

**ADMINISTRATIVE RULES COMMITTEE****Tuesday, September 1, 2009****Roughrider Room, State Capitol****Bismarck, ND****Robert Rutten, Director of Special Education****ND Department of Public Instruction**

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The new rule adopted by the Department of Public Instruction to article 67-23 of the North Dakota Administrative Code allows schools two exceptions to the requirement that all initial evaluations for determining eligibility for special education services must be completed within 60 days of the request for evaluation. One exception allows for extreme weather conditions; the other allows for those situations where evaluators are not available to conduct an evaluation within the 60 day period.

**1. Whether the rules resulted from statutory changes made by the Legislative Assembly:**

The rule did not result from statutory changes made by the Legislative Assembly, but came about because the Department recognized a need to address two situations in North Dakota that caused school districts to fail to comply with the requirement that initial evaluations be conducted within 60-days.

**2. Whether the rules are related to any federal statute or regulation.**

The rule relates to 34 CFR 300.301 which requires that initial evaluations for special education be conducted within 60 days of the request for evaluation and allows states the ability to adopt exceptions to this rule that relate to particular State circumstances.

3. **A description of the rule making procedures followed in adopting the rules, e.g. the type of public notice given and the extent of public hearing held on the rules.**

Notice was published on December 17 – 23, 2008 in each of the county newspapers in the state. It was also mailed to the superintendant of each school, or where there is no superintendent to the president of the school board. It was mailed to each statewide education entity.

4. **Whether any person has presented a written or oral concern, objection, or complaint for agency consideration with regard to the rule. If so, describe the concern, objection, or complaint, and the response of the agency, including any change made to the rules to address the concern, objection, or complaint. Please summarize the comment of any persons who offered comments at the public hearing on this rule.**

The Department's consideration of the comments on the proposed rule is attached.

5. **The approximate cost of giving public notice and holding any hearing on the rules and the approximate cost (not including staff time) of developing and adopting the rules.**

The cost for publication of the notice was \$1,989.91. The hearing was brief and the adoption of the final rule did not require much time or materials.

6. **An explanation of the subject matter of the rule and the reasons for adopting the rule.**

The rule will allow schools and parents additional time to complete an initial evaluation when a child is suspected of having a disability if legitimate exceptions to the standard evaluation timelines exist. The rule was adopted because extreme weather conditions and a lack of availability

of evaluators have resulted in schools and parents being unable to complete some evaluations in the required 60 days.

7. **Whether a regulatory analysis was required by N.D.C.C. § 28-32-08 and whether that regulatory analysis was issued.**

No regulatory analysis was required by N.D.C.C. § 28-32-08.

8. **Whether a regulatory analysis or economic impact statement of impact on small entities was required by N.D.C.C. § 28-32-08.1 and whether that regulatory analysis or impact statement was issued.**

The Department prepared a regulatory analysis and economic impact statement for small entities.

9. **Whether a constitutional takings assessment was prepared as required by N.D.C.C. § 28-32-09.**

No constitutional takings assessment was required.

10. **If this rule was adopted as an emergency (interim final) rule under N.D.C.C. § 28-32-03, provide the statutory grounds from that section for declaring the rule to be an emergency and the facts that support the declaration and provide a copy of the Governor's approval of the emergency status of the rule.**

The rule was not adopted as an emergency rule.

**- Agency Consideration of  
Oral and Written Comments  
To Proposed  
New Section to N.D. Administrative Code Article 67-23**

**Public Comment:** Several commenters noted that the exceptions in the proposed rule were appropriate but additional exceptions were necessary. They requested substitution of “emergency situation” for “extreme weather.” One commenter suggested a “reasonable and prudent person” rule. They requested additional exceptions for emergency situations including death, accident, water main breaks, complicated pregnancies, major illnesses, car accidents, and access by parents to advocates. The comments included recognition that what constituted an “emergency” was difficult to define and therefore should be very broad to allow for all circumstances and a suggestion that a list of exceptions be developed and included in the rule. A commenter suggested that “extreme weather” be changed to “circumstances beyond the control of either the parent or school district involved.” A solution offered was an “excusal” process similar to that used when the IEP is developed that allowed the parties to agree that certain individuals need not be present for the evaluation.

**Agency Comment:** DPI considered additional exceptions when preparing the proposed rule and reviewed possibilities including agreement between the school and the parents with the state office of special education. We determined not to adopt these exceptions for several reasons. The federal Office of Special Education Program’s (OSEP) 100% compliance standard demonstrates the law’s focus is that schools place a high priority on completing evaluations quickly so students can begin receiving the services they need as quickly as possible.

OSEP’s discussion of the time for exceptions and exceptions to 34 CFR §300.301 state that “the Act gives States the authority to establish different timeframes and imposes no restriction on State exercise of that authority.” 71 Fed. Reg. 46637 (August 14, 2006)(Comment to 34 CFR §300.301(c)). OSEP’s discussion goes on to state its belief that “this is evidence of an intent to permit States to make reasoned determination of the appropriate period of time in which evaluations should be conducted base on particular State circumstances.” Id. (Emphasis supplied.) The list of exceptions provided are not based upon particular state circumstances however, but could occur in any state. The exceptions in the draft rule on the other hand are particular to North Dakota. Moreover creating an exception for a broad category of situations will place the Department in a fact finding role requiring it to determine if the particular circumstances constitute an emergency or if the parties could or should have taken other steps to initiate the process earlier or to address the “emergency” in another manner. The proposed broad category of exceptions also places the Department in the situation where it might have to second guess schools or defend their decisions. It also raises the specter of who decides what is an emergency – if the parent states it is an emergency is the school bound by that determination?

Likewise who will resolve the-conflict if the parent does not agree with the school that an emergency caused the evaluation to be delayed?

All parties should be focused on assuring that students are evaluated as quickly as possible. While it is true that many situations may arise that could result in a failure to meet the 60-day requirement, the situations presented, while they may not occur regularly, are not so far out of the realm of possibilities that they should require an exception.

There are only 180 days in a school year and the longer the evaluation process takes, the fewer days the student receives the needed services. OSEP strongly advised against expanding the exceptions in such a broad manner as requested by the commenters. While the list of “emergencies” provided are real situations which can arise, DPI statistics show that weather and availability of evaluators were the most common reasons for failing to meet the 60-day limit. Elimination of these two situations should address the majority of non-compliance issues in North Dakota.

**Public Comment:** A commenter noted that the rule was acceptable as proposed.

**Agency Comment:** No comment necessary.

**Public Comment:** A comment noted confusion whether the exception applied when there was a lack of in-state as well as out-of-state providers for evaluations.

**Agency Comment:** The exception for access to a qualified evaluator applies to access to in-state as well as out-of-state evaluators.

**Public Comment:** Schools have no control over doctor’s availability to schedule evaluations.

**Agency Comment:** DPI recognized that an evaluator’s availability was a concern and prepared the rule to allow additional time for schools to schedule evaluations with both in and out of state evaluators.

**Public Comment:** The 100% compliance rate established by the Federal OSEP is too difficult for school districts to meet.

**Agency Comment:** The 100% compliance requirement is established by OSEP and DPI cannot change that requirement however the two exceptions in the proposed rule will provide more leeway for schools and parents.

**Public Comment:** There should be an additional exception when parents did not make the student available for evaluation. The commenter cited § 300.301(d)(1) as support for this.

**Agency Comment:**

The federal rules already allow an exception to the 60 day evaluation requirement when the parent does not make the student available. 34 CFR § 300.301(d)(1) provides:

*Exception.* The timeframe described in paragraph (c)(1) of this section does not apply to a public agency if –

- (1) The parent of a child repeatedly fails or refuses to produce the child for the evaluation;

The comments and discussion to this rule note that the circumstances that arise in these cases are varied and determinations as to whether this exception would apply must be based upon those circumstances in each case. An LEA should document their attempts to schedule evaluations so that the record is clear whether the parent was cooperative in the scheduling. LEAs should also attempt to accommodate the parent's schedule from the outset to remove any need for the parent to reschedule the appointment.

In light of the comments to this rule and OSEP's response, the situation where a parent does not make the student available due to cancelled appointments is already covered in those situations where that behavior was the reason for not meeting the 60 day requirement.

**Public Comment:** A commenter would like an exception where both the school and the parents agreed to an extension of the 60-day requirement.

**Agency Comment:** While the State is given latitude to adopt exceptions, comments to 34 CFR §300.301 state that OSEP considered and rejected allowing an extension of the 60-day timeframe for initial evaluations "by mutual agreement between the parent and the public agency." 71 Fed. Reg. 46637 (August 14, 2006)(Comment to 34 CFR §300.301(d)). The Department also feels that using the parties agreement alone without some extenuating circumstance necessitating an extension of time could lead to unnecessary delay in the provision of services to the student.

**Public Comment:** A commenter suggested that as an aid to monitoring, the parents and school district enter a written agreement to document that the circumstances for an extension were agreed upon and this met the criteria.

**Agency Comment:** This is a good suggestion that can be adopted through the evaluation guidelines.

**Public Comment:** A commenter asked to have the existing federal exceptions included in the rule because there is a concern that the two existing exceptions would be lost.

**Agency Comment:** The exceptions in §34 CFR 300.301 also apply. Department rules should not duplicate existing law because it leaves open the opportunity for confusion and adds unnecessary

length to the rules. However, additional language can be added to the proposed rule to clarify that exceptions in the federal requirements also apply to the 60 day rule.

**Public Comment:** The commenter requested a definition of “extreme weather” and asked who would make the determination, how it would be made, and what documentation would be required.

**Agency Comment:** As suggested by the commenter, these issues will be addressed in the Department’s evaluation guidelines.

**Public Comment:** A commenter left a voice mail message asking about the statement that the impact of the rules did not exceed \$50,000.

**Agency Comment:** The Department does not expect the rules will have an impact upon the regulated community of more than \$50,000 because the evaluation in question must occur regardless of whether this rule is adopted and the rule merely allows more leeway to school districts and parents for the completion of evaluations.