provides services to a child without disabilities who is similarly removed.

30.4.4 After a child with a disability has been removed from his or her current placement for ten (10) school days in the same school year, if the current removal is for not more than ten (10) consecutive school days and is not a change of placement under 36.0, school personnel, in consultation with at least one (1) of the child's teachers, determine the extent to which services are needed, as provided in 14 **DE Admin. Code** 923.1.2 so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP.

30.4.5 If the removal is a change of placement in 36.0, the child's IEP Team determines appropriate services in 30.4.1.

30.5 Manifestation determination: Within ten (10) school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine:

30.5.1 If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

30.5.2 If the conduct in question was the direct result of the LEA's failure to implement the IEP.

30.5.3 The conduct shall be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either 30.5.1 or 30.5.2 was met.

30.5.4 If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in 30.5.2 was met, the LEA shall take immediate steps to remedy those deficiencies.

30.6 Determination that the behavior was a manifestation: If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team shall either:

30.6.1 Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or

30.6.2 If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

30.6.3 Except as provided in 30.7, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

30.7 Special circumstances: School personnel may remove a student to an interim alternative educational setting for not more than forty five (45) school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child:

30.7.1 Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of the DOE or an LEA;

30.7.2 Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of the DOE or an LEA; or

30.7.3 Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of the DOE or an LEA.

30.8 Notification: *The LEA or other public agency shall ensure that the parents, guardian or Relative Caregiver of each child with disabilities receive written notice of the rules and regulations applicable to such children with respect to discipline, suspension,*

expulsion, and exclusion as a treatment procedure at the beginning of each school year or upon entry into a special education program during the school year; and

30.8.1 On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA shall notify the parents of that decision, and provide the parents the procedural safeguards notice described in 4.0.

30.9 Definitions: For purposes of this section, the following definitions apply:

“Controlled Substance” means a drug or other substance identified under schedules I, II, III, IV, or V in section 202c of the Controlled Substances Act (21 U.S.C. 812(c)).

“Illegal Drug” means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

“Serious Bodily Injury” has the meaning given the term “serious bodily injury” under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.

“Weapon” has the meaning given the term “dangerous weapon” under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code. (Authority: 20 U.S.C. 1415(k)(1) and (7); 14 Del.C. §3110)

Determination of Setting

31.0 The child’s IEP Team determines the interim alternative educational setting for services in 30.3, 30.4.5 and 30.7.

(Authority: 20 U.S.C. 1415(k)(2); 14 Del. C. §3110)

32.0 Expedited Appeal

32.1 General: The parent of a child with a disability who disagrees with any decision regarding placement in 30.0 and 31.0, or the manifestation determination in 30.5, or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others may appeal the decision by requesting a hearing. The hearing is requested by filing a complaint pursuant to 7.0, 8.1 and 8.2.

32.2 A single, impartial hearing officer appointed by the DOE from its Registry of Impartial Hearing Officers shall make a determination regarding an appeal under paragraph (a) of this section. The hearing officer may:

32.2.1 Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of 30.0 or that the child’s behavior was a manifestation of the child’s disability; or

32.2.2 Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than forty five (45) school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

32.2.3 The procedures in 32.1 and 32.2 may be repeated, if the LEA believes that returning the child to the original placement is substantially likely to result in injury to the child or to others.

32.3 Expedited due process hearing:

32.3.1 Whenever a hearing is requested in 32.1, the parents or the LEA involved in the dispute shall have an opportunity for an impartial due process hearing consistent with the requirements of 7.0 and 8.1 through 8.3, and 10.0 through 14.0, and 14 **Del.C.** Ch. 31, except as provided in 32.3.2 through 32.3.4.

32.3.2 The DOE shall be responsible for arranging the expedited due process hearing, which shall occur within twenty (20) school days of the date the complaint requesting the hearing is received by the DOE. The hearing officer shall make a determination within ten (10) school days after the hearing.

32.3.2.1 *Any party to an expedited due process hearing has the right to prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least two (2) business days before the hearing*

32.3.2.2 *At least two (2) business days prior to the expedited due process hearing, each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.*

32.3.2.3 *The hearing officer may bar any party that fails to comply with 32.3.2.1 and 32.3.2.2 from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.*

32.3.3 Unless the parents and LEA agree in writing to waive the resolution meeting described in 32.3.3.1 or agree to use the mediation process described in 6.0:

32.3.3.1 A resolution meeting shall occur within seven (7) days of receiving notice of the due process complaint; and

32.3.3.2 The expedited due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within fifteen (15) days of the receipt of the due process complaint.

32.3.4 The decisions on expedited due process hearings are appealable consistent with 14.0.

(Authority: 20 U.S.C. 1415(k)(3) and (4)(B), 1415(f)(1)(A) 14 **Del.C.** §3110)

33.0 Placement During Appeals

33.1 When an expedited appeal under 32.0 has been made by either the parent or the LEA, the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period specified in 30.3 and 30.7, whichever occurs first, unless the parent and the DOE or LEA agree otherwise.

(Authority: 20 U.S.C. 1415(k)(4)(A); 14 **Del.C.** §3110)

34.0 Protections for Children not Determined Eligible for Special Education and Related Services

34.1 General: A child who has not been determined to be eligible for special education and related services under these regulations and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in these regulations if the public agency had knowledge (as determined in accordance with 34.2) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

34.2 Basis of knowledge: A public agency shall be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred:

34.2.1 The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

34.2.2 The parent of the child requested an evaluation of the child pursuant to 14 **DE Admin. Code** 925.1.0 through 925.12.0; or

34.2.3 The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency.

34.3 Exception: A public agency would not be deemed to have knowledge under 34.2 if the parent of the child has not allowed an evaluation of the child pursuant to **DE Admin. Code** 925.1.0 through 925.12.0; or has refused services under these regulations; or the child has been evaluated in accordance with **DE Admin. Code** 925.1.0 through 925.12.0 and determined to not be a child with a disability under these regulations.

34.4 Conditions that apply if no basis of knowledge: If a public agency does not have knowledge that a child is a child with a disability (in accordance with 34.2 and 34.3) prior to taking disciplinary measures against the child, the child may be subjected to the disciplinary measures applied to children without disabilities who engage in comparable behaviors consistent with the following requirements:

34.4.1 If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures in 30.0, the evaluation shall be conducted in an expedited manner.

34.4.2 Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services.

34.4.3 If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with these regulations, including the requirements of 30.0 through 36.0 and section 612(a)(1)(A) of the Act.

(Authority: 20 U.S.C. 1415(k)(5); 14 **Del.C.** §3110)

35.0 Referral to and Action by Law Enforcement and Judicial Authorities

35.1 Rule of construction: Nothing in these regulations prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities or prevents Delaware law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

35.2 Transmittal of records: An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.

35.2.1 An agency reporting a crime under this section may transmit copies of the child's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act. (Authority: 20 U.S.C. 1415(k)(6); 14 **Del.C.** §3110)

36.0 Change of Placement Because of Disciplinary Removals

36.1 For purposes of removals of a child with a disability from the child's current educational placement in 30.0 through 35.0, a change of placement occurs if:

36.1.1 The removal is for more than ten (10) consecutive school days; or

36.1.2 The child has been subjected to a series of removals that constitute a pattern:

36.1.2.1 Because the series of removals total more than ten (10) school days in a school year;

36.1.2.2 Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and

36.1.2.3 Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another; or.

36.1.3 *The child has been subjected to a series of in-school removals totaling more than ten (10) school days and it deprives the child from meeting the goals set out in the IEP; progressing in the general curriculum though another setting; and receiving those services and modifications described in the IEP; or the child has been subjected to a series of removals from transportation and it results in the child's absence from school for more than ten (10) school days.*

36.1.4 The public agency determines on a case by case basis whether a pattern of removals constitutes a change of placement.

36.1.5 This determination is subject to review through due process and judicial proceedings.

(Authority: 20 U.S.C. 1415(k); 14 **Del.C.** §3110)

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

927 Children with Disabilities Subpart F, Monitoring, Enforcement and Confidentiality of Information

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

1.0 General Monitoring and Priority Areas

1.1 State monitoring and enforcement: The DOE will monitor the implementation of these regulations, enforce them as provided in these regulations and any other applicable state or federal law, and annually report to the public on performance under these regulations.

1.2 The primary focus of the State's monitoring activities will be on improving educational results and functional outcomes for all children with disabilities; and ensuring that public agencies meet the program requirements under Part B of the Act and these regulations, with a particular emphasis on those requirements that are most closely related to improving educational results for children with disabilities.

1.3 As a part of its responsibilities under this section, the DOE will use quantifiable indicators and such qualitative indicators as are needed to adequately measure performance in the priority areas identified in 1.4 and the indicators established by the Secretary of the United States Department of Education for the states' performance plans.

1.4 The DOE will monitor LEAs, using quantifiable indicators in each of the following priority areas, and using such qualitative indicators as are needed to adequately measure performance in those areas:

1.4.1 Provision of FAPE in the least restrictive environment.

1.4.2 General supervision, including child find, effective monitoring, the use of resolution meetings, mediation, and a system of transition services.

1.4.3 Disproportionate representation of racial and ethnic groups in special education and related services, to the extent the representation is the result of inappropriate identification.

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

(Authority: 20 U.S.C. 1416(a); 14 **Del.C.** §§ 122 and 3110)

2.0 State and Local Performance Plans and Public Reports

2.1 State performance plan and annual performance reports: The DOE will submit a State performance plan to the United States Department of Education at such

times and in such manner and format as required by the Secretary of the United States Department of Education.

2.1.1 The state performance plan will include measurable and rigorous targets for any indicators required by the Secretary of the United States Department of Education for the priority areas in 1.4.

2.1.2 The DOE will make the State's performance plan available through public means, including posting it on DOE's website, distributing it to the media and distributing it through other public agencies within a reasonable time after its federal submission.

2.1.3 The DOE will report annually to the United States Department of Education on the performance of the State under the State's performance plan, in the manner and format required by the United State Secretary of Education.

2.1.3.1 The DOE will post any annual state performance report the DOE submits to the United State's Department of Education on the DOE's website within a reasonable time after its federal submission.

2.1.4 Federal determination review: The Secretary of the United State's Department of Education annually reviews the State's annual performance report, submitted under 2.1.3, and determines whether the State meets the requirements and purposes of Part B of the Act, and if not, the level of assistance and intervention the State requires to meet those requirements and purposes. The DOE will make the Secretary's determination publicly available by posting it on the DOE's website within a reasonable time after its federal submission.

2.2 DOE public reporting of LEA performance.

2.2.1 *LEA Obligations: Each LEA shall use the targets established in the State's performance plan, and the priority areas described in 1.4, to analyze and report on its performance to the DOE. The LEA's report shall be submitted in the manner and format required by the DOE.*

2.2.2 The DOE will report annually to the public on the performance of each LEA located in the State on the targets in the State's performance plan. If the DOE collects performance data through monitoring or sampling, the DOE will include in its report the most recently available performance data on each LEA, and the date the data were obtained.

2.3 Privacy: The DOE will not report to the public or the Secretary of the United States Department of Education any information on performance that would result in the disclosure of personally identifiable information about individual children, or where the available data are insufficient to yield statistically reliable information. The DOE's obligation under this subsection shall not be construed to create an individual cause of action for its violation.

(Authority: 20 U.S.C. 1416(b); 14 **Del.C.** §§122 and 3110)

3.0 DOE's Review and Determination Regarding LEA Performance

3.1 *The DOE will annually review the performance of LEAs on the targets in the State's performance plan. The DOE's review may include such other data, indicators and*

monitoring information as it determines appropriate to fully review an LEA's performance under, and compliance with, these regulations.

3.2 Determination: Based on its annual performance review, the DOE will determine if an LEA:

3.2.1 Meets the requirements and purposes of Part B of the Act and these regulations;

3.2.2 Needs assistance in implementing the requirements of Part B of the Act and these regulations;

3.2.3 Needs intervention in implementing the requirements of Part B of the Act and these regulations; or

3.2.4 Needs substantial intervention in implementing the requirements of Part B of the Act and these regulations.

3.3 Notice and opportunity for a hearing.

3.3.1 The DOE will provide reasonable notice and an opportunity for a hearing on any determination that an LEA needs intervention, or needs substantial intervention, in implementing the requirements of Part B of the Act and these regulations.

3.3.2 The hearing described in 3.3.1 will consist of an opportunity to meet with the Associate Secretary of the DOE's Curriculum and Instructional Improvement Branch, or with a designee of the Secretary, to demonstrate why the DOE should not make the determination described in 3.2.

(Authority: 20 U.S.C. 1416(d); 14 Del.C. §§122 and 3110)

4.0 Enforcement of Determination Findings

4.1 Needs assistance: If the DOE determines, for two consecutive years, that an LEA needs assistance in implementing the requirements of Part B of the Act and these regulations, the DOE shall take one or more of the following actions:

4.1.1 Advise the LEA of available sources of technical assistance that may help the LEA address the areas in which the LEA needs assistance, which may include assistance from the DOE, other State agencies, Federal agencies, technical assistance providers, and state and federal nonprofit agencies, and require the LEA to work with appropriate entities. Such technical assistance may include:

4.1.1.1 The provision of advice by experts to address the areas in which the LEA needs assistance, including explicit plans for addressing the area for concern within a specified period of time;

4.1.1.2 Assistance in identifying and implementing professional development, instructional strategies, and methods of instruction that are based on scientifically based research;

4.1.1.3 Designating and using distinguished superintendents, principals, special education administrators, special education teachers, and other teachers to provide advice, technical assistance, and support; and

4.1.1.4 Devising additional approaches to providing technical assistance, such as collaborating with institutions of higher education, educational service

agencies, national centers of technical assistance, and private providers of scientifically based technical assistance.

4.1.2 *Direct the use of LEA sub grants under Section 611(f) of the Act on the area or areas in which the LEA needs assistance.*

4.1.3 Identify the LEA as a high-risk grantee and impose special conditions on the LEA's sub grant under Part B of the Act.

4.2 Needs intervention: If the DOE determines, for three or more consecutive years, that an LEA needs intervention in implementing the requirements of Part B of the Act and these regulations, the following shall apply:

4.2.1 The DOE may take any of the actions described in 4.1.

4.2.2 The DOE shall take one or more of the following actions:

4.2.2.1 Require the LEA to prepare a corrective action plan or improvement plan if the DOE determines that the LEA should be able to correct the problem within one year.

4.2.2.2 *Require the LEA to enter into a compliance agreement with the DOE if the DOE has reason to believe that the LEA cannot correct the problem within one year. The compliance agreement shall be developed in accordance with the standards in the federal General Education Provisions Act, 20 U.S.C. § 1234f, to the extent practicable. Any hearing held as part of the development of a compliance agreement shall be conducted in accordance with Delaware Department of Education's "Hearing Procedures and Rules" as from time to time amended.*

4.2.2.3 *For each year of the determination, withhold not less than 20 percent and not more than 50 percent of the LEA's sub grant under section 611(f) of the Act, until the DOE determines the LEA has sufficiently addressed the areas in which the LEA needs intervention.*

4.2.2.4 *Seek to recover funds in any manner available under state or federal law. Prior to taking any action to recover funds, DOE will provide reasonable written notice of the proposed action and an opportunity for a hearing to the LEA involved. The hearing shall be conducted in accordance with Delaware Department of Education's "Hearing Procedures and Rules" as from time to time amended.*

4.2.2.5 Withhold, in whole or in part, any further payments to the LEA under Part B of the Act.

4.2.2.6 Refer the matter for any other appropriate enforcement action.

4.3 Needs substantial intervention: Notwithstanding any provision in 4.1 or 4.2 to the contrary, at any time that the DOE determines that an LEA needs substantial intervention in implementing the requirements of Part B of the Act, or that there is a substantial failure to comply with any condition of the LEA's eligibility under Part B of the Act, the DOE shall take one or more of the following actions:

4.3.1 *Seek to recover funds in any manner available under state or federal law. Prior to taking any action to recover funds, DOE will provide reasonable written notice of the proposed action and an opportunity for a hearing to the LEA involved. The hearing shall be conducted in accordance with Delaware Department of Education's "Hearing Procedures and Rules" as from time to time amended.*

4.3.2 Withhold, in whole or in part, any further payments to the LEA under Part B of the Act.

4.3.3 *Refer the case to any other appropriate state or federal agency.*

4.3.4 *Refer the matter for any other appropriate enforcement action.*

(Authority: 20 U.S.C. 1416(e)(1)-(e)(3), (e)(5); 14 **Del.C.** §§122 and 3110)

5.0 Withholding Funds

5.1 *Opportunity for hearing: Prior to withholding any funds under Part B of the Act, the DOE will provide reasonable written notice of the proposed withholding and an opportunity for a hearing to the LEA involved. The hearing shall be conducted in accordance with Delaware Department of Education's "Hearing Procedures and Rules" as from time to time amended.*

5.2 *Suspension: Pending the outcome of any hearing to withhold payments under 5.1 the DOE may suspend payments to the LEA, suspend the authority of the LEA to obligate funds under Part B of the Act, or both, after the LEA has been given reasonable notice and an opportunity to show cause why future payments or authority to obligate funds under Part B of the Act should not be suspended.*

5.3 *Nature of withholding: If the DOE determines that it is appropriate to withhold further payments to an LEA, the DOE may determine that:*

5.3.1 *That the withholding will be limited to programs or projects, or portions of programs or projects, that affected the DOE's determination in 3.2; or*

5.3.2 *That the LEA shall not make further payments under Part B of the Act to specified programs, providers or vendors that caused or were involved in the DOE's determination in 3.2.*

5.3.3 *Until the DOE is satisfied that the condition that caused the initial withholding has been substantially rectified, payments to the LEA under Part B of the Act may be withheld in whole or in part; and payments by the LEA under Part B of the Act shall be limited to programs, providers and vendors whose actions did not cause or were not involved in the DOE's determination in 3.2, as the case may be.*

(Authority: 20 U.S.C. 1416(e)(4), (e)(6); 14 **Del.C.** §3110)

6.0 Reserved

7.0 Reserved

8.0 State Enforcement through Maintenance of Effort

8.1 If the DOE determines that an LEA is not meeting the requirements of Part B of the Act or these regulations, including the targets in the State's performance plan, the LEA is prohibited from reducing the LEA's maintenance of effort under 14 **DE Admin. Code** 924.3.0 for any fiscal year.

8.2 Nothing in this subpart shall be construed to restrict the DOE from utilizing any other authority available to it to monitor and enforce the requirements of Part B of the Act and these regulations.

(Authority: 20 U.S.C. 1416(f); 20 U.S.C. 1412(a)(11); 14 **Del.C.** §3110)

9.0 Reserved

10.0 Confidentiality of Personally Identifiable Data, Information and Records

10.1 To ensure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by public agencies pursuant to Part B of the Act, the DOE, each LEA and any other public agency shall comply with applicable provisions of 14 **DE Admin. Code** 251 and 252 and with 11.0 through 26.0. (Authority: 20 U.S.C. 1417(c); 14 **Del.C.** §§3110 and 4111)

11.0 Definitions as used in 11.0 through 26.0.

“**Destruction**” means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

“**Education Records**” means the type of records covered under the definition of “education records” in 34 CFR part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g (FERPA)).

“**Participating Agency**” means any agency or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained, under Part B of the Act.

(Authority: 20 U.S.C. 1221e-3, 1412(a)(8), 1417(c); 14 **Del.C.** §§3110 and 4111)

12.0 DOE Confidentiality Notice to Parents

12.1 The DOE will notify parents about the confidentiality requirements of 14 **DE Admin. Code** 251 and 252, and with 11.0 through 26.0, through any method the DOE determines is adequate to fully inform parents, including posting the information on its website. Such notice shall include:

12.1.1 A description of the extent that the notice is given in the native languages of the various population groups in Delaware;

12.1.2 A description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the DOE intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;

12.1.3 A summary of the policies and procedures that participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; and

12.1.4 A description of all of the rights of parents and children regarding this information, including the rights under FERPA and implementing regulations in 34 CFR part 99.

12.2 Before any major identification, location, or evaluation activity, the notice required by 12.1 shall be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout Delaware of the activity.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c); 14 **Del.C.** §§3110 and 4111)

13.0 Rights to Access Educational Records

13.1 Each participating agency shall permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under these regulations. The agency shall comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to **DE Admin. Code** 926.7.0 or 926.30.0 through 926.32.0 or resolution session pursuant to **DE Admin. Code** 926.10.0, and in no case more than 45 days after the request has been made.

13.2 The right to inspect and review education records under this section includes:

13.2.1 The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

13.2.2 The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

13.2.3 The right to have a representative of the parent inspect and review the records.

13.3 An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State laws governing such matters as guardianship, separation, and divorce.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c); 14 **Del.C.** §§3110 and 4111)

14.0 Record of Access to Education Records

14.1 Each participating agency shall keep a record of parties obtaining access to education records collected, maintained, or used under Part B of the Act (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c); 14 **Del.C.** §§3110 and 4111)

15.0 Education Records on More Than One Child

15.1 If any education record includes information on more than one child, the parents of those children have the right to inspect and review only the information relating to their child or to be informed of that specific information.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c); 14 **Del.C.** §§3110 and 4111)

16.0 List of Types and Locations of Information

16.1 Each participating agency shall provide parents on request a list of the types and locations of education records collected, maintained, or used by the agency.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c); 14 **Del.C.** §§3110 and 4111)

17.0 Fees for Records

17.1 Each participating agency may charge a fee for copies of records that are made for parents under these regulations if the fee does not exceed the actual cost of the records, or effectively prevent the parents from exercising their right to inspect, review and copy the records.

17.2 A participating agency may not charge a fee to search for or to retrieve information under these regulations.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c); 14 **Del.C.** §§3130 and 4111)

18.0 Amendment of Education Records at Parent's Request

18.1 A parent who believes that information in the education records collected, maintained, or used under these regulations is inaccurate or misleading or violates the privacy or other rights of the child may request the participating agency that maintains the information to amend the information.

18.2 The agency shall decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

18.3 If the agency decides to refuse to amend the information in accordance with the request, it shall inform the parent of the refusal and advise the parent of the right to a hearing in 19.0.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c); 14 **Del.C.** §§3110 and 4111)

19.0 Opportunity for a Hearing Regarding Records

19.1 The agency shall, on request, provide an opportunity for a hearing to challenge information in education records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c); 14 **Del.C.** §§3130 and 4111)

20.0 Result of Hearing

20.1 If, as a result of a hearing in 19.0, the agency decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it shall amend the information accordingly and so inform the parent in writing.

20.2 If, as a result of the hearing, the agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, it shall inform the parent of the parent's right to place in the records the agency maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

20.3 Any explanation placed in the records of the child under this section shall be maintained by the agency as part of the records of the child as long as the record or contested portion is maintained by the agency; and if the records of the child or the contested portion is disclosed by the agency to any party, the explanation shall also be disclosed to the party.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c); 14 **Del.C.** §§3130 and 4111)

21.0 Hearing Procedures

21.1 A hearing held under 19.0 shall be conducted according to the procedures in federal regulations implementing FERPA at 34 CFR 99.22.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c); 14 **Del.C.** §§3110 and 4111)

22.0 Consent for Releasing Personally Identifiable Information

22.1 Parental consent shall be obtained before personally identifiable information is disclosed to parties (other than officials of participating agencies in accordance with 22.2, 22.3 and 22.4) unless the information is contained in education records, and the disclosure is authorized without parental consent under federal regulations implementing FERPA at 34 CFR part 99.

22.2 Except as provided in 22.3 and 22.4, parental consent is not required before personally identifiable information is released to officials of participating agencies for purposes of meeting a requirement of these regulations.

22.3 Parental consent, or the consent of an eligible child who has reached the age of 18, shall be obtained before personally identifiable information is released to officials of participating agencies providing or paying for transition services in accordance with **DE Admin. Code** 925.21.2.2.

22.4 If a child is enrolled, or is going to enroll in a private school that is not located in the LEA of the parent's residence, parental consent shall be obtained before any personally identifiable information about the child is released between officials in the LEA where the private school is located and officials in the LEA of the parent's residence.

22.5 *Parental Refusal to Release Records. In the event that a parent refuses to provide consent before personally identifiable information is disclosed in situations requiring consent, the parent shall be advised in writing either: (1) that the participating agency acknowledges that refusal and will not disclose the information or forward records; or (2) that the participating agency will exercise its option to request an impartial due process hearing in order to effect the release of records. In the event that the participating agency elects to seek a due process hearing, the participating agency shall also provide the parent a copy of the "Special Education: Parents' Guide to Rights and Services" and a Notice of Procedural Safeguards.*

(Authority: 20 U.S.C. 1412(a)(8); 1417(c); 14 **Del.C.** §§3110 and 4111)

23.0 Other Safeguards

23.1 Each participating agency shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

23.2 One official at each participating agency shall assume responsibility for ensuring the confidentiality of any personally identifiable information.

23.3 All persons collecting or using personally identifiable information shall receive training or instruction regarding 11.0 through 26.0, 14 **DE Admin. Code** 251 and 252, and the federal regulations implementing FERPA at 34 CFR part 99.

23.4 Each participating agency shall maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c); 14 **Del.C.** §§3110 and 4111)

24.0 Destruction of Information

24.1 The public agency shall inform parents when personally identifiable information collected, maintained, or used under these regulations is no longer needed to provide educational services to the child.

24.2 The information shall be destroyed at the request of the parents. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c); 14 **Del.C.** §§3110 and 4111)

25.0 Children's Privacy and Confidentiality Rights

25.1 Except as otherwise provided in 25.2, when a child with a disability reaches the age of 18, and no guardian has been appointed over the person of the child, all rights and entitlements accorded to parents under these regulations, including the rights of privacy and confidentiality, shall be deemed accorded directly to the child with a disability.

25.2 Under the federal regulations implementing FERPA at 34 CFR 99.3 and 99.5(a), the rights of parents regarding education records are also transferred to a child with a disability at age 18 or when the child is attending an institution of postsecondary education.

25.3 Notwithstanding 25.1 and 25.2, any public notice required under section 615 of the Act shall be provided to both the student and the parents.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c); 1 **Del.C.** §701; 14 **Del.C.** §§3110 and 4111)

26.0 Enforcement of Confidentiality Requirements.

26.1 The DOE may enforce the confidentiality requirements of 10.0 through 25.0, including the imposition of sanctions, through its general supervision and monitoring activities, including 1.0 through 8.0.

(Authority: 20 U.S.C. 1412(a)(8); 1417(c); 14 **Del.C.** §§3110 and 4111)

27.0 to 39.0 Reserved

40.0 Annual Report of Children Served Report Requirement and Protection of Personally Identifiable Data.

40.1 The DOE annually reports to the Secretary of the United States Department of Education on the information required by section 618 of the Act. The DOE will also publicly report the data required by the Secretary in a manner that does not result in disclosure of data identifiable to individual children.

(Authority: 20 U.S.C. 1418(a); 14 **Del.C.** §§3110 and 4110)

41.0 to 44.0 Reserved

45.0 Public Agency Duties Regarding Annual Report of Children Served

45.1 Comply with the DOE's procedures, instructions and forms in counting the number of children with disabilities receiving special education and related services;

45.2 Meet any established timeline or due date for reporting to the DOE under these regulations, including timelines necessary for the DOE's timely report to the United States Department of Education in accordance with 40.0;

45.3 Certify to the DOE that an unduplicated and accurate count has been made of its children with disabilities;

45.4 Aggregate the data from its count to the extent and in the manner directed by the DOE; and

45.5 Ensure that documentation is maintained that enables the LEA and the DOE to audit the accuracy of the count.

(Authority: 20 U.S.C. 1418(a); 14 **Del.C.** §3110)

46.0 Disproportionality

46.1 General: Each LEA and other public agency shall comply with the DOE's procedures, instructions and forms for the collection and examination of data to determine if significant disproportionality based on race and ethnicity is occurring in Delaware and the LEAs of the State with respect to:

46.1.1 The identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a particular impairment described in section 602(3) of the Act;

46.1.2 The placement in particular educational settings of these children; and

46.1.3 The incidence, duration, and type of disciplinary actions, including suspensions and expulsions.

46.1.4 Review and revision of policies, practices, and procedures: In the case of a determination of significant disproportionality with respect to the identification of children as children with disabilities, or the placement in particular educational settings of these children, in accordance with 46.1, the DOE shall:

46.1.4.1 Provide for the review and, if appropriate revision of the policies, procedures, and practices used in the identification or placement to ensure that the policies, procedures, and practices comply with the requirements of the Act.

46.1.4.2 Require any LEA identified in 46.1 to reserve the maximum amount of funds under section 613(f) of the Act to provide comprehensive coordinated early intervening services to serve children in the LEA, particularly, but not exclusively, children in those groups that were significantly over identified 46.1; and

46.1.4.3 Require the LEA to publicly report on the revision of policies, practices, and procedures described 46.1.4.1.

(Authority: 20 U.S.C. 1418(d); 14 **Del.C.** §3110)

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

928 Children with Disabilities Subpart G Use and Administration of Funds

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

1.0 Administration of Funds: DOE Audit

1.1 Administration of Funds: Funds for the education of children with disabilities shall be administered pursuant to Title 14 of the **Delaware Code**, these regulations and 14 **DE Admin. Code** 701.

1.2 Child Count procedures: Each public agency shall participate in the annual count of children served under the Act in accordance with procedures and forms developed by the DOE. Such procedures and forms shall conform to applicable state and federal requirements, regulations and written instructions.

1.3 Unit count audit and recovery of funds for misclassified children: DOE shall conduct a random file audit in each LEA as soon as possible after September 30.

1.3.1 The purpose of the audit is to ensure that students reported as part of a special education unit as of September 30 are eligible for special education services as part of that unit on or prior to September 30 and that such services are being provided. The audit may be joined with other monitoring activities in the discretion of the DOE.

1.3.2 The specific procedures used to authenticate the count of children with disabilities shall be as provided in the “Monitor’s Handbook for the September Audit and Site Monitoring.”

1.3.3 Nothing in this regulation limits DOE’s monitoring and general supervisory authority or its ability to identify children who have been misclassified at times other than the audit of State units as of September 30, including as part of other routine monitoring activities.

(Authority: 14 **Del.C.** §§122 and 3110)

2.0 Reserved

3.0 State Funding for Children with Disabilities

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

3.2 Paraprofessional Positions for Services to Children with Disabilities authorized under 14 **Del.C.** §1324.

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

3.2.2 All paraprofessionals shall work under the supervision of teachers.

3.2.3 The following positions are authorized:

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

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

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

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

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

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

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

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

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

3.3.1 A nurse shall be employed for eight (8) or more units of children with autism, orthopedic impairment, trainable mental disability, severe mental disability, or a combination thereof, and for hearing impairment as per statutory formula, i.e., 40:1. Such units shall be subtracted from the LEA’s total units so that they are not counted twice.

3.4 Other Positions for Services to Children with Disabilities

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

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

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

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

(Authority: 14 **Del.C.** §§122 and 3110)

4.0 Reserved

5.0 Federal Sub Grants to LEAs

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

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

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

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

5.5 Review of application: appeal of adverse determination

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

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

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

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

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

5.5.6 The DOE shall schedule and conduct a hearing on the record within 30 days of the Secretary's receipt of a hearing request from the LEA. *Except as otherwise specifically provided in this section, the hearing shall be conducted in accordance with Delaware Department of Education's "Hearing Procedures and Rules" as from time to time amended.*

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

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

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

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

6.0 to 17.0 Reserved

18.0 Facilities, Equipment and Materials

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

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

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

18.2.2 Appendix A of subpart 101-19.6 of title 41, Code of Federal Regulations (commonly known as the “Uniform Federal Accessibility Standards”).
(Authority: 20 U.S.C. 1404; 14 **Del.C.** §3110)

Subpart H Reserved

1.0 through 18.0 Reserved

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

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

929 Children with Disabilities Subpart I Special Programs and Unique Educational Alternatives

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

1.0 Special Programs for Children who are Deaf-Blind

1.1 *The Margaret S. Sterck School, Delaware School for the Deaf, located in the Christina School District, shall have administrative responsibility for providing services to the deaf-blind program.*

2.0 Special Programs for Children with Autism.

2.1 *The following definitions shall apply to this section:*

“Accepted Clinical Practice” means any behavior management procedure or treatment, the effectiveness of which has received clear empirical support as documented by publication in peer reviewed journals or similar professional literature.

“Behavior Management Procedure” means any procedure used to modify the rate or form of a target behavior.

“Behavior Management Target” means any child's behavior that either causes or is likely to cause (a) injury to the child (e.g., self abuse), (b) injury to another person (e.g., aggression), (c) damage to property, (d) a significant reduction in the child's actual or anticipated rate of learning (e.g., self stimulation, noncompliance, etc.) or (e) a significant reduction in the societal acceptability of a child (e.g., public masturbation, public disrobing, etc.).

“Emergency Intervention Procedure” means any procedure used to modify episodic dangerous behavior (e.g., self injurious behaviors, physical aggression property destruction) identified in a behavioral intervention plan.

“Ethical Use” means the application of a procedure in a manner that is consistent with current community values and protects all of a child's rights.

“Informed Consent” means knowing and voluntary consent by the parent(s), based upon a thorough explanation by the program staff member supervising the individualized Behavior Management procedure, of the nature of the procedure, the possible alternative procedures, the expected behavior outcomes, the possible side effects (positive and negative), the risks and discomforts that may be involved, and the right to revoke the Procedure at any time.

“Least Restrictive Procedure” means that behavior management procedure which is the least intrusive into, and least disruptive of, the child's life, and that

represents the least departure from normal patterns of living that can be effective in meeting the child's educational needs.

“School” means any public school or program (special education or otherwise), which has enrolled a child who is primarily eligible for special education related services under the autism classification.

2.2 The Statewide Monitoring Review Board (SMRB) shall be generally administered by the Director for State Services for Children with Autism and the DOE’s Director of the Exceptional Children and Early Childhood Education Group.

2.2.1 The purpose of the SMRB is to define research based best educational practices for students with autism served in approved programs in Delaware. This includes reviewing and making recommendations to the Secretary regarding the special education and related services for children with autism in approved programs, including programs for students with autism whose placement in private facilities has been authorized by DOE.

2.2.2 The SMRB shall consist of the following members:

2.2.2.1 Director for State Services for Children with Autism.

2.2.2.2 Director of the Exceptional Children and Early Childhood Education Group, or the Director’s designee.

2.2.2.3 One administrator from each LEA with an approved program for students with autism, or their designee. The administrator or designee must have experience in, and responsibility for, the program for students with autism.

2.2.2.4 One non administrative experienced professional from each approved program for students with autism. These individuals are nominated by the administrator responsible for the approved program and are subject to the approval of the Director for State Services for Children with Autism.

2.2.2.5 Two nonvoting public representatives nominated annually by the Statewide Parent Advisory Committee. These individuals must not have a child currently served in an approved program.

2.2.3 The SMRB shall operate under the following procedures:

2.2.3.1 The Director of State Services for Children with Autism shall serve as the Chairperson of the Board.

2.2.3.2 A majority of the voting members of the board shall constitute a quorum.

2.2.3.3 Decisions of the Board shall be determined by a majority vote of the quorum.

2.2.3.4 The chairperson shall set mutually agreeable times and places for meetings, which shall be scheduled at least five times per year, contingent upon agenda items.

2.2.3.5 The SMRB shall discharge its responsibilities in accordance with the Act and these regulations.

2.2.3.6 The SMRB shall function in an advisory capacity and the procedural safeguards guaranteed to students with autism, their parents (as defined under the Act), and LEAs or other public agencies, shall not be diminished by the activities of the SMRB.

2.2.4 The SMRB has the following responsibilities:

2.2.4.1 To determine which educational methods and curricula are consistent with research based best practices for students with autism. This includes reviewing and making recommendations regarding proposed new practices.

2.2.4.1.1 Requests for review of practices may be submitted to the SMRB by SMRB members, the Secretary, the State Parent Advisory Committee, superintendents or chief administrators of LEAs.

2.2.4.1.2 If the party making the request for review disagrees with the recommendation of the SMRB regarding best educational practices, they may request the Secretary appoint an independent expert to review the practice. The procedural safeguards guaranteed to students with autism, their parents (as defined under the Act) and LEAs or other public agencies, shall not be diminished by any recommendations of an independent expert appointed by the Secretary.

2.2.4.2 To review, at least annually, educational programming and aggregated performance data for students with autism in approved programs in Delaware.

2.2.4.3 To make recommendations based on this review regarding appropriate strategies, supports, services, and professional development necessary to ensure the implementation of research based best educational practices with respect to the evaluation and educational programming for students with autism.

2.2.4.4 To assist LEAs with approved programs in developing and implementing plans to address the recommendations of the SMRB.

2.2.4.5 To submit an Annual Report by September 1 of each year to the Secretary, the State Board of Education, and the Governor's Advisory Council for Exceptional Citizens.

2.3 A Parent Advisory Committee (PAC) shall be established by each local education agency operating a center for the Delaware Autism Program.

2.3.1 The function of the PAC shall be to advise the LEA on matters pertaining to the local center. A PAC formed under this section may combine its activities and meetings with other local parent organizations or committees serving children with disabilities.

2.3.2 Each PAC shall meet no less than four times each year and shall be representative of the age groups of children with autism served by the local center.

2.3.3 When an LEA operates a residential program, at least one member of the PAC shall be a parent of a child with autism served in the residential program associated with that center.

2.4 A Statewide Parent Advisory Committee (SPAC) shall be established whose membership shall consist of one representative elected annually from each local education agency PAC.

2.4.1 The SPAC shall meet no less than four times each year with the Director of DAP advising on matters pertaining to the program.

2.4.2 The establishment and revision of bylaws for the SPAC shall be by majority vote of all of its eligible members.

2.4.3 A current statewide membership list shall be provided to all parents.

2.4.4 Reimbursement for travel expenses shall be available to members of the SPAC.

2.5 A Peer Review Committee (PRC) shall be established by the Director of the Delaware Autism Program (DAP) and DOE in consultation with the Statewide Monitoring Review Board (SMRB).

2.5.1 Purpose: The purpose of the PRC shall be to review, in light of accepted clinical practice, the professional and clinical issues involved in the use of behavior management procedures to ensure their appropriate use by the staff of an LEA serving children with autism.

2.5.2 Composition: The PRC shall consist of three to five members who shall be competent, knowledgeable professionals with at least three years of post doctoral experience in the theory and ethical application of behavior management procedures. Membership shall be external to the Delaware Autism Program, DOE, any Delaware LEA, and any other State agency or department, excluding State institutions of higher education. Members shall not belong to any in-State committee, council, board or program that deals directly with children with autism.

2.5.3 Operation: The PRC shall elect a chairperson and shall adopt a set of rules to guide its operation. A copy of these rules shall be provided to the DOE and the Director of the DAP.

2.5.4 Peer Review Committee (PRC) Responsibilities:

2.5.4.1 The PRC shall meet at least every three months to review those behavior management procedures requiring after the fact examination.

2.5.4.1.1 A quorum shall consist of a majority of the Committee.

2.5.4.1.2 The PRC chairperson shall announce the dates of review at least one month prior to the review date.

2.5.4.1.3 The PRC shall meet at least 6 times per year to review procedures requiring prior, case by case review that have been granted interim or on going approval. The monthly review shall continue until said procedure has been discontinued or the PRC votes otherwise. This review may be held jointly with HRC.

2.5.4.1.4 The PRC chairperson shall invite staff members of DAP responsible for implementation of behavior management procedures, the Director of DAP, or any other individual (e.g., a consultant to ensure expertise in a specific behavior management procedure under review) to participate as needed in a non voting capacity.

2.5.4.1.5 The PRC shall provide technical assistance when requested by the Program Director to develop a behavior management procedure for children with disabilities engaged in behaviors that pose a significant health risk to the child or others, a significant risk of damage to property, or a significant reduction of learning.

2.5.4.1.6 The PRC shall review and evaluate the training and supervision for the staff that will carry out all behavior management procedures requiring prior, individual review and may evaluate the training of staff carrying out procedures requiring after the fact review.

2.5.4.1.6.1 *The PRC shall provide the Program Director with written comments and recommendations concerning the findings of this review.*

2.5.4.1.7 *The PRC shall keep written minutes of all its meetings and shall submit them to the Director of DAP, the Department of Education and the HRC chairperson.*

2.5.4.1.7.1 *These minutes shall be submitted within two weeks of each meeting.*

2.5.4.1.7.2 *An oral summary of the PRC recommendations shall be made within 24 hours following the PRC meeting to the Director of DAP and the HRC chairperson.*

2.6 *A Human Rights Committee (HRC) shall be established by the Director of the DAP and DOE in consultation with the Statewide Autistic Program Monitoring Review Board.*

2.6.1 *Purpose: The purpose of the HRC shall be to review the ethical and children rights issues involved in the use of behavior management procedures to ensure their humane and proper application.*

2.6.2 *Composition: The HRC shall consist of five to ten members representing various occupations, who are not employees or relatives of children enrolled in the DAP, who are not employees of DOE, and who are not members of any in State organization, agency, or program that deals directly with children with autism. No member of the HRC shall be a member of the PRC.*

2.6.3 *Operation: The HRC shall elect a chairperson and shall adopt a set of rules to guide its operation. A copy of these rules shall be provided to DOE and the Director of the DAP.*

2.6.4 Human Rights Committee Responsibilities

2.6.4.1 *Whenever a school proposes to use a behavior management procedure requiring review prior to implementation, the HRC shall meet and review the proposed use of the behavior management procedure. This review shall occur within 7 days after the PRC chairperson informs the HRC chairperson of PRC's recommendations.*

2.6.4.1.1 *A quorum shall consist of a majority of the Committee.*

2.6.4.1.2 *This review, however, may be held jointly with the PRC.*

2.6.4.2 *The HRC chairperson shall invite staff members who are responsible for the implementation of behavior management procedures, the Director of DAP, or any other individual (e.g., consultant, parent) to participate as needed in a non voting capacity.*

2.6.4.3 *The HRC shall develop a written form to be used to ensure that informed parental consent is obtained before implementation of specified behavior management procedures.*

2.6.4.4 *The HRC shall keep written minutes of all its meetings and shall submit them to the Director of DAP, the Director of DOE's Exceptional Children and Early Childhood Group, and the PRC chairperson.*

2.6.4.4.1 *These minutes shall be submitted within two weeks of each meeting.*

2.6.4.4.2 *An oral summary of the HRC recommendations shall be made within 24 hours following the HRC meeting to the Director of DAP and the PRC chairperson.*

2.7 *Joint responsibilities of the Peer Review and Human Rights Committees are as follows:*

2.7.1 *Issue a written statement indicating which behavior management procedure(s) shall be recommended for use:*

2.7.1.1 *Without further PRC and HRC review during the year approved;*

2.7.1.2 *Without a case by case PRC and HRC review but with after the fact review time lines to be established by the PRC; or*

2.7.1.3 *Only with prior case by case PRC and HRC before the fact review;*

2.7.2 *Recommend written modifications, if necessary, of behavior management procedures along with accompanying rationale;*

2.7.3 *Review a school's proposed Emergency Intervention Procedures for children with autism and issue a written statement indicating which Emergency Intervention Procedures shall be recommended:*

2.7.3.1 *For use without after the fact reporting to the PRC and HRC;*
or

2.7.3.2 *For use with after the fact reporting to the PRC and HRC;*

2.7.4 *Issue an advisory, not mandatory, statement presenting a recommended hierarchy of reviewed behavior management procedures according to the Least Restrictive Procedure principle.*

2.7.4.1 *Notice shall be given to parents of children with autism in the program of the availability upon request, and at no cost to parents, of copies of the reviewed behavior management procedures.*

2.7.4.2 *A copy shall also be forwarded to the Governor's Advisory Council for Exceptional Citizens.*

2.7.5 *The PRC chairperson, in cooperation with the HRC chairperson, shall announce the joint PRC and HRC annual review at least one month prior to the review date.*

2.7.5.1 *At the discretion of either chairperson, Committees may meet jointly or separately to conduct before the fact and after the fact reviews.*

2.7.6 *Approve, before the fact, the housing of children under age twelve with a child over age sixteen in a community based residential program for children with autism operated by a school district designated and approved by the Secretary as the administering agency for the DAP.*

2.7.7 *Review, within 30 days of the granting of interim approval, any request by a school for the immediate implementation of a behavior management procedure requiring prior, case by case review.*

2.7.7.1 Immediate implementation of a proposed procedure may occur after the Program Director has obtained unanimous interim approval from one PRC member and two HRC members.

2.7.7.2 Proposed prior review procedures not requiring immediate implementation shall be submitted by a school directly to PRC and HRC chairperson to be reviewed within two weeks of submission of the proposal.

2.7.8 Have access to the educational records of any child with autism for purposes of 2.5.1 and 2.6.1 of this section.

2.7.8.1 A quorum of a joint meeting shall consist of a majority of combined membership.

2.7.9 Submit written Procedural Descriptions for Behavior Management and Emergency Interventions.

2.7.9.1 Prior to utilizing a behavior management procedure or an emergency intervention procedure for a particular child with autism, a school shall submit written procedural descriptions for at least annual joint review by the PRC and HRC.

2.7.9.1.1 The annual date of review shall be announced by the HRC chairperson at least one month prior to the review date.

2.7.9.1.2 The school shall submit written procedural descriptions at least two weeks prior to the joint annual review date to the PRC and HRC chairpersons.

2.7.9.1.3 The written descriptions shall contain information determined by PRC and HRC and set forth in their operating rules.

2.7.9.1.4 PRC and HRC may request pertinent information needed for the completion of reviews.

2.7.9.2 After reviewing each behavior management and emergency procedure, the PRC and HRC shall indicate what kind of review each procedure requires (annual, after the fact, or prior case by case review). A school serving children with autism shall then submit proposals in accordance with PRC and HRC recommendations.

2.7.9.3 Behavior management and emergency intervention procedures that require annual review only may then be implemented by a school without further PRC/HRC review until the next annual joint review. A school shall require that the use of these procedures be indicated in a child's IEP.

2.7.9.4 Behavior management and emergency intervention procedures that require after-the-fact review only shall be used by a school without case by case review, but shall be reported after the fact to the PRC by dates specified by the Committee chairperson.

2.7.9.4.1 The school shall submit written records as set forth in PRC and HRC operating rules, or any other relevant information requested by either Committee, to the PRC chairperson at least one week prior to the review date.

2.7.9.4.2 Behavior management procedures that require prior case by case review shall be submitted to the PRC and HRC for joint review prior to implementation.

2.7.9.5 If the PRC and HRC decide not to review the case jointly, the PRC shall first review the proposal.

2.7.9.5.1 The proposal shall contain information determined by PRC and HRC and set forth in their operating rules.

2.7.9.5.2 Recommendations and rationale for the decision shall be provided whenever the PRC fails to recommend use of a proposed procedure.

2.7.9.6 Following the PRC recommendation (or following joint PRC and HRC approval), written informed parental consent shall be obtained by the school.

2.7.9.6.1 If an interim consent is obtained by telephone, then two witnesses to the content of the conversation shall sign a form certifying that the parent(s) gave informed consent. The school must then obtain written verification of this consent from the parent(s).

2.7.9.6.2 Parents may withdraw consent at any time; if said withdrawal is done verbally in person or by telephone, the parent shall provide written verification of withdrawal within 10 days of the initial notice.

2.7.9.7 Whenever the PRC and HRC choose not to meet jointly, the information provided by a school shall be submitted to the HRC along with the PRC's recommendations.

2.7.9.7.1 Recommendations and rationale for the decision shall be provided whenever the HRC fails to recommend the use of a proposed procedure.

2.7.9.7.2 Whenever a proposal is recommended for implementation, an IEP objective shall be developed relating to the behavior management target and the proposed procedure.

2.7.9.8 Whenever the PRC or HRC fail to recommend or modify the proposed procedure, the parent(s) shall be notified by the school.

2.7.9.8.1 If the procedure is to be modified, informed written consent shall be obtained from the parents.

2.7.9.9 The school staff responsible for implementing the behavior management procedure shall provide written reports to the PRC and HRC, summarizing the records (which shall be kept on a daily basis) on the use and results obtained by implementing the procedure.

2.7.9.9.1 Records shall be kept in an objective, quantitative form, permitting easy evaluation of child data.

2.7.9.9.2 The PRC and HRC shall have unrestricted access to all data, records, and reports relating to the behavior management procedures used.

2.7.9.10 Any behavior management or emergency intervention procedure that is developed by a school after the joint annual review date for a particular school year shall be submitted to the PRC and HRC chairpersons for joint review prior to any implementation of the new procedure, unless interim approval has been recommended as described in 2.7.7.

2.8 Private facilities serving autistic children shall have Peer Review and Human Rights Committee policies as follows:

2.8.1 Private facilities serving children with autism located in Delaware shall have Peer Review Committee and Human Rights Committee policies that comply with DELACARE standards (requirements for Residential Child Care Facilities, Department of Services for Children, Youth and Their Families (DSCYF)).

2.8.2 Private facilities serving Delaware children with autism located in other states shall comply with the Peer Review Committee and Human Rights Committee policies used by the state in which the facility is located.

2.8.2.1 Said policies shall be reviewed by Delaware's DOE to determine that they grant protection substantially equivalent to that provided by Delaware for children prior to any recommendation of approval for private placement by the Secretary.

2.8.3 Private facilities serving Delaware children with autism located in states which have no Peer Review Committee and Human Rights Committee policies shall have written Peer Review and Human Rights Committee policies that shall be reviewed by Delaware's DOE in consultation with Delaware's PRC, to determine that they grant protection substantially equivalent to that provided by Delaware for children, prior to any recommendation of approval for private placement by the Secretary.

2.8.4 Private facilities serving Delaware children with autism located in states which require substituted judgment or other court order for the use of aversive or related restrictive procedures, and which have obtained such an order for each Delaware child, shall be deemed to have met the peer review and human rights requirements of this section.

2.9 Whenever psychotropic medication has been prescribed by a physician and appears to affect adversely the educational program of a child with autism, the administrator of the center shall contact the parent and request a medication review with the parent and physician.

2.10 Appropriate liaison with the Department of Health and Social Services (DHSS) and other agencies shall be established by the Director of DAP and the DOE.

3.0 Students in Need of Unique Educational Alternatives

3.1 Unique Educational Alternative support shall be available for those children with disabilities who have needs that cannot be addressed through the existing resources and programs of the State. Unique Educational Alternatives include, but are not limited to, private residential placements and private day programs.

3.1.1 The Secretary shall approve children for Unique Educational Alternative support and the type of Unique Educational Alternative Support to be provided when such support is necessary to provide special education and related services to a child with a disability.

3.1.2 If the Unique Educational Alternative is a private residential or private day placement, the Secretary shall approve the designation of each child with a disability eligible for private placement and the private school or facility in which the approved child is to be enrolled.

3.1.3 Such approval of unique educational alternatives shall be for no more than a one year period, ending no later than August 31 of the year in which the child is to be enrolled.

3.2 The DOE shall convene the Interagency Collaborative Team (ICT) to review the expenditures for placements of children with disabilities in need of Unique Educational Alternatives.

3.2.1 ICT membership shall consist of:

- 3.2.1.1 Division Director, Division of Child Mental Health Services, DSCYF;
- 3.2.1.2 Division Director, Division of Family Services of DSCYF;
- 3.2.1.3 Division Director, Division of Youth Rehabilitation Services of DSCYF;
- 3.2.1.4 Division Director, Division of Developmental Disabilities Services of DHSS;
- 3.2.1.5 Division Director, Division of Alcoholism, Drug Abuse and Mental Health of DHSS;
- 3.2.1.6 Director of the Office of Management and Budget, or a designee;
- 3.2.1.7 Controller General or a designee;
- 3.2.1.8 Director, Exceptional Children and Early Childhood Education Group, DOE, who will serve as Chair;
- 3.2.1.9 Associate Secretary, Curriculum and Instructional Improvement Branch, DOE.

3.2.2 A Director shall be assigned to the ICT and may designate staff to be their representative on the ICT only if these designated representatives are empowered to act on behalf of the Division Director, including commitment of Division resources, for a full fiscal year.

3.2.3 The ICT shall invite to its meetings: a representative of a responsible LEA for the case under consideration, the parents of the child, and other persons the team believes can contribute to their deliberations.

3.2.4 The ICT shall:

- 3.2.4.1 Review existing assessments of new referrals;
- 3.2.4.2 Prescribe, if required, additional assessments for new referrals;
- 3.2.4.3 Review proposed treatment plans of new referrals;
- 3.2.4.4 Recommend alternatives for treatment plans of new referrals;
- 3.2.4.5 Coordinate interagency delivery of services;
- 3.2.4.6 Review at least annually, current Unique Educational Alternatives for the appropriateness of treatment plans and transition planning;
- 3.2.4.7 If appropriate, designate a Primary Case Manager for the purpose of coordination of service agencies;
- 3.2.4.8 If appropriate, designate agencies to be involved in collaborative monitoring of individual cases.

3.2.5 The ICT shall ensure that state costs incurred as the result of a Team recommendation or assessment of a child currently funded from the Unique Educational Alternatives appropriation for this purpose in the annual Appropriations Act will be covered from the existing appropriation.

3.2.5.1 New referrals will be assessed in the interagency manner described above.

3.2.5.2 Cases reviewed by the ICT will employ Unique Educational Alternatives funding to cover state costs to the extent determined appropriate by the Interagency Collaborative Team.

3.2.5.3 Other agencies may recognize a portion of the responsibility for the treatment of these children if determined appropriate by the Team. Funds may be transferred upon the approval of the Budget Director and the Controller General.

3.2.6 The ICT shall report on its activities to the Governor, Director of the Office of Management and Budget, President Pro Tempore, Speaker of the House and the Controller General by February 15 of each year. The report shall address the status of items addressed in the previous February ICT Annual Report.

3.3 Interagency Collaborative Team Review Criteria

3.3.1 The ICT shall recommend to the Secretary action on referrals for approval of Unique Educational Alternatives based on the following criteria:

3.3.1.1 An LEA or other public agency support program is either not available or is not adequate.

3.3.1.2 The LEA certifies that it cannot meet the needs of the child with existing resources and program.

3.4 Procedures for LEAs Seeking to Place Students in Unique Educational Alternative Settings

3.4.1 The responsible LEA for a child seeking Unique Educational Alternative support shall be the child's school district of residence. The district of residence is responsible for inviting the parent, and, if appropriate, the child with a disability, to the ICT meeting.

3.4.2 The chairperson of the ICT shall be contacted by the district of residence special education supervisor or designee as soon as the district has reason to believe Unique Educational Alternative support may be needed.

3.4.3 The IEP team that includes district of residence level representation shall meet and determine if the child's need for special education and related services can be met within the existing resources and programs available to the district.

3.4.3.1 Representatives of all agencies involved with the child shall be invited to attend this meeting.

3.4.4 The district of residence shall submit an application to the Chair of the ICT at least 5 business days before the meeting if it is determined that the child's needs for special education and related services as delineated on the child's IEP cannot be met through existing resources and programs.

3.4.5 The application will include:

3.4.5.1 Current and other relevant assessment information;

3.4.5.2 A historical summary of all placements and major interventions and support services that have been provided to the student;

3.4.5.3 A current IEP;

3.4.5.4 A concise statement of the needs that cannot be addressed through existing resources or programs;

3.4.5.5 A list of all agencies and resources that are currently supporting the child and the family; and

3.4.5.6 An Interagency Release of Information Form.

3.5 Procedures for the ICT

3.5.1 Review the application at its next monthly meeting.

3.5.2 Parents and representatives of all involved agencies shall be invited to participate in the meeting.

3.5.3 Recommendations of the ICT shall be shared in writing with the LEA, parents and other agency staff involved with the case within 5 business days. The ICT may:

3.5.3.1 Request additional information before making a final recommendation. This may include the involvement of additional agencies, additional assessments and review of additional programs and resources that the local team had not considered;

3.5.3.2 Request for additional information shall be sent to the LEA, parents, and other agency staff involved in the case within 5 business days of the meeting and as soon as the additional information is available, the case shall be brought back to the ICT for further review.

3.5.3.3 Recommend approval and agree that the child has needs that cannot be addressed through existing programs and resources. The local team may then develop the specifics of the Unique Educational Alternative support; or

3.5.3.4 Recommend rejection and ask the local team to use existing programs and resources to meet the educational needs of the children.

3.5.4 Final recommendations of the ICT shall be shared in writing with the LEA, parents and other agency staff involved in the case within 5 business days.

3.5.4.1 If the recommendation is for approval, the local team shall develop the specifics, including costs, of the Unique Educational Alternative.

3.5.4.2 The final plan, with costs, shall be submitted to the Chair of the ICT.

3.5.4.3 The Chair shall submit the recommendations for approval to the Secretary.

3.5.4.4 A recommendation for rejection shall be submitted by the Chair of the ICT to the Secretary for final action.

3.5.4.5 The parent, LEA superintendent or chief administrator, the special education supervisor, and the director of any other involved agency shall be notified in writing by the Secretary, following the action.

3.6 Financial Aid for Unique Educational Alternatives

3.6.1 Financial aid for children with disabilities approved for Unique Educational Alternative support by the Secretary, other than private residential or day schools, shall include only those costs that are not covered by an existing funding line.

3.6.1.1 The DOE shall pay 70% of the Unique Educational costs and the LEA will pay 30% of the costs unless waivers for the LEA are recommended by the ICT.

3.6.2 Financial aid for children with disabilities approved for private placement by the DOE shall include maintenance, transportation and tuition.

3.6.2.1 The DOE shall pay 70% of the private placement costs and the LEA shall pay 30% of the private placement costs.

3.6.2.2 The amount authorized for payment shall be the amounts charged by the private school or facility for tuition or program costs, transportation and maintenance, in accordance with the definitions in the Delaware Code.

3.7 Independent placements by LEA or public agency: An LEA or other public agency may independently place a child with a disability in a private or public school or facility and provide the tuition from appropriate LEA or other public agency funds without DOE approval.

3.7.1 Any private or public out of state facility in which an LEA or other public agency uses local funds to independently place a child with a disability must, nonetheless, be approved under any applicable standards of the state in which the facility is located.

3.8 LEA and public agency responsibility for private placements: When an LEA or other public agency responsible for the education of children with disabilities is unable to provide an appropriate program, the LEA or other public agency may refer the student for consideration of a unique educational alternative, including a private placement.

3.8.1 LEA Certification and Documentation

3.8.1.1 The LEA certification that the child is eligible for private placement and the statement pertaining to the lack of an appropriate program shall be forwarded on the designated forms to the DOE for review by the ICT prior to action by the Secretary.

3.8.1.2 Documentation shall accompany each application describing the nature and severity of the child's disabling condition(s).

3.8.1.3 Such documentation shall include report(s) of the appropriate specialist(s), depending upon the nature of the child's disability.

3.8.1.4 Additional documentation will be requested, if needed, in order to make a recommendation as to the child's eligibility for private placement or the appropriateness of the requested placement.

3.9 Responsibility for Individualized Education Program

3.9.1 The LEA or any other public agency shall develop the initial Individualized Education Program for each child with a disability referred for approval for placement that is in a private school or facility.

3.9.2 The LEA or other public agency shall ensure that a representative of the private school or facility attends the meeting. If a representative of the private school cannot attend the meeting, the LEA or other public agency shall use other methods to ensure participation by the private school or facility, including individual or conference telephone calls.

3.9.3 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 LEA or any other public agency.

3.9.4 If the private school or facility initiates and conducts these meetings, the LEA or any other public agency shall ensure that the parents and an LEA or other public agency representative are involved in any decision about the child's IEP and agree to any proposed changes in the program before those changes are implemented.

3.9.5 District of residence: The referring LEA for a child in private placement is the child's district of residence.

3.9.6 Responsibility for compliance: Primary responsibility for compliance with State and federal regulations shall remain with the LEA or other public agency responsible for the education of the child, even if a private school or facility implements a child's IEP.

3.10 State responsibility for private school accountability: In implementing State and federal regulations governing accountability for and to private programs, the DOE shall have the authority to:

3.10.1 Monitor compliance through procedures such as written reports, onsite visits and parent questionnaires.

3.10.2 Develop regulations that define the standards by which private schools and facilities may be approved to serve children with disabilities, and a schedule for reevaluation.

3.10.3 Disseminate copies of applicable standards to each private program to which a public agency has referred or placed a child with disability.

3.10.4 Provide an opportunity for those private schools or facilities to participate in the development and revision of State standards which apply to them.

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