



DISABILITIES LAW PROGRAM

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MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Regulatory Initiatives

Date: October 4, 2013

I am providing my analysis of eleven (11) regulatory initiatives in anticipation of the October 10 meeting. Given time constraints, the commentary should be considered preliminary and non-exhaustive.

1. DMMA/DDDS Final HCBS Waiver Amendments [17 DE Reg. 432 (10/1/13)]

The SCPD and GACEC commented on the proposed version of this regulation in August, 2013. A copy of the August 26 GACEC letter is attached for facilitated reference.

The Division of Medicaid & Medical Assistance and Division of Developmental Disabilities Services have now adopted a final regulation which addresses each of the Councils' comments.

First, the Councils endorsed the addition of "transportation" as an included expense for individuals participating in supported employment. The Divisions acknowledged the endorsements.

Second, the Councils shared concerns with the case manager monitoring standards. The Councils noted that the waiver still contained references to the former standards, did not offer flexibility, and included a "paper" review process which was not robust. In response, the Divisions submitted alternate language to CMS which clarifies that the review schedule is a minimum (not a cap) and that the monthly reviews are conducted with the participant and/or team members (as juxtaposed to a mere "paper" review). The Divisions also corrected a reference to the superseded standards.

Third, the Councils noted that references to "hourly" billing undermined the desired flexibility in allowing participants to engage in combinations of supported employment and pre-vocational services. The Councils recommended adoption of a "quarter hour" standard. The Divisions responded that the references to "hourly" billing were in error and removed them. The Divisions noted that billing would be allowed in "15 minute" increments.

Fourth, the Councils noted that the waiver specifically allowed “rounding” (e.g. 8 minutes billed as 15-minute unit) for behavioral consultative services and nursing consultative services but was silent on rounding for other services. The Divisions responded that the “rounding” references would be deleted from the waiver application and transferred to a billing instructions document. The Divisions also clarified that the latter document will authorize “rounding” for all services.

Since the Divisions adopted revisions based on each comment, the Councils may wish to forward a “thank-you” communication to them.

2. DOE Final Health Education Program Regulation [17 DE Reg. 425 (10/1/13)]

The SCPD and GACEC commented on the proposed version of this regulation in August. A copy of the August 29 SCPD letter is attached for facilitated reference.

First, the Councils provided an overview of recent legislation promoting cardiopulmonary resuscitation (CPR) and automated external defibrillator (AED) training in schools. The Councils also noted that less than half of individuals with a driver’s license, permit, or State identification card are listed as organ donors. Given the documented need for training and education in these contexts, the Councils endorsed the inclusion of training on CPR, AED usage, and organ donation in the health education curriculum effective with the 2014-15 school year.

Second, the Councils observed that the regulation deleted a requirement that the method used to implement and evaluate the effectiveness of the health education program be included in the District/School Success Plan. The Councils noted that no rationale for the change was provided. The Councils therefore deferred commentary based on a lack of information.

The Department has now adopted a final regulation with only minor changes. Parenthetically, the DOE reports that it received 57 comments supporting the initiative.

Since the regulation is final, and the Councils did not suggest any edits, no further action is warranted.

3. DOE Final State Science Content Standards Regulation [17 DE Reg. 423 (10/1/13)]

The SCPD and GACEC commented on the proposed version of this regulation in August. The August 15 GACEC letter is attached for facilitated reference.. The Councils endorsed the proposed adoption of the “Next Generation Science Standards (NGSS) ” developed in partnership with twenty-five other states. The Department of Education has now adopted a final regulation adopting the NGSS standards. The attached press release describes the State Board’s approval of the regulation and its perceived value to Delaware students.

Since the regulation is final, I recommend no further action.

4. DOE Final Accelerated Academic Programs Regulation [17 DE Reg. 427 (10/1/13)]

The SCPD and GACEC commented on the proposed version of this regulation in August. A copy of the August 15 GACEC letter is attached for facilitated reference. The Department of Education has now adopted a final regulation incorporating one (1) amendment prompted by the Councils' commentary.

First, the Councils identified an inconsistency in references to "visual and performing arts". In response, the DOE eliminated a reference in §2.5 to remove the conflict. Parenthetically, on October 2, 2013, the News Journal published the attached informative article linking participation in the arts to higher graduation rates and academic creativity.

Second, the Councils questioned the inclusion of "educator professional development" within the scope of activities available for funding as "directly impacting students". The Councils noted that the regulatory emphasis on professional development could result in dilution of funds more closely linked to "direct impact" on students (e.g. purchase of books and supplies; field trips; guest lecturers; films). The DOE effected no change based on the following rationale: "The Department supports the current language as there is a need to ensure general education teachers are provided professional development on how to engage, react to and teach academically accelerated students". At 428.

Since the regulation is final, and the DOE considered each of the Councils' comments, I recommend no further action.

5. DOE Emergency School Health Tuberculosis Control Program Reg. [17 DE Reg. 361 (10/1/13)]

The Department of Education has published an emergency regulation. As background, new school staff are currently required to submit TB test results from a test administered within the past 12 months during the first 15 working days of employment. However, the Division of Public Health advised the DOE on September 5 that there is a nationwide shortage of a component of the approved tuberculin skin test. Therefore, the DOE is issuing revised standards which are intended to remain in effect for 120 days from September 16, 2013. At 362. Comments on the emergency regulation are invited. At 362.

I have the following observations.

First, in §2.1.3.3, the reference to "notification to the Department of Public Health" should be amended to read "notification from the Division of Public Health".

Second, the regulation does not address an individual who actually obtains qualifying TB test results (e.g. the new employee obtains the test in a surrounding state or a part-time school nurse obtains the test as part of employment in a health facility). Although §2.1.3.3. refers to the new regulatory standard as an "alternative procedure", the regulatory standard is not written in the alternative. Section 2.1.3 literally would not allow a new employee to qualify as a "cleared" employee based on actual submission of test results. This oversight is easily resolved by substituting "may" for "shall" in §2.1.3 AND amending §2.1 by adding the following introductory phrase - "Subject to §2.1.3, ". This would also resolve the literal conflict between §2.1 and §2.1.3.

Third, although the order adopting the regulation recites that it is “effective for 120 days from the date of execution”, the actual regulatory text includes no firm expiration date. This may result in confusion in implementation. For example, how will schools know that the onset of the “20 working day” period has been triggered by an “unknown” notice from DPH to DOE. One option would be to amend §2.1.3 as follows: “~~During the~~ Given a shortage of purified derivative (PPD) ~~and until such time as sufficient quantities of PPD are available in Delaware, between September 16, 2013 and January 15, 2014, ...~~ “ In the alternative, a sentence could be added at the end of §2.1.3.3 as follows: “The Delaware Department of Education will notify public schools of the receipt of the Division of Public Health notification under this section.”

I recommend sharing the above observations with the DOE, SBE, and DPH.

6. DOE Prop. Issuance of Initial License Regulation [17 DE Reg. 372 (10/1/13)]

The Professional Standards Board proposes to adopt a revised regulation covering the initial license for educators.

I have the following observations.

First, in §2.0, the definition of “suspension” is limited to removal of a license for failure to pass the PRAXIS I test. In contrast, §§6.0 and 7.1.1 authorize suspension for failure to pass alternatives to the PRAXIS I. Moreover, the enabling legislation authorizes “suspension” in a variety of contexts apart from failure to pass the PRAXIS I test. See Title 14 Del.C. §1218(a). The definition of “suspension” in §2.0 may simply be too narrow.

Second, the Councils have previously noted that it is odd to disallow applicants from seeking a license unless they also meet the requirements of a certification. This approach is retained in §3.3. This approach is facially contrary to Title 14 Del.C. §1210 which recites that the Department “shall issue an initial license” if certain criteria are met, none of which requires certification.

Third,, §5.2.1 recites that “(t)he one year of teaching experience must have occurred within the last year.” This may result in confusion. For example, do all of the “countable” days have to occur within the last 365 days or is it sufficient that the last portion of the “countable” days be within the last 365 days? Moreover, in other sections, the standards refer to “fiscal year”. See, e.g., §§7.1 and 13.1.1. Does “year” in §5.2.1 refer to calendar year or fiscal year?

Fourth, §11.2 would ostensibly allow someone who obtains an initial license to keep the (inactive) license indefinitely (e.g. 20 years) until offered a job by a public school. There is some “tension” between such an authorization and the normal 3-year duration of an initial license. See §11.1. Even a leave of absence cannot exceed 3 years without some effect on the duration of the initial license. See §14.0.

I recommend sharing the above observations with the DOE, SBE, and Professional Standards Board.

7. DOE Prop. Uniform Definitions for Student Conduct Reg. [17 DE Reg. 367 (10/1/13)]

As background, legislation (H.B. No. 42) was enacted in 2011 requiring the Department of Education to promulgate regulations with uniform definitions for student conduct which may result in alternative placement or expulsion. The DLP submitted the attached August 10, 2012 comments to a pre-publication draft of the regulations. The Department of Education is now issuing a revised set of proposed regulations.

I have the following observations on the proposed definitions.

Alcohol: I assume the main concern for possession of alcohol in schools is ingestion. I recommend adding an explicit exclusion for disinfectant wipes. See, e.g., http://www.clorox.com/products/clorox-disinfecting-wipes/?utm_source=bing&utm_medium=cpc&utm_term=Clorox+Disinfecting+Wipes&utm_campaign=CDW+Branded. Such wipes, which contain alcohol, are promoted for classroom, locker, and restroom use and can be carried in a purse or pocket.

Commission by a student: I recommend inserting “intentionally” between “has” and “engaged”. This would clarify that a physical act, without the requisite mens rea, should not justify expulsion or placement in an alternate setting.

Drug Like Substance: This definition is “overbroad”. Literally, it would cover chocolate; sugar; cough drop containing sugar; Cold-eze (Zinc and sugar); Gatorade; candy, and any product with caffeine (coffee; tea; Coke; Pepsi). I recommend deletion. Note that the definition of “drug” already covers “counterfeit controlled substance”.

Look Alike Substance: This definition is likewise overbroad. Substances capable of “altering a state of mind or feeling” include chocolate, sugar, candy and any product with caffeine. This definition could be invoked to justify expulsion if a student possessed or distributed benign substances.

Possession: I recommend incorporating the notion that the student knows or is aware of the presence of an item.

Sexual Act: The definition of “sexual act” may be somewhat graphic to include in a student handbook for young students. I recommend deleting the term. It’s content would ostensibly be covered by the definition of “sexual offense”. Moreover, most of the defined conduct is also covered by the definition of “sexual intercourse”.

Sexual Offense: I recommend substituting “1353” for “1353(2)” since the conduct proscribed by §1353(1) could occur within a school environment.

Use: I recommend insertion of “voluntarily” between “be” and “under”.

Arson: This definition is “overbroad”. It is not consistent with the definition used in the criminal code, which limits arson to the burning of buildings. See 11 Del. C. §§ 801-803. It overlaps with the definition of “reckless burning” which covers fires not involving buildings. For example, if a student is caught smoking a cigarette in the restroom, which causes “alarm”, that should not be characterized as “arson”. Likewise, if a student burns another student’s homework, that should be punishable but not punishable as “arson”.

Bullying: This definition is based on Title 14 Del.C. §4112D. Consistent with prior commentary, both the statutory and conforming regulatory definition are “overbroad” and infringe on students’ First Amendment rights.

Criminal Mischief (Vandalist): The definition is not restricted to school-based behavior. It should be limited to behavior that occurs on school grounds or at a school event. If the DOE includes vandalism behavior that occurs outside of the school grounds, the student must pose a proximate risk to the school community.

Criminal Sexual Offense, Commission of: I recommend substituting “1353” for “1353(2)” since the conduct proscribed by §1353(1) could occur within a school environment.

Dangerous Instrument(s) Possession/Concealment/Sale: This definition is “overbroad”. It is not limited to school grounds and covers conduct which may be perfectly legal. For example, if a student merely arranges for the sale of a bow and arrow or a knife in which delivery will occur off school grounds, that should not justify school discipline.

Deadly Weapon(s) Possession/Concealment/Sale: This definition is “overbroad”. It is not limited to school grounds and covers conduct which may be perfectly legal. For example, if a student possesses a slingshot or knife off school grounds, that should not justify school discipline.

Defiance of School Authority: This definition is “overbroad”. The term “uncivil” is defined in the dictionary as “impolite” or “unmannerly”. Being “impolite” or “unmannerly” towards school personnel is not conceptually equivalent to “defiance” which connotes some act of obdurate “refusal”. I recommend deletion of Subsection (2) of the definition, limiting the scope of the definition to a refusal. The definition of “disorderly conduct” can cover actions which are problematic but do not involve a “refusal” to comply with a reasonable directive.

Disorderly Conduct: This definition is based on Title 11 Del.C. §1301. However, it omits the term “intentional” which is an important component in the statute. I recommend insertion of “intentional” prior to “conduct”. I also recommend limiting the definition to occurrences within the “school environment” which is previously defined.

Disruption of the Educational Process: I recommend deletion of this definition. The conduct legitimately intended to be proscribed should already be covered by other definitions (e.g. disorderly conduct; defiance). The standard is so general that it could easily run afoul of student First Amendment rights. See, e.g., the attached articles describing barring of Delaware student with pink hair as “disruptive” and the “protest” manifested by hundreds of students wearing “hoodies” which could easily be considered “disruptive”.

Gambling: Gambling does not warrant potential expulsion or alternative placement. If a student is over 18 and carrying a lottery ticket, or even bets a friend a dollar that the Phillies will win, the student should not potentially be subject to such dire disciplinary consequences. Under this definition, in-class bingo games for candy or other prizes could be implicated. This should be stricken from the regulation.

Harassment: This definition does not “track” the Delaware statute, Title 11 Del.C. §1311. It omits any requirement of “intent” which is a “cornerstone” of the statute. Proscribing any action which “offends the dignity or self-esteem of individuals or groups” is extremely “overbroad”.

Inhalant Abuse: There is no exclusion for prescribed medications. Consider adding “unless prescribed for an individual student by a licensed practitioner”.

Repeated Violations of Student Code of Conduct: Literally, a single, minor violation of a behavior contract qualifies as “repeated violations” of the Code of Conduct. This is not logical. Query why the same “5 or more violations” standard should not apply to behavior contracts?

Sexual Assault: This definition is “overbroad”. For example, it “counts” harassment as an “assault”. Harassment includes merely suggesting that another engage in sex knowing that the suggestion is an unwelcome annoyance. See Title 11 Del.C. §763. Characterizing a “suggestion” as an actual “assault” on someone is unreasonable. Moreover, the definition characterizes “any unwanted sexual behavior” as an “assault”. There are many forms of sexual behavior that do not rise to the level of an “assault”. Finally, the reference to “include but are not limited to” exacerbates the undue breadth of the definition.

Sexual Misconduct: Since there is no definition of “sex act”, this definition could result in expulsion if students kiss or hug. If two 18 year old students kissed at their high school prom, application of this standard could result in expulsion.

Teen Dating Violence: The DOE may wish to consider whether the conduct covered by this definition could be converted to a “stalking” definition. The use of the term “teen violence” suggests that it only applies to “teens” and “dating” which typically occurs in non-school contexts.

Terroristic Threatening: The term “crime” should not be capitalized. Subsection (2) of the definition is not included in the relevant statute (Title 11 Del.C. §621). It is not intuitive that an act which is not a “threat” is characterized as terroristic threatening.

Use and/or Possession of drugs and/or Alcohol and/or Drug Paraphernalia: I recommend deletion of “or any prohibited substance”. There are definitions of drug, alcohol, and drug paraphernalia. Adding “any prohibited substance” is outside the scope of the standard and could result in the inclusion of extraneous substances under this definition.

I recommend sharing the above observations with the DOE, SBE, and ACLU.

8. DMMA Prop. Medicaid State Plan Rehabilitative Services Reg. [17 DE Reg. 395 (10/1/13)]

The Division of Medicaid and Medical Assistance proposes to adopt some significant amendments to the Medicaid State Plan in the context of “rehabilitative services”. The primary impetus is “to be responsive to the United States Department of Justice (DOJ) Settlement through the addition of new services and modifications to existing services.” At 395-396. The amendments target “service delivery, specifically substance use disorder treatment services, crisis intervention services, and other licensed behavioral health practitioners.” At 395. The Division indicates that the amendments will be “budget neutral” for the State while “drawing down” additional federal funds, i.e. \$13,685,958.92 in FFY2014 would increase to \$17,469,215.07 in FFY15. At 396.

I have the following observations.

First, in Attachment 3.1-A, Page 6a, the definition of “crisis intervention services” recites that it is “a face-to-face intervention”. This may be unduly limiting and could prove problematic if DMMA contemplates provider billing for many of the “specific activities” listed in the same section, including contact with collateral sources for information, follow-up with the individual and family members, and consultation with a physician. The listed activities would often occur by phone and would not be “face-to-face”.

Second, in Attachment 3.1-A, Page 6b, there are multiple references to “consumers”. In contrast, there are also references to “Medicaid eligible individuals” or “individuals”. The term “consumer” is not a common description of Medicaid beneficiaries. The Division may wish to adopt alternate and consistent language.

Third, in Attachment 3.1-A, Page 6c and Page 6d, the term “certified screener” is used. I assume this refers to a “credentialed mental health screener” as defined in Title 16 Del.C. §5122(a)(1). DMMA includes definitions of some terms (e.g. “Licensed Behavioral Health Practitioner” in Attachment 3.1-A, Page 3 Addendum) but there is no definition of “certified screener”. Moreover, neither the above statute nor the applicable regulation (16 DE Admin Code 6002) authorizes “certification” of screeners. Rather, they are “credentialed”. DMMA may wish to conform the reference to the terminology used in the statute and regulation and provide a definition of the term.

Fourth, in Attachment 3.1-A, Page 6d, DMMA refers to “Advanced Practice Nurse and employment under a formal protocol with a Delaware licensed physician”. This makes no sense grammatically and substantively. I assume the Division intended to refer to an advanced practice nurse operating “in collaboration with” a physician. See Title 24 Del.C. §1902(b)(1). There is no requirement that an APN be employed by a physician.

Fifth, in the same Attachment 3.1-A, Page 6d, the list of practitioners includes “Licensed Physician Assistant and employment under the delegated authority of a licensed physician.” This makes no sense grammatically and substantively. There is no requirement that an LPA be “employed” by a physician. See Title 24 Del.C. §1770. The LPA must be “supervised” by a physician. Moreover, this is the only reference to licensed physician assistant in the entire regulation. There are many lists of practitioners authorized to provide Medicaid-reimbursable services. LPAs are omitted from the lists. See, e.g., Attachment 3.1-A, Pages 6b, 6c, 6e, 6h, 6i; and Attachment 4.19-B, Page 3a Addendum. The Division may wish to assess whether LPAs should be included in some of these sections. Finally, the Division may wish to correct the grammar in the final bullet on Page 6d.

Sixth, there is an anomaly in the age standards within the regulation. A “certified peer” must be at least 21 years of age. See Attachment 3.1-A, Page 6e. Other unlicensed staff, including a “recovery coach”, can be 18 years of age. See Attachment 3.1-A, Page 6h and Page 6i. Moreover, page 6h includes “certified peers” as “unlicensed staff” who can be age 18. The references are inconsistent and the rationale for the divergent standards is not intuitive.

I recommend sharing the above observations with the Division. The SCPD may also wish to share a courtesy copy of the commentary with the trade organization for licensed physician assistants in Delaware.

9. DSS Proposed TANF State Plan Amendment Regulation [17 DE Reg. 406 (10/1/13)]

The Division of Social Services proposes to adopt three (3) discrete amendments to its TANF State Plan.

First, given enactment of Delaware’s Civil Marriage Equality and Religious Freedom Act of 2013, the Plan is being updated to afford partners in a same gender marriage the same program rights, benefits, responsibilities and obligations as different gendered marriage partners. The proposed amendment in this context is straightforward and summarizes the effect of the new State law.

Second, federal legislation requires states which issue electronic benefits to have policies to deter TANF recipients from conducting a benefit transfer transaction in liquor stores, casinos, and adult oriented entertainment venues. In response to the federal requirement, DSS is adding a provision confirming that it does not issue TANF benefits electronically. Rather it issues checks via PNC bank. DSS confirms that, if it converts to an electronic benefit system in the future, it will amend the TANF Plan to include safeguards against transactions in liquor stores, casinos, and adult oriented entertainment venues.

Third, there is a federal requirement that the TANF Plan include methods to reduce out-of-wedlock births. DSS is adding one program to the section describing such efforts. Specifically, DSS notes that the Jobs for Delaware Graduates program provides services to needy children attending middle schools in Delaware which target multiple objectives, including reduction in out of wedlock/teen pregnancies.

Since the proposed changes are designed to implement federal requirements, and are essentially “housekeeping” measures, I recommend endorsement.

10. DPH Prop. Medical Facilities Performing Invasive Procedures Reg. [17 DE Reg. 397 (10/1/13)]

In 2012, legislation (H.B. No. 47) was enacted to require the Department of Health & Social Services to establish sanitation and safety standards in certain facilities performing invasive medical procedures. The Division of Public Health published an initial set of proposed regulations in April, 2013 which prompted several comments from the SCPD and GACEC. A copy of the April 25 GACEC commentary is attached for facilitated reference. Rather than adopt an amended final regulation, the Division has now published a revised set of proposed regulations.

I have the following observations.

1. In §2.0, definition of “accredited facility”, second sentence, I recommend insertion of “the” between “from” and “facility”.

2. In §2.0, definition of “accredited organization”, second sentence, I recommend the following revision - “...organization requires facilities to complete self-assessments and expert surveyors to conduct thorough reviews.”

3. In §2.0, the definition of “certified registered nurse anesthetist” is simply “an individual currently licensed under 24 Del.C. Ch. 19.” This definition is problematic since it would literally mean anyone licensed under that chapter (LPN; RN; APN) qualifies as a nurse anesthetist under the regulations. There is no separate license or certification of a nurse anesthetist mentioned in Chapter 19, only a passing reference in §1902(b)(1).

4. In §2.0, definition of “general anesthesia”, I recommend not capitalizing “(t)he in Par. (2) and inserting “and” before “(4)”.

5. In §2.0, definition of “invasive medical procedure”, the reference to “major conduction anesthesia or sedation” is surplusage since the terms are included in the definition of “anesthesia.

6. In §2.0, I recommend inserting “and” before “(2)”.

7. In §2.0, the definitions of “physician” and “physician assistant” are identical. Consider the following revisions:

“Physician” means an individual currently licensed as a physician under 24 Del.C. Ch. 17.

“Physician Assistant” means an individual currently licensed as a physician assistant under 24 Del.C. Ch. 17.

8. In §2.0, definition of “time-out”, the reference to “site” is not intuitive. It suggests that the team does not know its location.

9. In §3.2, insert a comma after “anesthetist”.

10. In §3.5.1.11, delete “and”.

11. In §3.5.1.12, substitute a semicolon for the period.

12. In §3.5.1.13, insert “which” between “cart” and “include”.

13. In §3.5.1.13.2, substitute a semicolon for the period. Compare §6.2.2.2.

14. In §3.5.2, substitute “; and” for the period.

15. In §4.6, substitute “prohibit licensed individuals” for “prohibit a licensed individual” since there is otherwise a plural pronoun (“their”) which refers back to a singular noun (“individual”).

16. In §4.11, delete the comma after “accreditation”.

17. In §5.1, delete the comma after “environment”.

18. In §6.2.7, add a semicolon.

19. In §6.2.8, delete “and”.

20. In §6.2.9, insert a semicolon.

21. Delete §§6.2.10.1 and 6.2.10.2 while amending §6.2.10 to read as follows: “A separate anesthesia record for each administration of anesthesia which must include:”

22. Renumber §§6.2.10.2.1 through 6.2.10.2.9 as 6.2.10.1 through 6.2.10.9. Substitute “; and” for the period after the renumbered 6.2.10.9.

23. Delete the comma after “near”.

24. Section 8.2.1.1.1 categorically caps the duration of an order of closure to 90 days in the absence of a request for continuance of the date of a Departmental hearing. This is problematic.

A. Under §§8.3.3.3.1 and 8.3.3.3.1.1, a hearing could routinely occur on the 80th day after issuance of the closure order and §8.3.3.3.1.3 suggests that the hearing decision could be issued on the 110th day. During days 91-109, the closure order would no longer be in effect and the facility could reopen. If a continuance were granted per 8.2.1.1.1, this time period would be extended and the facility could reopen for an even longer period.

B. Under §8.3.3.1, if the facility takes no action on an order of closure, the order of closure remains in effect. It is not capped at 90 days per §8.2.1.1.1.

25. Section 9.3.1 addresses unannounced inspections. I recognize that §9.3.1.1 mirrors the statute. However, the Department's licensing authority might also authorize unannounced inspections at any time. As written, §9.3 would arguably bar the Department from initiating an unannounced inspection in the absence of a complaint or DPR referral. The Division may wish to add a catch-all provision (§9.3.1.3) to read as follows: "Anytime as otherwise authorized by law or applicable regulation."

26. The exclusion in §9.5.1.1 is contrary to the statutory definition of "facility". See Title 16 Del.C. §122(3)y.3.C. If the Stockley Center, Mary Campbell Center, or other long-term care facility engaged in invasive procedures (including dental and podiatry procedures), they should be required to comply with the regulation.

I recommend sharing the above observations with the Division.

11. DPH Prop. Medical Marijuana Program Regulation [17 DE Reg. 405 (10/1/13)]

As background, legislation (S.B. No. 17) was enacted in 2011 to authorize the establishment of a medical marijuana program in Delaware. The SCPD and GACEC commented on an initial set of implementing regulations in April, 2012 which covered eligibility, registration cards, etc. Although final regulations were adopted in June, 2012, the State placed the actual growing and distribution of marijuana "on hold" when the federal Justice Department warned that State employees involved in the processing and distribution of marijuana could be prosecuted under federal drug laws. See attached April 7, 2012 and August 17, 2013 News Journal articles. There are now at least nineteen (19) states with medical marijuana laws enacted and the Governor issued a letter to legislators in September, 2013 indicating that the administration has reassessed the legal landscape and plans to move forward to have the Delaware program operational in 2014. See attached excerpt from Delaware House of Representatives (Republican Caucus) August 17, 2013 e-newsletter. The DHSS website has also been updated to reflect plans to make the program operational. See attachment.

The Division of Public Health has now formally issued a proposed regulation to address the operation of "compassion centers" which would actually grow and distribute marijuana. There are many safeguards, including constant video surveillance, alarms, random inspections, personnel background checks, and audits. A facility could only cultivate a maximum of 150 plants and maintain a stockpile of less than 1,500 ounces. A compassion center must operate on a "not-for-profit" basis. See §7.0. The State plans to only initially authorize the establishment of a single compassion center which the DHSS website characterizes as a "pilot". Another curtailment in the program is elimination of an authorization for a "visiting qualifying patient" with an out-of-state medical marijuana identification card obtaining marijuana in Delaware. See §2.0, definition of "visiting qualifying patient". An RFP will be issued and the successful applicant will be authorized to begin growing medical marijuana on July 1, 2014.

I recommend endorsement subject to the Division's consideration of the following technical observations.

First, in §5.3.7, there is a plural pronoun ("their") with a singular antecedent ("patient"). I recommend substitution of "the patient's" for "their".

Second, the compassion center and each growing site is required to comply with local zoning standards. See §§7.6.3.1.1, 7.8.2, and 7.93.11. This could prove somewhat problematic since local zoning codes may not address an entity such as a compassion center. The Division may wish to reconsider this aspect of the standards.

Third, §7.10.3 recites as follows:

7.10.3. Suspension: The Department will suspend a registration certificate authorizing the operation of a compassion center, with or without notice, for any violation of an applicable law or regulation.

Literally, this is a rather "brittle" standard. If there is a single, minor violation of a regulation, the Department would have no choice but to "suspend" the registration. There may be instances in which the Department would prefer to simply accept a remedial plan or prompt correction of non-compliance. I recommend substituting "may" for "shall" so the Department has some flexibility in its response to identification of a violation of a law or regulation.

Attachments

STATE OF



DELAWARE

GOVERNOR'S ADVISORY COUNCIL FOR EXCEPTIONAL CITIZENS

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RE: DMMA/DDDS Proposed Home and Community Based Services (HCBS) Waiver Amendments [17 DE Reg. 156 (8/1/13)]

Dear Ms. Summers:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Division of Medicaid & Medical Assistance (DMMA) and Division of Developmental Disabilities Services (DDDS) proposal to adopt some discrete amendments to the current DDDS Medicaid waiver. The GACEC would like to share the following observations.

First, the current "supported employment" definition contains an exclusion for transportation: "Transportation is not included in supported employment services." At p. 158. In contrast, the proposed definitions of individual and group supported employment include transportation as an included expense.^{1[1]} At pp. 158-159. Although not mentioned by DMMA/DDDS, this change merits the endorsement of the Council.

Second, the State proposes to revamp its standards for case manager monitoring of progress on plans of care. The current standard requires a direct interview with the client every month. The proposed standard requires monthly "paper" monitoring supplemented by a face-to-face direct interview four times/year, two of which must be in the client's home. At p. 159. See also attached p. 91 from Waiver. The GACEC identified a few concerns in this context.

A. The "Waiver" still contains references to the old standard. See, e.g., attached p. 92: "The DDDS Case Manager reviews and monitors the implementation of services at least monthly through a

^{1[1]}Transportation costs are also included in rates for day programs and pre-vocational services. See attached p. 153 from "Waiver".

direct, person to person meeting and discussion with the participant.”

B. The new standards literally do not permit any flexibility. For example, other sections in the Waiver contemplate updating a plan when the participant’s needs change (Waiver, attached pp. 85 and 99) and the Essential Lifestyle Plan (ELP) can require “other progress reports” (Waiver, attached p. 91). Literally, a case manager could view the schedule as a rigid “cap” which cannot be exceeded. Thus, there may be circumstances in which more than four face-to-face interviews are needed annually to address a participant’s needs. It would be preferable to clarify that the monthly review protocol is a “minimum” which case managers may exceed.

C. It’s unclear what documentation would be analyzed by the case manager conducting a monthly “paper” review. Attendance reports may be available on a monthly basis but would not be informative in the context of progress on ELP vocational goals. See attached p. 156 from Waiver. The Waiver only contemplates submission of vocational work reports on a quarterly, not a monthly basis. See attached p. 91. DHSS could consider either making submission of vocational work reports a monthly requirement or requiring submission of other documentation to allow for meaningful monthly review. For example, Chimes prepares a detailed monthly vocational report. See attached form.

Third, one of the principal rationales for adopting a 15-minute billable unit for day program, pre-vocational services and supported employment services is flexibility. DDDS wishes to ensure that participants can engage in combinations of supported employment and pre-vocational services. Authorizing billing in small increments facilitates this approach. However, there is some “tension” between this intended flexibility and language in the Waiver itself. Consider the following recitals:

Day Habilitation services can be provided as a full day or hourly. ...Day habilitation may not be provided to a participant during the same hours that Supported Employment, Work Services or Community Inclusion is provided.

Pre-Vocational services can be provided as a full day or hourly. ... Pre-vocational services may not be provided to a participant during the same hours that Supported Employment, Work Services, or Community Inclusion is provided.

Waiver, pp. 48 and 50 (attached).

Consider a participant who engages in supported employment between 11-11:30 and pre-vocational services between 11:30-12. Using the 15-minute billing increment, the provider could bill two units of supported employment and two units of pre-vocational services. However, the language above would literally bar such billing. Alternatively, consider a participant who engages in supported employment between 9-11:05 and pre-vocational services between 11:05 - 12:00. The provider could not bill for pre-vocational services for the period 11:05 - 12:00 since it is within the same hour as the supported employment. For maximum flexibility, the State could consider revising the “limiting” language above and adopting a “quarter hour” unit similar to that used for behavioral consultative services and nursing consultative services. See attached p. 167 from Waiver. See also attached p. 153: “Small group will be paid in 15 minute billable units.” It would simply be less confusing to adopt a “quarter hour” standard than to sometimes refer to “hourly” units (p. 166) and sometimes refer to “15 minute billable units” (p. 153).

Fourth, in a related context, guidance on the 15-minute billable units for behavioral consultative

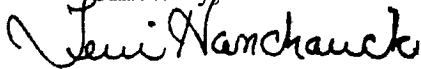
services and nursing consultative services addresses "rounding":

Units of time 1-8 minutes shall not be billed. Units of time 8-15 minutes shall be billed as one 15 minute unit.

See attached p. 154 from Waiver. Council could not locate any equivalent for "rounding" for 15-minute billable units for supported employment, pre-vocational services, and day programming. Clarification would be preferable.

Thank you in advance for your time and consideration in reviewing our observations. Please feel free to contact me or Wendy Strauss should you have questions or concerns.

Sincerely,



Terri A. Hancharick
Chairperson

TAH:kpc

CC: Stephen Groff, DMMA
Jane J. Gallivan, DDDS

Enclosures



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES

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August 29, 2013

Ms. Susan K. Haberstroh, Ed.D.
Department of Education
401 Federal Street – Suite 2
Dover, DE 19901

RE: 17 DE Reg. 150 [DOE K-12 Health Education Program Regulation]

Dear Ms. Haberstroh:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposal to amend its regulations regarding health education. First, the proposed regulation would require the course, effective with the 2014-15 school year, to include at least two (2) hours on CPR awareness; use of an Automated External Defibrillator (AED); and organ and tissue donation. Second, it would delete a requirement that "the method(s) used to implement and evaluate the effectiveness of the program" be reported in the District/School Success Plan. The proposed regulation was published as 17 DE Reg. 150 in the August 1, 2013 issue of the Register of Regulations. SCPD has the following observations.

Health Education Course Content

First, the regulation is ostensibly partially motivated by three sets of State legislation.

A. H.B. 299 from the 146th General Assembly would have required all students to participate in a training program in CPR and use of an AED to be granted a high school diploma. While conceptually "open" to CPR/AED education, the Department of Education expressed reservations about the legislation given the potential for enactment of multiple bills dictating content of instruction in a wide variety of contexts. H.B. 299 was tabled in committee on April 26, 2012.

B. The legislation may also be partially motivated by SCR 30 which passed the House and Senate in June 2013. That legislation notes that CPR and AED use can be effective in resuscitating student athletes who are subject to sudden cardiac arrest. The resolution "encourages the state of Delaware to work with the Delaware Interscholastic Athletic Association (DIAA) to explore Sudden Cardiac Arrest education

initiatives and alternatives for saving lives such as setting standards for protecting student athletes exhibiting signs of Sudden Cardiac Arrest, and training coaches and officials of interscholastic athletes.”

C. Finally, SCR 11 passed the House and Senate in April, 2013. It notes that “in Delaware only 48 percent have placed the organ donor designation on their learner’s permit, driver’s license or state identification card.” It further recites that “in Delaware, the organ transplant list includes 600 people while thousands of others await a tissue transplant...” It encourages education on the importance of organ and tissue donation.

SCPD endorses this aspect of the proposed regulation given the compelling legislative findings on the value of education and training on CPR/AED usage and organ/tissue donation.

District/School Success Plan Deletion

The second component of the proposed regulation is to delete the current requirement that the methods used to implement and evaluate the effectiveness of the program be included in the district/school success plan. Instead, the “methods” would be shared with the Department of Education upon request. The DOE provides no rationale for this change. It is therefore difficult to assess and SCPD is unable to share perspective on this aspect of the regulation given lack of information.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our position and observations on the proposed regulation.

Sincerely,



Daniëse McMullin-Powell, Chairperson
State Council for Persons with Disabilities

cc: The Honorable Mark Murphy, Secretary of Education
Dr. Donna Mitchell, Professional Standards Board
Dr. Teri Quinn Gray, State Board of Education
Ms. Mary Ann Mieczkowski
Ms. Paula Fontello, Esq.
Ms. Terry Hickey, Esq.
Mr. John Hindman, Esq.
Mr. Brian Hartman, Esq.
House and Senate Education Committees
Developmental Disabilities Council
Governor’s Advisory Council for Exceptional Citizens

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STATE OF



DELAWARE

GOVERNOR'S ADVISORY COUNCIL FOR EXCEPTIONAL CITIZENS

GEORGE V. MASSEY STATION
516 WEST LOOCKERMAN STREET
DOVER, DELAWARE 19904
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FAX: (302) 739-6126

August 15, 2013

Susan Haberstroh, Regulation Review
Department of Education
35 Commerce Way, Suite 1
Dover, Delaware

RE: DOE Proposed State Science Content Standards Regulation [17 DE Reg. 148 (August 1, 2013)]

Dear Ms. Haberstroh:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Department of Education (DOE) proposal to amend its content standards regulation. The DOE envisions adoption of "Next Generation Science Standards". The NGSS standards were developed in partnership with twenty-six states, including Delaware. Council **endorses** the proposed changes.

An August 5, 2013 News Journal article provided useful background on the initiative. Delaware educators and a DuPont scientist were involved in the development of the standards which include the science of evolution and the effect of humans on global climate change. According to the article, some critics have expressed reservations about the standards. For example, climate change and sea level rise education could potentially affect property values and construction at Delaware beaches. Others decry a perceived loss of local control over standards.

For a small state like Delaware, there is great value in partnering with a large consortium of other states to develop evidence-based standards based on "mainstream" science. This approach also reduces prospects for local political interests attempting to skew standards based on considerations apart from "mainstream" science (e.g. business interests could attempt to suppress student exposure to environmental issues).

Thank you in advance for your consideration of our observations. Please feel free to contact me or Wendy Strauss should you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Terri Hancharick".

Terri A. Hancharick
Chairperson

TAH:kpc

CC: The Honorable Mark Murphy, Secretary of Education
Dr. Teri Quinn Gray, State Board of Education
Dr. Donna Mitchell, Professional Standards Board
Mary Ann Mieczkowski, DOE
John Hindman, Esq., DOE
Terry Hickey, Esq., DOE
Paula Fontello, Esq., DOE

For immediate release

Contact Alison May at (302) 735-4000

STATE BOARD OF EDUCATION ADOPTS NEXT GENERATION SCIENCE STANDARDS

The State Board of Education today approved new science standards that better reflect the knowledge and skills students will need to be prepared for college and career.

State Board of Education President Teri Quinn Gray, a DuPont scientist, lauded the standards: "The Next Generation Science Standards provide clear and consistent, researched-based standards that engage students in science instruction that will prepare them to utilize critical thinking and creative problem-solving necessary to excel in the global society."

The Delaware Department of Education now will work with educators to develop a multi-year implementation plan to provide teachers with the training and resources they will need to transition to the Next Generation Science Standards in the coming years.

Broad-based teams from 26 states, including Delaware, worked with the National Research Council, the National Science Teachers Association, the American Association for the Advancement of Science and Achieve to develop the standards, which identify science and engineering practices and content that all K-12 students should master to be prepared for college and career.

Delaware officials partnered with scientists, administrators, teachers, parents and business leaders as the state helped review and refine the standards. DuPont is among the sponsors that have helped fund the development nationally.

The State Board of Education held a retreat session to learn more about the Next Generation Science Standards in April, a work session in June and participated in forums and webinars through the National Association of State Boards of Education in the months prior to discussing the formal adoption of standards at its August meeting.

In early August, the department hosted a series of meetings across the state to share information about the standards with the public and solicited feedback, which the State Board considered before its vote.

Secretary of Education Mark Murphy said he is excited about the new standards, which are needed because of the changes in science and in the understanding of how students learn over the past few decades.

"Our current standards do not emphasize science and engineering practices and don't promote the type of deeper and critical thinking skills students need to be successful after graduation," he said. "These new performance expectations will increase opportunities for all students."

More information about the standards is available here and here.

STATE OF



DELAWARE

GOVERNOR'S ADVISORY COUNCIL FOR EXCEPTIONAL CITIZENS

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August 15, 2013

Susan Haberstroh, Regulation Review
Department of Education
35 Commerce Way, Suite 1
Dover, Delaware

RE: DOE Proposed Accelerated Academic Programs Regulation [17 DE Reg. 152 (August 1, 2013)]

Dear Ms. Haberstroh:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Department of Education (DOE) proposal to implement the provisions of Senate Bill No. 27 which was signed by the Governor on June 30, 2013. Senate Bill No. 27 authorizes "academic excellence start-up grants" for public schools and directs the Department of Education to award such grants based on appropriated funds. The DOE is further charged with development of a formula for evaluating grant proposals which must be consistent with "preferences" identified in the legislation. Council **endorses** the proposed regulation subject to revisions consistent with the two concerns listed below.

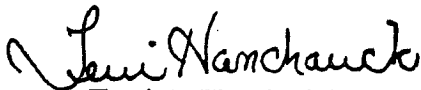
First, there is an inconsistency between §1.0 (definition of "academic work") and §2.5. Although the legislation [§3113(b)(3)] authorizes the inclusion of "programs on the visual and performing arts", it does not specifically list "visual and performing arts" in the definition of "academic work" [§3113(d)]. In contrast, the DOE regulation [§1.0, definition of "academic work"] specifically adds "visual and performing arts" to the definition. It then refers to "visual and performing arts" as outside the definition of "academic work" in §2.5. This discrepancy should be resolved. For example, the DOE could delete the reference from the definition of "academic work" in §1.0. In that case, §2.5 would be appropriate.

Second, §3.7 authorizes earning up to six points for "efficiency of spending" which focuses on the extent to which projects allocate funds to activities "that will directly impact students". The DOE explicitly stresses that educator professional development is "counted" as an activity directly affecting students. This approach is difficult to justify. Using funds to send teachers

to training events should not be a core component of this grant program. The regulatory emphasis on professional development "sends the wrong message" to prospective applicants and could result in dilution of funds more closely linked to "direct impact" on students (e.g. purchase of books and supplies; field trips; guest lecturers; films).

Thank you in advance for your consideration of our observations. Please feel free to contact me or Wendy Strauss should you have any questions.

Sincerely,



Terri A. Hancharick
Chairperson

TAH:kpc

CC: The Honorable Mark Murphy, Secretary of Education
Dr. Teri Quinn Gray, State Board of Education
Dr. Donna Mitchell, Professional Standards Board
Mary Ann Mieczkowski, DOE
John Hindman, Esq., DOE
Terry Hickey, Esq., DOE
Paula Fontello, Esq., DOE

The arts are integral to a quality education

Delaware schools are buzzing with activity once again.

Under the guidance of dedicated teachers, students are working hard to master subject matter, hone their skills, and prepare for the future. Our youngest students are in school for the first time.

Others are just months away from making decisions about their post-high school years.

But they all share a common goal that we are entrusted to help them realize.

And that is for them to participate in an education that engages them, enriches them and prepares them to be productive citizens in a 21st-century society and workforce.

Arts education plays a critical role in that endeavor. I have seen the excitement on a young person's face upon seeing that first live theater performance or watching the musician play her instrument. I have marveled at the child gazing at a painting, picking out details that the adults around him have helped him appreciate.

When we capitalize on this fascination from an early age, the arts, as a part of learning and teaching, contribute far beyond the aesthetic value of music, dance, painting and theater. The

arts, as a routine part of our children's education, keep them engaged and reinforce skills in all subject areas.

Studies show strong correlations between the arts and other curricular areas. Teaching math concepts through music, writing through dramatic storytelling, spatial concepts through dance, scientific observation through visual arts, all have been used successfully in settings that integrate the arts into the broader curriculum.

We know, too, that students participating in the arts fare better on standardized tests, have higher graduation rates and are more likely to emerge as leaders. As adults, they are more likely to be active in their communities through civic participation. Schools with strong arts programs also tend to have broader parent involvement and community support.

Not only are there academic reasons for teaching the arts, but social and civic reasons as well. We engage students in a creative process that validates who they are, and helps them to understand their own cultural heritage.

Using the arts in teaching other cultures, we introduce our children to the expression of a wide range of human values and concerns. The arts help sensitize students to the common humanity that we share, despite our cultural differences.

The arts are transformative. I have seen at-risk youth working through the challenges they face through poetry

and drama; and individuals with cognitive disabilities expressing themselves, some for the first time, through painting.

We don't teach science or math to every student, expecting that each will become a scientist or a mathematician. We do so because we believe that the skills gained in those subjects will help students better understand their world and contribute to it. Teaching the arts is no different. Not every student will become a professional artist or musician, though I hope some will. Even so, the arts teach life skills that carry across the curriculum and into every walk of life.

It's no accident that some medical schools now enroll first-year interns in art classes to develop their powers of observation. Studies show that medical interns who learn to view and analyze the details of a painting develop stronger observation skills, resulting in more accurate diagnoses on their hospital rounds. Many professional football players take dance lessons to build stamina, improve agility and better understand how their bodies move through space. I could go on with examples from professions as wide ranging as urban planning, industrial design and the communications industry.

A recent national study listed creativity as one of the top skill sets for 21st-century employment, recognizing it as the precursor to innovation and the cornerstone of entrepreneurship.

To remain competitive in the global economy, we need workers that can think creatively and visualize new possibilities, using those talents to design and develop new products, services and processes.

To compete in the global economy, we need a well-educated, technically proficient workforce — one that is flexible and nimble. In an ever-changing world with rapidly advancing technology, we need a workforce that understands the positive power of creation, innovation, self-criticism and reflection. In short, we need a workforce strengthened by the skills taught in and through the arts.

I encourage parents to attend arts events in our schools and to expose kids to museums and cultural events of all kinds, giving children the chance to participate in and appreciate these activities from a young age.

And if you have the opportunity to be a mentor, the arts are great way to expose students to experiences outside of his or her comfort zone.

In an age when young people spend 6.5 hours a day with electronic media, arts and culture offer valuable alternatives.

When we speak up in support of the arts and participate in cultural events, we attest to the value of the arts in education and their contribution to our children, our communities and our nation's cultural legacy.

Carla Markell is Delaware's first lady.



DELAWARE VOICE

CARLA MARKELL



DISABILITIES LAW PROGRAM

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August 10, 2012

VIA EMAIL

John R. Sadowski, MEd
Education Associate, School Climate & Discipline
Delaware Department of Education
401 Federal Street, Suite #2
Dover, DE 19901-3639

RE: Proposed regulation – uniform definitions for student conduct which may result in alternative placement or expulsion

Dear Mr. Sadowski:

Please accept the following comments from the Disabilities Law Program (DLP) on the Delaware Department of Education (DOE)'s proposed new regulation creating uniform definitions for student conduct which may result in alternative placement or expulsion.

The DLP is the statewide protection and advocacy agency for persons with disabilities in Delaware. The DLP has represented clients with physical or mental disabilities which manifest in behaviors that may result in expulsion or alternative placements. The DLP offers the following comments to highlight areas in which the Department's proposed new regulation may adversely impact students with disabilities.

1.0 Purpose and General Comments

The DLP is highly concerned to read the inclusion, into the regulatory purpose section of this regulation, of the ability of districts and charter schools to add language to the common definitions. Such flexibility and ambiguity is unprecedented. Further, it contradicts the goals of this regulation, to prevent radically divergent treatment of behavior across different districts. According to the synopsis of House Bill 42, the legislation requires the DOE "to promulgate uniform regulations related to school discipline to provide consistency across all districts and charter schools" as required in response to House Resolution Number 33 of the 145th General Assembly (emphasis added). This resolution likewise sets forth that the purpose in creating the "common legal definitions of student offenses that lead to alternative placement or expulsion" is to "minimize potential inequities to students, their families and the public school system resulting from to differences among policies."

Permitting language to be added to definitions by districts and charter schools removes the "consistence," commonality, and minimization of potential inequities resulting from

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DELAWARE'S PROTECTION AND ADVOCACY SYSTEM FOR PERSONS WITH DISABILITIES

differences among policies, which is the motivation behind the promulgation of the regulation. Permitting this type of additions would leave districts and charter schools free to continue to have divergent and unequal practices. Practically this would leave the burden on parents and students to object when there is a "conflict" between the regulations and the local policy. Many parents and students would not have the knowledge or tools to launch a successful challenge. And those with disabilities will be even more at a disadvantage.

Likewise, the use of the phrases "including but not limited to" and "for example" throughout the definitions in this regulation raise these same concerns: the definitions are left open for interpretation rather than being made uniform. This does not help the DOE further the goal of reducing discipline disparities, including disproportionate discipline of minority students and those with disabilities (students with disabilities accounted for 20% of suspensions but only 14% of the student population, in 2008-2009).¹ Lack of uniformity has, historically, meant discipline disparities for minorities and students with disabilities and unless these regulations take a firmer approach, they do not further our goal of minimizing inequities. The DOE's definitions should be narrow in order to meet the spirit of the state law directing that this regulation be promulgated, and the statistics showing the very high rates of suspension and expulsion in Delaware (twice the national average in 2009).²

While it is recognized that "kids are better off in their seat learning"³ schools do not consistently opt for discipline that in-fact maintains them in school. It should be clear in the regulation that expulsion / alternative placement is not a mandatory consequence. Further, the child's age, intellectual and emotional⁴ level, as well as the intent behind the student's actions, should be considered when determining the severity of the discipline. We recommend the DOE add a definition of "intent" using, as a minimum, the definition utilized in 11 Del. C. § 231, and add intent as an element of the offenses defined throughout this regulation.

The regulation reads in a very legalistic fashion and is written at a higher reading level than is accessible to most students. If the students cannot read and understand their code of conduct, they cannot properly be put on notice that they must abide by it.

2.0 Definitions

A. "Deadly Weapons"

This definition simply references to 11 Del. C. §§1442 - 1458, which are specific offenses (carrying a concealed weapon, wearing body armor during commission of a felony, etc.) rather than a clear definition of the term. Further, the cited statutes cover more than simply

¹ See Delaware Online articles, [Discipline disparities merit a long look from education reformers](#) (Exhibit A); and [Delaware schools: Discipline numbers flag need to address disabilities](#) (Exhibit B).

² Delaware Online, [Delaware students suspended at twice the U.S. average](#) (Exhibit C).

³ Quote of Robin Case, Delaware Department of Education, from Exhibit C, pg. 2.

⁴ Districts and charter schools should be reminded that children and teens are not small adults; some misbehavior may be a result of their still developing brains. See e.g., [The Teen Brain](#) and [Teenage plus: The New Adolescence](#) (Exhibit D).

“deadly weapons.” This lack of a distinct definition makes it cumbersome for schools, parents, and students to have real clarity on what is considered a deadly weapon. Further, “deadly weapon” is specifically and more clearly defined at 11 Del. C. §222(5); the DLP recommends that the definition of “deadly weapons” be modified using §222(5) as a guide. The DLP notes that section 3.43 of the DOE’s proposed regulation includes an enumerated list of “deadly weapons/weapons.” This is more appropriately placed in the definition of “deadly weapons” itself as §222(5) has done. An intent element should be added. For example, if a student brings a bicycle chain to school to lock up his bicycle, that should not give rise to an expulsion for possession of a deadly weapon.

B. “Drug”

This definition references to the definitions in 16 Del.C. §4701 of “controlled substance” and “counterfeit substance”; however the term “counterfeit substance” is missing the word “controlled” and should instead read “counterfeit controlled substance.” There is no term “counterfeit substance” in 16 Del.C. §4701. “For example” should be removed because it makes the definition ambiguous.

C. “Drug like substance”

This definition is overbroad. Based on the definition, as phrased (“including, for example”), it would include legitimate substances like chocolate or sugar as they are noncontrolled, nonprescribed, and alter a student’s behavior or feelings. Likewise, this definition lacks intent as part of the definition, which is problematic. If a student has a noncontrolled and nonprescription substance which is capable of producing a change in behavior/alternate state of mind or feeling, for a legitimate purpose, they could face discipline based on this definition. Perhaps the student has glue for his art class or brings over the counter allergy medicine to school to manage symptoms of hay fever; these actions should not result in an alternative placement or expulsion. The intent behind the possession is essential to judging the culpability.

D. “Look Alike Substance”

This definition references to 16 Del. C. §4752A which was repealed; there is no provision defining “look alike substance” in the criminal code or Uniform Controlled Substances Act. This term should be deleted as it is no longer valid. Further, this definition is far too broad, does not look at intent or at the degree of risk of the behavior (giving another student oregano versus a substance that could be harmful if ingested) in determining culpability. This could implicate students who make a harmless joke or a drama club production using a prop that resembles drugs. The term noncontrolled substance is undefined, thus, because a “noncontrolled substance capable of producing a change in behavior”, state of mind, or feeling can be interpreted quite broadly; a student could be implicated here for representing, falsely, that a cup of salt is really sugar.

E. "Possess" "Possessing" or "Possession"

This definition is intended to be read as a two-part test, but because of how it is worded it could be read in the disjunctive. Thus, someone who knows where an illicit item is does not mean that they have it under their control. For example, they know another student, who they are terrified of, has drugs, but they have no control over the drugs. Or, someone else could have placed something in their backpack without their knowledge. Thus this definition should be clarified, for example:

"Possess" "Possessing" or "Possession" shall mean location of:

- 1) Prohibited item(s) or substance(s) on the student's person, in the student's belongings, or under the student's reasonable control; and*
- 2) the student has knowledge of the whereabouts of those prohibited item(s) or substance(s)*

The current definition is limited to possession of alcohol, drugs, look alike substances, a drug like substance (which is undefined), or drug paraphernalia while the regulation uses these terms in other contexts without providing a different definition (e.g., weapons and pornography).

F. "Prescription drugs"

This definition should be amended to add a provision to allow students to possess prescription drugs not intended for that student, when there is a legitimate purpose. For example, a parent sends an inhaler to school with a sibling because the child it is intended for forgot it, or perpetually loses it and the sibling is more trustworthy. While parents should not be encouraged to do this it does not warrant the sibling's expulsion or alternative placement. The inclusion of this provision would signal to schools to consider the intent behind the possession in determining whether or not to discipline the student.

G. "School Environment"

As written, this provision is overbroad. Rather than "extracurricular activities" it should specify "school sponsored extracurricular activities." Otherwise, we are creating a State where students can be disciplined for misbehavior anywhere, as "extracurricular activities" could include a Boy Scouts meeting or swim practice at the YMCA. "For example" should be removed because it makes the definition more ambiguous than necessary.

H. "Use"

The definition of "use" should include intent. A student could ingest or otherwise assimilate a prohibited substance without the student's knowledge. For example, a student could add alcohol or a drug to another student's beverage without that student's knowledge. They would later be "reasonably found to be under the influence of such a substance" but bear no culpability for that state.

3.0 Uniform School Conduct Definitions

A. Subsection name

It is unclear on why section 2.0 and section 3.0 are separate sections; they both involve "definitions" without explanation of the difference. These two sections should be merged. It would undermine the legislative intent to not make the definitions in both 2.0 and 3.0 mandatory. Further, it would compromise the data collection if, for example, districts were using a different definition of the term "drug" or "possession", and thus treating the same behavior differently.

B. Specific Definitions

3.1. Arson

The definition of arson is not consistent with the definition used in the criminal code, which limits arson to the burning of buildings. See 11 Del. C. §§ 801-803. There is a separate offense for the burning of physical property "reckless burning or exploding." 11 Del. C. § 804. Given the seriousness of a record of committing true arson, these two offenses should be separated. For example, if a student who lights a classmate's homework on fire, while his behavior should be punishable, his behavior should not be labeled arson. Indeed, the DOE has included, later in this proposed regulation, a "reckless burning" violation (3.30).

Additionally, the inclusion of "cause alarm" is also problematic because it captures behavior which is less culpable than damage, under the same very serious term of arson. For example, a student who wants to cause his teacher alarm by lighting a cigarette in class could conceivably be disciplined under arson. Or, a student who brings a "smoke snake", which does nothing more than smoke and poses no actual danger, could be disciplined under "arson." While these behaviors should be punishable they should not be labeled arson and we suggest that they not be included in this list of offenses which may result in expulsion or alternative placement.

3.2 Assault III

"Physical injury" should be defined to clarify that it entails "impairment of physical condition or substantial pain," as it is defined at 11 Del. C. §222 (23). This will help to prevent the use of this charge when it the behavior does not rise to this significant of a level.

3.3 Attorney General's Report (Juvenile Arrest Warrant and Complaint)

In the context of this regulation, these reports should not be an independent justification for an expulsion or alternative placement. The reports are broader and may include allegations of behavior that does not justify school discipline. The off-campus transgression must be linked to a risk of harm to others at the school, otherwise this regulation would be inconsistent with Howard v. Colonial School District, 621 A.2d 362 (Del. Super. Ct. 1992); aff'd by 615 A.2d 531, 1992 WL 276302 (Del. Supr. 1992). Further, this procedure runs afoul of Goss v. Lopez, 419

U.S. 565 (1975), requiring, among other due process steps, an individualized preliminary investigation to determine the facts associated with the infraction and allowing the student to discuss the charges against him.

3.5 Bullying

We recognize that this definition reflects the definition set forth by statute in 14 Del.C. § 4112D. It is our position that both the statute and the regulation are overbroad and infringe on students' First Amendment rights.

3.6 Criminal Drug Offense, Commission of

This definition should not include alcohol and alcoholic liquors as that is a separate offense which should be punishable by the school only when it is possessed on school property, at a school event, or during a school-sponsored extracurricular activity.

The mandatory reporting of criminal drug offense statute includes only students who possess "on school property or at a school function." 11 Del. C. § 1442(c). The definition in this regulation is overbroad, therefore, as it does not limit conduct to on school property or at school functions. Possession alone may not be punishable unless the possession occurs on school property. Delaware Courts have permitted discipline for drug *dealing* that occurred off-campus when there was a link of a risk of harm to the school community. Howard v. Colonial School District, 621 A.2d 362 (Del. Super. Ct. 1992); aff'd by 615 A.2d 531, 1992 WL 276302 (Del. Supr. 1992). In the Howard case the court emphasized that it was a *dealing* case (and later, that the court was "not ruling that all off-campus, non-school activity conduct subjects a student to the threat of expulsion").

This definition states that it "shall mean behavior in which law enforcement believes probable cause exists to arrest a student..." Presumably this is because this definition is being included to respond to Attorney General's reports. As stated above, in our comments to section 3.3, these reports should not be an independent justification for an expulsion or alternative placement.

3.7 Criminal Deadly Weapons/Dangerous Instrument Offense, Commission of

The definition contains a typographical error in the citation to the deadly weapons / dangerous instruments offenses. It should read 11 Del. C. §§ 1442-1458. Including the "examples include, but are not limited to" may give the misimpression that this is in addition to 11 Del. C. §§ 1442-1458. This sentence should be removed or in the alternative, each offense should be written out, preferably with their respective citations.

Our concerns noted above for sections 3.3. and 3.6, that Attorney General reports should not be an independent justification for an expulsion or alternative placement, applies equally here.

3.8 Criminal Mischief (Vandalism)

This is not restricted to school-based behavior. This should be limited to behavior that occurs on school grounds or at a school event. If the DOE includes vandalism behavior that occurs outside of the school grounds, the student must pose a proximate risk to the school community.

3.9 Criminal Sexual offense, Commission of

Including the "examples include, but are not limited to" may give the misimpression that this is in addition to the cited statutes. This sentence should be removed or in the alternative, each offense should be written out, preferably with their respective citations. Our concerns noted above for sections 3.3. and 3.6, that Attorney General reports should not be an independent justification for an expulsion or alternative placement, applies equally here.

3.10 Criminal Violent Felony Offense, Commission of

Our concerns noted above for sections 3.3. and 3.6, that Attorney General reports should not be an independent justification for an expulsion or alternative placement, applies equally here.

3.11 Dangerous Instrument(s) Possession / Concealment / Sale

This definition is missing an important part of the statutory definition from the criminal code that "under the circumstances in which it is used, attempted to be used or threatened to be used," it is readily capable of causing serious physical injury or death. See 11 Del. C. § 222. The use of the word unlawful in this regulation is not sufficient to capture the culpability that is necessary. Further, intent should be added as a necessary element. Without these additions we are not rectifying situations where these policies are enforced too strictly, such as when an elementary student was expelled for bringing his camping knife to school to eat his pudding.⁵

3.12 Defiance of School Authority

This definition is overbroad. "Uncivil behavior" is abstract and undefined. What is "uncivil" to one person may be perfectly appropriate to another. Finally, defiance alone should not merit potential expulsion or alternative placement; we recommend that it be stricken from this regulation.

3.13 Disorderly Conduct

This definition is overbroad. Of significant concern, the behavior is not linked to school and could apply to "disorderly conduct" that occurs outside of school. Further, it should include

⁵ Delaware Online article: [Public not tolerating latest 'zero tolerance' verdict \(Exhibit E\)](#).

an intent requirement. Otherwise, a child with Tourette 's syndrome may find himself disciplined for his "offensively coarse utterances." Fighting should be removed from this provision as it is addressed separately in 3.18. Disorderly conduct alone should not merit potential expulsion or alternative placement; we recommend that it be stricken from this regulation.

3.14 Disruption of the Educational Process

Boycotts, sit-ins, and walk-outs that are an exercise of a student's free speech rights should not be included as discipline potentially subject to alternative placement. This could be interpreted to cover activities such as the recent wearing of hooded sweatshirts in memory of Trayvon Martin.⁶ The DOE should not condone the crippling of students' critical thinking skills by so severely restricting their ability to express their thoughts and beliefs. Broad definitions of "disruptive" behavior raises First Amendment concerns, as was the case for the Shue-Medill Middle School student who was turned away from school for her "disruptive" pink hair, until the ACLU stepped in.⁷ Disruption of the educational process, unless it is chronic and extreme, should not merit potential expulsion or alternative placement; we recommend that it be stricken from this regulation.

3.15 Distribution of Drugs and/or Alcohol and/or paraphernalia

This definition should include that the distribution is unauthorized. For example, if a parent sends an inhaler to school with a sibling because the other child forgot it at home.

3.16 Extortion

This definition should include an element of intent as used in the criminal code 11 Del. C. § 846, requiring the intent element of § 841: "intending to deprive that person of it or appropriate it" or "fraudulently converts same to the person's own use."

3.18 Fighting

"Nonconsensual" should be added to this definition so as to exclude amicable roughhousing or sports activities (under the current definition the entire football team could be facing expulsion).

3.19 Gambling

This does not warrant potential expulsion or alternative placement. If a student is over 18 and carrying a lottery ticket, or even bets a friend a dollar that the Phillies will win, the student should not potentially be subject to such dire disciplinary consequences. Under this definition

⁶ Delaware Online, [Hoodies a symbol of solidarity for Trayvon Martin](#) (Exhibit F).

⁷ See News Journal articles on Brianna Moore (Exhibit G).

in-class bingo games for candy or other prizes could be implicated. This should be stricken from the regulation.

3.20 Gun Free School's Violation

A comma should be placed between "school" and "of a firearm."

3.21 Harassment

The second sentence is far too broad. Students may make statements that offend or "defame the dignity" without those statements constituting harassment. For example, if a student states "I am a lesbian," that statement may "offend" another, but that does not make it harassing. Or, if a student criticizes a teacher or another, it may embarrass them but not constitute harassment. This definition raises First Amendment concerns for students. Of significant concern, it does not limit the discipline to in-school speech or speech which causes a "substantial disruption" at school. This runs afoul of recent Third Circuit case law protecting student speech. See Snyder v. Blue Mountain School District, 650 F.3d 915 (3d Cir. 2011).

3.22 Inappropriate Behavior

This definition is overbroad and could include expressions of speech such as the organized response to Trayvon Martin's death, where students planned to wear hooded sweatshirts rather than their uniform.⁸ This includes both minor and serious behavior and could lead to unequal treatment and disproportionate discipline.

3.23 Inhalant Abuse

This could include nasal spray taken by a congested student. This definition should clarify that the inhalation is not for a legitimate purpose (i.e., per a physician's prescription or over the counter medication provided by a parent).

3.24 Medications: Inappropriate use or Possession

"Using any substance for a purpose for which it was not intended for" could mean that a student whose doctor has recommended treatment for an "off label" or non-FDA approved use of a medication, would be in violation of this policy. This provision should be removed or amended.

3.25 Misuse of Technology

This definition should clarify that it is the school's equipment. A student should be free to download, install files, etc. to his/her own laptop, for example. And, as written, this definition includes damage to a student's own equipment (e.g. a student breaks his own i-pod). Further, the

⁸ See Exhibit F.

downloading and/or files provision is overly broad. This would prevent a student saving his work to a flash drive. And, it would expose students to the risk of expulsion who, inadvertently downloaded a file, or clicked "ok" to get rid of a screen, without realizing such actions were not permitted.

3.26 Misuse of Technology (Severe Clause)

As above, this definition should clarify that it is the school's equipment, i.e., "deliberately tampers with, damages, alters, accesses, crashes, or corrupts the school or district's computer/communications system..."

3.27 Offensive Touching

Most children commit "offensive touching" – they are children and such behavior is a part of being a child. This definition does not narrow what is viewed as "offensive touching" which may result in an alternative placement or expulsion. Because this behavior is common, and the definition so broad, it is prone to be invoked in an inequitable fashion. The DLP has seen this disciplinary offense misused by districts. This regulation should narrowly define this "offense" so that only the more extreme cases would be subject to potential expulsion or alternative placement.

3.28 Pornography

This should be limited to school grounds and school functions. If a student, for example, has an adult magazine in his home, that should not subject him to potential expulsion. Further, "obscene" material is too broad and subjective. For example, if a student in an art class paints a figure study, someone else might find that "obscene." Instead, we suggest that the DOE use a more specific definition, such as: "book, magazine, periodical, pamphlet, video or film depicting sexual acts or simulation of sexual acts" (modeled on 11 Del. C. § 1109).

3.31 Repeated Violations of Student Code of Conduct

As written, a student who has five referrals, but some of which were later determined not to be the student's fault (e.g., another student admitted guilt), would still be subjected to this provision. The definition should include a requirement of guilt. The provision with the behavior contract is highly problematic. Behavior contracts are often very broad, do not always provide positive supports, and are at times utilized when a student's behavior is related to his disability. And, the way this provision is written, if the parent violates the behavior contract the student may be expelled or alternatively placed.

3.32 Sexual Assault

This definition is too broad and includes sexual harassment, and even could include voyeurism as sexual assault. This should be renamed "sexual offenses" or should be broken into

multiple offenses. Unwanted sexual acts involving physical contact are correctly labeled sexual assault; other sexual behaviors, without sexual contact, should not be included under this term.

3.33 Sexual Harassment

We recognize that this definition is using the statutory definition. However, it is overly broad.

3.34 Sexual Misconduct

Sexual act is undefined. To some, it could include kissing or a couple walking with their arms around each other's waists. This should be clarified. There should be consideration of a student's age.

3.35 Stealing

This should have the same definition as theft; see above. One term should be utilized, either "theft" or "stealing."

3.36 Steroids Possession and/or Use

This should specify that the possession at issue is unlawful possession/use; students may be in possession of prescribed steroid medication.

3.38 Teen Dating Violence

"Dating" should be added to past or current relationships. "Controlling" should be defined. The DOE may wish to consider a "stalking" definition.

3.39 Terroristic Threatening

The DLP has seen this offense misused and applied in widely divergent ways. Schools have used this very broadly; as a result inequitable treatment is more likely. A credibility factor should be added so that mere "puffing" or expression of emotional state is not treated the same as a serious threat. The seriousness of the threat should influence whether or not it could result in alternative placement or expulsion.

3.40 Terroristic Threatening – Security Threat

This definition should include intent, i.e., the falsity of the statement should be known ("knowingly false statement"). Otherwise, this definition covers a student with an undiagnosed brain tumor could believe he smells smoke, and knowing that shouting fire will cause an evacuation, does so believing he is doing the right thing.

3.42 Use and/or possession of drugs and/or alcohol and/or paraphernalia

This should not include off-school ground activity unless there is a nexus to school. Possession alone should not be punishable unless the possession occurs on school property. As discussed above, there must be a risk posed to the school by the student's off campus behavior, for that to be punishable. See e.g., Howard v. Colonial School District, 621 A.2d 362 (Del. Super. Ct. 1992); aff'd by 615 A.2d 531, 1992 WL 276302 (Del. Supr. 1992). There should also be an intent element to this definition so that a student who ingests alcohol or drugs without his knowledge is not subjected to this provision.

3.43 Weapons / Deadly Weapon(s) Possession / Concealment / Sale

This does not include an intent element, which would be necessary in order to deal with the "cake knife" type situations, or if, for example, a student has a xacto knife to work on an art project. Both of these situations were part of a series of high-profile cases that brought to the public's attention concerns about "zero-tolerance" policies.⁹ Non-functional weapon should be defined otherwise it could include innocuous items such as a squirt gun or part of a Halloween costume. This definition includes an enumerated list of "deadly weapons/weapons." This is more appropriately placed in the definition of "deadly weapons" itself, above, as §222(5) has done.

Thank you for the Department's consideration of the DLP's comments.

Respectfully,



Marissa L. Band
Staff Attorney

Cc: Brian Hartman, Esq., Disabilities Law Program
Daniel C. Lang, Esq., Disabilities Law Program

⁹ See Exhibit C, pg. 5.



Discipline disparities merit a long look from education reformers

By RHONDA B. GRAHAM • The News Journal • April 1, 2010

Two weeks ago Secretary of Education Arne Duncan said he wanted to tackle the disparity in how students of different races with discipline problems are treated in public schools.

Earlier this month, the Civil Rights Division of his federal agency informed Delaware's largest school district that it is opening an investigation involving the same issue.

Then on Monday, Duncan announced that Delaware is one of two first-round winners in the federal Race To the Top education reform competition. It now has \$100 million to spend on strengthening standards and assessment, supporting quality educators, developing data systems to better measure student performance, and turning around failing schools.

Talk about intended consequences.

The state's willingness to tie the money to data-proven success apparently floated Delaware's application to the top of the heap.

And no doubt Duncan is paying attention to what is being called a "growing body of research" that finds

the heavy use of suspensions of minority students is increasing dropout rates and a "school-to-prison" pipeline.

Just before his death in 2000, State Rep. Al O. Plant got the feds to require compliance agreements for how the Seaford, Brandywine and Red Clay districts were disciplining black students. Each district had to outline how it would address the problems. That included keeping data on the number and race of those expelled and various intervention programs.

But there was no urgency or incentive about finding successful practices and programs. A decade later, the academic success of minority students still lags. National and local data show they are still more likely to be expelled than white classmates.

Which is why New Castle Councilman Jea Street is not interested in broad compliance agreements. He wants a review of Christina's zero-tolerance policies -- specifically, the fairness of how extenuating circumstances allow some students to return to school. And he wants the feds to order the Delaware districts to offer better alternatives than the current at-home study options.

His complaint refers to the case of a white 6-year-old boy, who didn't know his scouting knife was considered a dangerous weapon under the district's zero-tolerance policy. Street said the decision to immediately end the expulsion once the facts were known should have been applied to four black students.

The most striking case appears to be that of a high school senior with no record of discipline problems. However, during an argument with her divorced mother's boyfriend, she picked up an 8-inch knife. The mother phoned police and she was

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arrested. Last fall, a municipal court judge ruled the senior could return to school. Now at the end of the third marking period, she's still waiting for permission to return to a classroom.

"If our primary obligation is to educate kids, then to punish them by excluding them doesn't make sense," Daniel A. Domenech, executive director of the American Association of School Administrators recently told the New York Times.

This is apparently the thinking of the authors behind Delaware's Race To The Top application. By targeting discipline as a candidate for data-driven solutions, the state wants to spend money on solutions that work, not just the most promising.

"We don't want to be really prescriptive," Deputy Education Secretary Dan Cruce said. "We want to be clear about the mandate. They do need to provide us with a final scope of work. But we can also be their sounding board. It's important that we provide flexibility to the districts without being too big brother about it."

So if a highly successful academic specialist is out of budget, Cruce said, this is the time to consider bringing her in. Being creative is as encouraged as being bold. For instance, paying someone double her fee to come in on a temporary basis wouldn't be frowned upon, as long as the claims to improving achievement are backed by the data.

With the grant's emphasis on parental engagement and community involvement, a recently formed effort to help Wilmington parents who admit they have lost control of their children sounds like it may be eligible.


The former and current district and charter school administrators, retired teachers, ministers and community activists have been energized by the failure of the second city charter school for black students. They will be meeting April 10 at New Destiny Church in northeast Wilmington to hammer out a variety of strategies.

Cruce said the idea has possibilities. But Race To The Top, to its credit, is not about possibilities. It's about known successes.

"If they want to make a purchase of an intervention model from vendor X, they need to show us the data

where that works. The whole idea is we don't want to have to put parameters up. We want people to think widely. We believe what Secretary Duncan said, this is really a once-in-a-lifetime opportunity."

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Delaware schools: Discipline numbers flag need to address disabilities

Special-needs youth punished more often

By NICHOLE DOBO • The News Journal • June 11, 2010

Schools across Delaware are punishing a disproportional number of students with disabilities, mirroring a national trend.

A News Journal analysis of 2008-2009 school year data found that these students accounted for about 20 percent of the students suspended but nearly 14 percent of the student population. National studies have shown that these students represent about 20 percent of all students suspended but make up about 11 percent of the population.

State officials acknowledge the problem and say school leaders must understand what is causing the students' misbehavior.

"The piece we think is important is the problem-solving piece," said Martha Toomey, the state Department of Education's director of special education. "When we see behavior that warrants discipline, we need to figure out why."

In a story published Sunday, a News Journal study of more than 23,000 suspension and expulsion records found that nearly one out of five Delaware public school students was suspended or expelled last year, a figure nearly double the national average. Statewide, 22,828 of the 125,430 students in public schools were suspended or expelled, missing tens of thousands of school days. Almost 80 percent were sent home for non-criminal offenses such as breaking the dress code or cutting class.

For some parents of special-needs students, the concern is whether educators understand their children's disabilities and how to work with them.

Parent Rick Schroeter said his 14-year-old son's lack of communication skills leads to misunderstandings at school. The boy -- who has been diagnosed emotionally disturbed by his Caesar Rodney middle school but is in the process of an independent evaluation for autism -- has a hard time explaining his feelings, so he sometimes lashes out, Schroeter said.

One time, a teacher did not want to hug him, something the boy mistook for rejection, so he kicked her. When he does not understand an assignment, he refuses to do it because he does not know how to tell the teacher he's unable to do the work, his dad said.

Some of this behavior has led to suspensions. His father estimates that his son lost about a month and a half of school last year and at least nine days this school year.

"His kicking and hitting is not due to him just wanting to be that way," said Schroeter, who lives near Camden. "He just basically can't help himself."

Caesar Rodney officials did not return calls seeking comment this week.

Drawing the line

School districts have the ability to track student discipline numbers, and educators say that's

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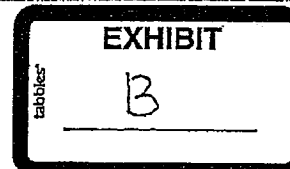
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helping them make informed decisions about teacher training needs and options for preventing problems. But some say it's not enough.

"Everything to help that teacher is in place," said Marie-Anne Aghazadian, executive director of the Parent Information Center of Delaware, a nonprofit resource and support center for parents of children with special needs. "What's really lacking is will on the part of the school districts to accept responsibilities."

Those responsibilities include figuring out if the behaviors that lead to punishments are manifestations of the child's disability. State and federal statutes are in place to help ensure children with disabilities are being treated fairly. The regulations -- which can be complex to navigate even for those who work in education -- require that teams evaluate a child's education and behavior plan after a suspension takes place to make sure the child is getting the right support to be successful in school.

That can be a challenge, especially for students with so-called "invisible disabilities," such as Attention Deficit Hyperactivity Disorder, Aghazadian said. Teachers of these students need to want to learn the best ways to educate these children and to recognize when bad behavior stems from the child's disability, she said.

For Schroeter, it's been difficult to find a place where his child can learn. He knows his son shouldn't hit people -- and he tells the teen so -- but sometimes the outbursts are hard to manage. He wants his child to be in an environment where he can learn and to be understood by his teachers.

"He opens doors for the same people that he hits," Schroeter said. "He's a loving kid."

Changing the trend

The U.S. Department of Education requires states to track the academic and behavioral progress of students with disabilities. A portion of the report deals with punishment of these children. Each school district and charter school must meet goals based on the proportion of students who are suspended for more than 10 days as compared with the general student population.

In Delaware, four school districts -- Caesar Rodney, Indian River, Red Clay Consolidated and Capital -- did not meet those goals in the 2007-2008 school year, the latest report available. That's an improvement from the last report, when seven districts did not meet the goals. Each of the districts on the list must create a plan to improve.

Educators and state officials stressed that the 2007-2008 reports are not representative of what's going on now, noting that data reviews show progress has been made. For instance, Red Clay's data show that it cut the number of special-education students who missed school in the 2008-2009 academic year more than 10 days by a quarter, spokeswoman Pat Nash said.


In the Indian River and Red Clay districts, officials worked with University of Delaware to implement a program called Positive Behavioral Support. Schools that use this education model focus on promoting good behavior, rather than just punishments. In Red Clay, nine schools use the program. In Indian River, all schools use it. Red Clay also used federal stimulus money to hire three behavioral interventionists who work in special education.

"We want to work with these families so that students are successful in school," said Hugh Broomall, an assistant superintendent at the district.

A team effort

At Appoquinimink, special-education director Mary


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
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Yes, my princess is a princess

No, I have a grocery store

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Ann Mieczkowski said it's important to make sure everyone is on the same page when educators and parents draft a plan to help the child with behavioral issues. During meetings, Mieczkowski puts paper on the wall and writes down plans they discuss on it. That helps prevent misunderstandings because everyone can see the notes and bring up any misunderstandings at the meeting.

Another key to success is tracking how well it's working, Mieczkowski said. She requires parents and educators to revisit the plan a couple weeks after it is drafted.

"Too many plans fall apart because nobody comes back to look at them," she said.

Mieczkowski has worked in special education for 25 years and was recently named special-education director of the year in Delaware. It is the school's responsibility to teach children how to behave, even if it's difficult, she said.

"We have to teach the appropriate behaviors," she said. "That's part of our job."

Contact Nichole Dobo at 324-2281 or ndobo@delawareonline.com.

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June 6, 2010

Delaware students suspended at twice the U.S. average

Majority of offenses are noncriminal

By *NICHOLE DOBO*
The News Journal

Nearly one out of five Delaware public school students was suspended or expelled last year, a figure nearly double the national average.

Statewide, 22,828 of the 125,430 students in public schools were suspended or expelled, missing tens of thousands of school days.

The majority of those students, close to 80 percent, were sent home for non-criminal offenses, infractions ranging from breaking the dress code to cutting class.

<http://php.delawareonline.com/schools/map/schoolDiscipline.php>">A News Journal analysis of more than 23,000 suspension and expulsion records shows Delaware's rate has been higher than the national rate for at least five years.

State officials agree Delaware's rate is too high, but say they give local school leaders autonomy to decide what punishments are warranted.

School and district leaders say they know pulling children out of school isn't ideal, but argue that sometimes suspension of a child disrupting the entire class is the best option for the remaining students.

And they believe better classroom management and expansion of in-school suspension programs will reduce the number of children sent home.

But parents such as Toyia Lopez are frustrated.

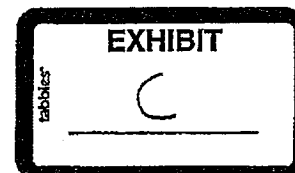
Her son Khaalid Lopez, a kindergartner, was suspended from <http://www.colonial.k12.de.us/>">Colonial School District's Eisenberg Elementary four times this year.

The 6-year-old sometimes throws toys and has hit his teacher, but his mother contends he's never hurt anyone or done anything serious enough to warrant suspension.

Khaalid's brother, Rahsheer Blake, is in fourth grade. He has Attention Deficit Hyperactivity Disorder and will storm out of the classroom when he's frustrated with his work or the teacher. The 10-year-old has been suspended so many times from Colonial that his mother says she's lost count.

She knows this much: Her boys need to be in class.

"They don't need to be out of school," Lopez says. "They need to be learning."



<http://php.delawareonline.com/schools/map/schoolDiscipline.php>">The News Journal analysis of the 2008-2009 school year data, the most recent available from the state, found:

- More than 18 percent of students were suspended or expelled last school year, a figure that includes in-school suspensions and does not count students more than once.
- The 22,828 students suspended or expelled lost a combined 147,392 days of classroom instruction.
- Eight schools suspended or expelled at least half the student body:
<http://www.redclay.k12.de.us/>">Red Clay Consolidated's Dickinson High; Prestige Academy charter school; <http://www.colonial.k12.de.us/>">Colonial's McCullough Middle; and <http://www.christina.k12.de.us/>">Christina's Bayard Middle, Bancroft Elementary, Stubbs Elementary, Shue-Medill Middle and Elbert-Palmer Elementary.

An overwhelming majority of the state's suspensions and expulsions were not for criminal incidents. In 2008, about 78 percent were for breaking school rules, such as not wearing a complete school uniform or disobeying a teacher.

The children who face these punishments tend to be the most at-risk youth, experts say, and their chances of academic success drop when they aren't in school.

The state's suspension and expulsion rate is too high, said Robin Case, who oversees school discipline for the state Department of Education.

"I always think kids are better off in their seat learning," Case says. "I don't think there's an educator in our state who doesn't agree."

Yet educators face a dilemma: One disruptive student can ruin the educational environment for an entire class.

"You have to take actions for the benefit of the rest of the students," says Colonial Superintendent George H. Meney.

There's been little progress in bringing Delaware's numbers down in the last five years, and that's unacceptable to New Castle Councilman Jea Street, who also works as a volunteer advocate for students who face expulsion at their disciplinary hearings.

"It's absurd," says Street. "I will say all the suspensions for criminal offenses are justified -- and that's a gift. Now I want them to justify the balance. And they can't do it."

Research shows that the key to keeping children in school is effective classroom management, says Walter S. Gilliam, director of the Edward Zigler Center in Child Development and Social Policy at Yale University. Educators need the support of behavioral health professionals to assess why individual children are having difficulties, smaller classroom enrollments and programs to deal with job-related stress.

"In the end, suspension and expulsion is not a behavior of a child," Gilliam says. "It's a decision made by adults."

A changing of culture

August 2008 started a difficult year at Christina's Bayard Middle School.

That year, the district shifted grades, making Bayard a sixth- through eighth-grade building. Principal

Donald Patton established a strictly enforced dress code and school-conduct rules.

During that year, 559 students -- about 83 percent of the student body -- were suspended or expelled. They missed a combined 8,816 days of regular classroom instruction. It was part of a deliberate effort to create an environment of order and respect, Patton says.

The culture shift impacted teachers, too. Three walked out in the first month. By year's end, about 60 educators had quit.

"We were putting expectations in place," Patton explains.

Delaware's highest district suspension and expulsion rate from the 2007-2008 term to last year was in <http://www.christina.k12.de.us/>>Christina. In 2005-2006, <http://www.capital.k12.de.us/>>Capital School District topped the list. Five years ago, <http://www.redclay.k12.de.us/>>Red Clay Consolidated had the highest rate.

The problem with suspending or expelling children is those who are the most likely to be punished often lack the home support to guide them back, says Michael P. Krezmien, a Rutgers University professor who studies school discipline. The more regular class these children miss, the more they fall behind. Eventually, some quit trying.

"The thing about kicking kids out of school is you remove them from the one structured place where they can be involved," Krezmien says.

Figuring out why a district or school has a high number of suspensions and expulsions requires a look at policies, training, staff and resources, says Russ Skiba, a professor in counseling and educational psychology at Indiana University. Each district -- and the school buildings within it -- has its own story. Schools with similar demographics and challenges don't necessarily have the same rates, research shows.

"If they are not aware of effective options for keeping kids in school they really are forced into removing kids from school," Skiba says.

Reduction efforts

One of Delaware's lowest suspension rates is found at a school that takes pride in strict rules: 3 percent of <http://www.demilacad.org/>>Delaware Military Academy students were suspended or expelled in 2008-2009.

Leaders there deal with misbehavior in a different way: Students drop to the floor and do pushups. Military instructors yell. Those who break the rules often find themselves facing the most dreaded of punishments -- marching during lunch while carrying a 16-pound rifle.

With 16 students suspended or expelled in 2008-2009, it has one of the lowest rates among Delaware high schools. Although Col. Jack Wintermantel, the charter school's superintendent and founder, says he is proud of his school's discipline record, he cautioned that comparing the school to a traditional public school isn't fair. It's a military academy, so educators there have discipline options that aren't available at most schools. And parents who sign their children up for the charter school choose this environment.

"High school kids are going to make mistakes," he says. "We just have to show them the error of their ways."

Keeping troubled students in an educational setting is a priority at <http://www.irsd.net/>>Indian River School District, says Charles Hudson, administrator for pupil services. Besides referring

students to an alternative education school, the district has an in-house program that's used instead of sending students home. The hope is to create a place where problem students can continue their education while getting help.

"If we can keep them in school, maybe we can change some of these behaviors," Hudson says.

Efforts also are being made in other districts. To reduce suspensions for first-time offenders, <http://www.brandywineschools.org> Brandywine is running a high school peer mediation program, Peer Court, for offenses such as fighting or stealing. The district plans to expand the program to the middle school level next year, says Ellen Marie Cooper, director of legal affairs. "We like to have our kids going to school."

Red Clay administrators use suspension and expulsion data to track when and why their students are getting into trouble. Then, they make adjustments aimed at preventing conflicts, says Hugh Broomall, assistant superintendent for school support.

A high rate remains at Dickinson High, where 55 percent of students were suspended or expelled last year. That figure should drop because ninth-graders were moved into their own area where they don't interact with upperclassmen, and new scheduling limits breaks between classes.

"The idea of being proactive to control discipline problems is something we've tried to wrap our arms around in Red Clay," Broomall says.

While secondary schools long have had disciplinary problems, more surprising may be how many young children are out of class.

Nearly 400 kindergarten students were suspended from Delaware public schools last academic year. Lopez, mother of the kindergartner suspended four times, says her son's behaviors -- including tossing toys and pulling on a teacher -- are typical for a child his age.

"I sit in the classroom, and the other children are hitting each other," she notes. "They are in kindergarten. They get excited."

The distinction can be difficult for educators.

A 2006 Yale University Child Study Center study of early childhood education expulsions and suspensions noted that nearly half of kindergarten students suspended from Connecticut schools were removed for behaviors such as kicking, biting and hitting. More than half of these children were repeat offenders, which signaled that the children continued these behaviors after the suspensions.

Suspending students never is a first choice, but after other options are exhausted, it's the only one that preserves the integrity of the classroom for classmates, says Meney, Colonial's superintendent. To make sure these students are being treated fairly, two Colonial administrators review every suspension and expulsion case on the primary school level.

"Sorting out the difference between immature behavior and serious behavior is not always easy," Meney adds.

Personal challenges

For some students -- regardless of age -- achieving in a traditional classroom is challenging, educators say. Some have disabilities. Some have grown-up responsibilities that limit time spent on academics. And some receive conflicting messages: Behaviors valued in school aren't the kinds of behaviors the children see at home.

Increasingly, children have so many personal and academic issues they are not able to function in a regular classroom, says Case, who was a principal and police officer before moving to her position with the state Department of Education.

To reach these children -- including some who do not get enough to eat or return home each day to neighborhoods struggling with crime -- requires sustained interventions. A state program, called Connections to Learning, is helping schools. But to make a real difference, the community and parents also must be involved, Case says.

"The frustrating thing to those of us in education is schools can't be everything to children," she says. "You can't just drop a kid down in school and expect him to be successful. It's an unreal expectation."

Some blame zero tolerance

Some say zero-tolerance policies, which mandate punishments for specific incidents, are to blame for high suspension rates.

As schools pressed forward with such policies in the early 1990s, many found the approach left administrators with little latitude.

In Christina, leaders moved to eliminate their zero-tolerance policy after a series of high-profile cases. In 2007, a seventh grader was expelled for using a utility knife blade to cut out paper windows for a class project. In April 2009, an elementary school girl was expelled for bringing a pastry knife to school to cut a cake. And in October, a 6-year-old boy was expelled for bringing a camping utensil to school to eat his pudding at lunch. After that case, which drew national attention, the district gathered parents, educators and community members for input.

"People were ready for a change," said Lee Irving, stepfather of the disciplined boy. "Finally, many people realized that the policies in effect for 10 to 15 years didn't work."

The district's proposed policy -- which gives more discretion to principals -- is up for a school board vote Tuesday. And state legislators passed a bill Wednesday that increases the student age -- from 9 to 12 -- that requires educators to involve police in less serious school crimes. The governor is expected to sign it.

In the meantime, Christina leaders expect suspensions to drop by at least a third when this year's statistics are compiled, thanks to efforts to improve teachers' classroom management and student relationships, says Sharon Denney, the district's supervisor of school climate and discipline. And, in an effort to increase transparency, the district makes the real-time data available to the public on its website.

Adds Denney: "We have clearly shifted our emphasis from reactive to proactive."

Additional Facts

ONE STATE PASSES LAW AS SOLUTION TO HIGH SUSPENSION RATES

A new state law in Connecticut aims to keep more children in school by restricting out-of-school suspensions.

The law, passed in 2007 and the first of its kind in the nation, came in response to a report that showed the state's high suspension rates. Set to take effect July 1, the law says children can only be given an out-of-school suspension if it's a safety issue or if the child's a chronic disruption to the educational process.

Even before the law has taken effect, the suspension rates have dropped significantly in the state's schools, said Tamara Kramer, a policy fellow at Connecticut Voices for Children. Overall, the state's suspension rates dropped from 7 percent in 2005-2006 academic year to about 5.4 percent in 2008-2009, according to a report from Connecticut Voices for Children, an advocacy group.

THE TEEN BRAIN

Surprise: It grows long past childhood. So chalk up some of that baffling behavior to neurobiology, not hormones.

BY TIM WENDEL

UNIL SCIENTISTS began to employ MRI imaging a few years ago, the teenage brain was thought to be largely finished. After all, brain size usually doesn't change that much after childhood. Many assumed it only required fine-tuning in preparation for adulthood. "Now we're finding out how wrong we were," says Richard Restak, a neuropsychiatrist and author of *The Secret Life of the Brain*. "The teenage brain is a work in progress that we're only beginning to understand."

From the thickening and then thinning of gray matter to the development of the all-important frontal lobes, the brain undergoes dramatic change during adolescence. What parents once blamed on hormones is actually "a grand upheaval of the brain," says Barbara Strauch, a medical science editor and author of *The Primal Teen: What the New Discoveries About the Teenage Brain Tell Us About Our Kids*.

This upheaval affects everything from schoolwork to teens' propensity for taking risks.

RISK-TAKING: Blame immature frontal lobes

All parents want their children to explore the world. But what if the family curfew has become a joke? What if a teen exhibits behavior that not only worries an adult but can be dangerous to the kid?

Ron Dahl, a pediatrician and child psychiatric researcher at the University of Pittsburgh Medical Center, says a desire for thrills and taking risks is a building block of adolescence. The frontal lobes help put the brakes on such behavior, but they're also one of the last areas of the brain to develop fully. Located right behind the forehead, the frontal lobes actually grow larger than adult size in puberty. But the process is far from complete; refinement of the lobes can continue into the early 20s. "This is a crucial stage," says Mel Levine, director of the University of North Carolina's development and learning center, "because the frontal lobes enable a person to know where they're heading as opposed to hav-



CHEN/ILLUSTRATIONS BY SACHEE TRAI FOR USA WEEKEND

ing no idea of what the consequences will be."

In calm situations, teenagers can rationalize almost as well as adults. But stress can hijack what Dahl calls "hot cognition" and decision-making. The frontal lobes cannot cope.

Dahl points out that studies are far from complete, but he and other experts contend that higher levels of the neurotransmitter dopamine make teens hungry for stimulation, including risky behavior.

ACADEMICS: "Wow! It suddenly makes sense"

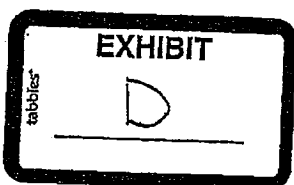
In addition to the frontal lobes, other key brain areas are transformed in adolescence. The corpus callosum, a thick bundle of nerve fibers that connects the brain's left and right hemispheres, enlarges. The anterior cingulate gyrus, which helps us stay focused, matures, as do key areas in the cerebral cortex that recently have been linked to language development and spatial reasoning. Such development may explain why things suddenly click for a struggling geometry student: The brain finally can make sense of the subject material.

PARENTS: Help new brain cells connect

In childhood, brain cells grow quickly, like new stalks on a plant. As adolescence accelerates, there's an overabundance of new connections in the brain. As teens mature, some connections are pruned away, increasing the brain's efficiency. The chance to help shape this pruning makes parents more crucial, not less. "This is a sensitive time, when feelings are becoming linked with rational thought,"

Dahl says. "The stakes are very high, and parents need to feel that it's OK to be monitoring what their adolescents are doing." **EW**

TIM WENDEL, the father of a teenager, is the author of *The New Face of Baseball, a look at 100 years of Latino baseball*, to be published in June by HarperCollins.



Teenage plus: The new adolescence

Remarkable new research suggests that conventional assumptions about how we mature are wrong – and that young people do not become true adults until they are 24

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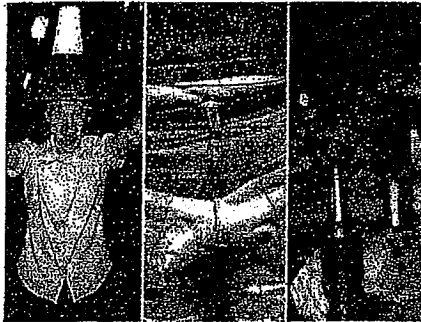
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They should be the healthiest people on the planet, the "almost grown ups" still in the bloom of youth and full of dreams for the future. But today's adolescents are instead a troubled generation, marooned in a no man's land between childhood and adulthood, prey to forces beyond their control.

Far from being the healthiest time of life, adolescence is instead a period of maximum risk and maximum vulnerability according to scientists, as still-growing bodies and undeveloped minds hurl themselves into experimentation with drink, drugs and sex. They are targeted by the mass marketing of unhealthy products and lifestyles – tobacco, alcohol, junk food – which doctors compare to an infectious disease epidemic. And evidence shows British teenagers are among those exposed to the greatest threats.

In a series of papers on adolescent health published in The Lancet today, scientists describe how new research has changed our understanding of adolescence which was thought to start with the physical changes to the body around puberty and to be completed when growth stopped in the late teens. Now researchers believe the brain goes on maturing and is not fully developed until at least the age of 24.

While puberty catapults adolescents into a period of risky behaviour powered by their raging hormones, their brains are ill-equipped to exert control and vulnerable to the effects of activities such as drinking and drug taking.

Scientists say the adolescent brain is handicapped in the rational assessment of risk and prone to "hot cognitions" – decisions influenced by exciting or stressful conditions which adults are better able to resist.

The modern teenager is taking longer than ever to grow up as social changes have added years to education and delayed marriage and "settling down". Despite its legal significance, 18 is no longer regarded as the start of adulthood. Fifty years ago, people married and started families at this age. Today these milestones are delayed, over three times more young people are in further education and most spend years in work before marrying and settling down.

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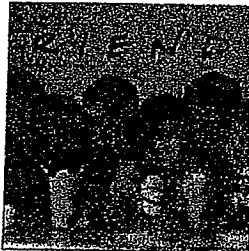


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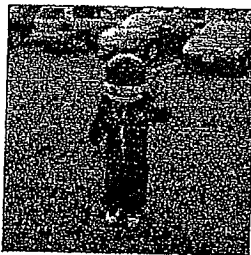
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The single biggest cause of deaths in adolescence is injury as a result of accident, often triggered by unnecessary or excessive risk taking. Better scientific understanding of the maturation of the brain has underpinned policy decisions such as the limit imposed on the number of adolescent passengers permitted in a car with a young driver in the United States and Canada.

Yet despite its significance for life-long health, adolescence has been neglected in scientific and medical research. The health of under-fives has improved dramatically in the last 50 years with death rates down by 80 per cent in many countries. But adolescent health has only marginally improved.

British teenagers score among the worst on measures of adolescent health behaviour. England ranked fourth out of 40 high-income countries for the proportion of 13-year-olds who had ever been drunk. Wales was fifth and Scotland eighth. One in five adolescents indulges in binge drinking at least weekly in high-income countries and Britain was again among the worst.

The UK also has high rates of sexual activity in early adolescence (aged 13-15), ranked third behind Denmark and Iceland in girls. Despite a recent decline, Britain still has one of the highest rates of teenage pregnancy in western Europe. The Health Survey for England reported last November that a quarter of girls had sex before the age of 16 – the legal age of consent – triggering claims about the "pornification" of British culture.

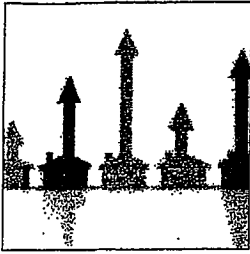
US researchers warned last year that heavy drinking during the teenage years, when the brain is still growing, can affect the brain, particularly the development of spatial memory – the ability to orientate oneself on a map and recall how to get from place to place.

Writing in The Lancet, Professor George Patton, from the University of Melbourne, Australia, and colleagues said new estimates of teenage drinking expected in the next few months in many countries would "provide an opportunity to assess whether policies to reduce harmful drinking among teenagers have had any impact over the past five years".

They add: "For the largest generation in the world's history, the available global profile of youth health is worrying." Yet for the 1.8 billion adolescents in the world today, comprising more than a quarter of the world's population, families remain the key factor in healthy development. Adolescents who feel connected to their family smoke fewer cigarettes, drink less alcohol, use less marijuana, start sex later and are less likely to be involved in violence. Parents who know about and are involved in their children's lives are less likely to have problem adolescents.

Research suggests infancy and early adolescence – represent two clusters of risk. The abused or neglected child, struggles to learn in primary school, is rejected by its peers and then progresses to drinking, smoking, drug taking, early sexual experience, violence and pregnancy, leading to the premature end of schooling. More than half of those who develop disorders such as alcohol misuse and anti-social personality disorder are diagnosed by the age of 26, highlighting the vulnerability of the adolescent years.

Yet the damage can be limited by effective policies such as providing free contraceptives, increasing taxes on alcohol and imposing restrictions on driving, such as in the UK where young drivers who commit offences shortly after qualifying face tough sanctions.



In an editorial, The Lancet says four steps are needed to improve the lives of adolescents: international comparisons of their behaviour, goals for their healthy development, preventive measures to reduce obesity, alcohol and drug abuse, and monitoring of their progress.

It adds: "Young people are our future assets. They provide energy, innovation, productivity and progress... Adolescent health [should be] an equal concern alongside existing health priorities in the world."

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October 13, 2009

Public not tolerating latest 'zero tolerance' verdict

Christina district under fire after pupil, 6, suspended

By *JENNIFER PRICE*
The News Journal

Hundreds of people are expected to be at the Christina School Board meeting tonight fighting for what many call common sense.

Six-year-old Zachary Christie was suspended last week for bringing a camping utensil with a knife, fork and spoon to Downes Elementary that he planned to use at lunch to eat his pudding. He is the latest casualty of a zero-tolerance policy that forbids "dangerous instruments" in schools.

<http://delaware.momslikeme.com/members/journalactions.aspx?g=247295&m=7915991> style="font-family:arial; font-size:16px; font-weight:bold; color:#385EA2">Join local moms discussing this story on MomsLikeMe.com.

He is not allowed to return to the Newark elementary school until he has completed at least 45 days at an alternative school.

On Monday, the Christina School District was flooded with more than 1,000 angry phone calls from across the country after the Christie family told their story to national media outlets, including The New York Times and the three major television networks.

Zachary's case struck a nerve with parents and others who feel the zero-tolerance policies unfairly punish children for innocent actions.

As of Monday evening, almost 29,000 people had signed an online petition to get Zachary back in school.

"This has gotten really crazy. It's ridiculous," said state Rep. Terry Schooley, D-Newark, who sponsored a bill in the spring that gives districts more flexibility around their zero-tolerance policies. "There are going to be hundreds of people at the school board meeting. It's going to be a circus."

Because the district's Student Code of Conduct bans dangerous instruments regardless of intent, the district could not take into consideration Zachary's age or why he brought the camping utensil to school, said Wendy Lapham, the district's spokeswoman.

"We have to follow the policy as it is written consistently because this is the code of conduct that is applied to all of our students in our district," she said. "It's never a question of a child's character or comparing one child to another."

Zachary's mother, Debbie Christie, is hoping the board will change its policy and reconsider her son's case.

"I think it's crazy that they don't use common sense," said Christie, who is also the school's PTA co-president.



"Zach doesn't have a mean bone in his body. We shouldn't have to go to the press to get people to use common sense."

A growing backlash

Christina has made headlines before, but this is the biggest public response they've ever received, Lapham said.

"We're getting e-mails and phone calls from as far as California, Tennessee and Colorado. There have been some that have been very threatening and have been targeted to our school board members, our staff and our superintendent," Lapham said. "They are telling us that we are idiots and if they lived closer they would come harm us."

Last year, fifth-grader Kasia Haughton was suspended for bringing a serrated knife to school to cut a cake. Because the knife's blade was longer than 3 inches, it qualified as a "deadly weapon." Haughton faced a possible expulsion until the district reversed its decision and allowed her back in school after determining that she never actually had possession of the knife.

Two years ago, the school board expelled a seventh-grader for using a utility knife from home to cut windows out of a paper house for a class project.

In both cases, district leaders said they must enforce Christina's code of conduct consistently to be fair.

Sympathizing with these students, Schooley sponsored legislation in the spring to allow districts to modify the terms of an expulsion or determine expulsion is not appropriate. The law, passed in June, is in effect this school year.

"I think they are very concerned about following the letter of the law and not taking any chances where they're not treating all children equally," she said. "But it makes them look like they have no common sense."

Schooley initially thought her bill would help Zachary, but because he was only carrying a "dangerous instrument" and not a "deadly weapon" and therefore was suspended, not expelled, the law does not apply to his case. Schooley now plans to revise the law next legislative session, which doesn't begin until January.

Pushing for a change

According to the district's code of conduct, if the full blade of a knife is shorter than 3 inches, school officials consider it a dangerous instrument; 3 inches or longer and it is a deadly weapon. The blade on Zachary's utensil was shorter than 3 inches.

First offenders who bring a dangerous instrument to school face five days of out-of-school suspension and possible placement in an alternative school. First offenders who bring deadly weapons face a week's suspension and recommendation for expulsion.

"I don't want to blame the district or the school because they were following their policy, but now they need to re-visit their policy," Schooley said. "I just wish they had done it before the Times found out. But I think this is the perfect opportunity for the school board to exert some leadership and take a look at their policy before they do any more damage to any more kids."

Lapham said the school board had already scheduled a workshop for the beginning of November to examine the district's code of conduct and see what, if any, improvements could be made. But district

staff could make a recommendation to the board tonight to modify the code of conduct and adjust the consequences when the district's youngest students are found in possession of a dangerous instrument or deadly weapon, Lapham said.

Rep. Michael Barbieri, D-Newark, who created a task force in May to study laws, regulations and district policies governing school discipline and codes of conduct violations, thinks placing Zachary in an alternative school is "overkill."

Barbieri said the district should create a range of consequences, not just expulsion or sending a child to an alternative school.

"Someone might be bringing in a knife to start a war while someone else is bringing in a knife to cut a cake, and they are treated the same when they are totally different situations," he said.



Hoodies a symbol of solidarity for Trayvon Martin

The hooded sweatshirt, commonly referred to a "hoodie," has been cast into a number of roles.

Everything from essential gear worn by street-thug-turned-super-athlete Rocky Balboa to hoodlum-wear donned by rappers to the preferred clothing of the sinister loner Ted Kaczynski -- at least in sketch renderings of The Unabomber.

But most recently, it's become a symbol, worn to remember 17-year-old Trayvon Martin, who last month was shot and killed by a neighborhood-watch volunteer in Sanford, Fla. His shooter, George Zimmerman, told police he thought the unarmed Martin, who was wearing the hood of his sweatshirt pulled over his head, looked suspicious. Zimmerman, who claimed self-defense, has not been arrested.

On Friday, about 300 William Penn High School students wore hoodies in a silent demonstration.

"We just want to show that a little old school in a small state can show support for something in a bigger place," said Warren Veney, a William Penn senior who, with Assistant Principal Kevin White, helped organize the demonstration. "It's about

every American coming together and showing true American spirit. That's what our goal is."

William Penn Principal Jeffrey Menzer said he agreed to lift the school's policy banning headwear in the building to allow the demonstration, one of countless rallies and protests across the nation calling for justice in the case. Menzer praised his students for planning a peaceful, silent protest and for engaging in a civic and social issue of national magnitude.

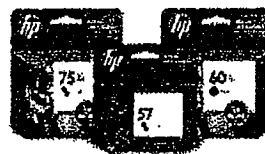
"I'm super proud of Warren ... to ask for a way for William Penn students to have a voice in this national debate or protest for the situation in Florida," Menzer said.

The school normally does not allow headwear, such as hats, caps or hoodies, out of respect and manners, Menzer said. There are exceptions to the rule, such as for religious matters.

Alexis Vann, of New Castle, said it wasn't unusual for her to wear a hoodie. But the

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18-year-old William Penn high student said she is now wearing them to honor Martin.

"Me seeing all these people wearing hoodies, it's like respectful because it shows that they actually care about what happened in Florida," Vann said.

Across the nation, celebrities and even some lawmakers have donned hoodies in support of Martin. Democratic California Sen. Curren Price Jr. presided over the state Senate in a hoodie earlier this week, while members of the black, Latino and Asian Pacific Islander caucuses called on the federal government to intervene in the Florida investigation into Martin's death, and used the case to highlight the problem of racial profiling in America. The California lawmakers all spoke while wearing hoodies and holding cans of iced tea and bags of Skittles -- items Martin was carrying when he was shot.

Rep. Bobby L. Rush, D-Ill., wore a hooded sweatshirt and sunglasses on the House floor Wednesday.

"I applaud the young people all across the land who are making a statement about hoodies, about the real hoodlums in this nation, specifically those who tread on our law wearing official or quasi-official cloaks," said Rush before being escorted off the floor because he was in violation of House rules that forbid headgear in the chamber.

The hoodie has its origins in monk robes of medieval Europe and was first made in the U.S. in the 1930s by Hanesbrands Inc.'s

Champion, according to recent articles in the Washington Post and Miami Herald. It gained popularity by its association with the hip-hop culture. But it also carries a stigma of being associated with a criminal element, people seeking concealment. Fox TV host Geraldo Rivera last week issued an apology after saying that the hoodie Martin wore was as much a factor in Martin's death as George Zimmerman.

Jack Severyn, a 75-year-old retired DuPont Co. accountant, and later a landscape designer from Edgemoor, said he becomes apprehensive when he sees someone donning the garment.

"If you check in the newspaper, all the situations in a robbery or whatever, he was wearing a hoodie," Severyn said.

Howard Johnson, 31, of Bridgeville, wore a gray Old Navy hoodie wrapped tightly around his face as he walked near the Rehoboth Beach boardwalk on Friday. But he also acknowledged the stigma.

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"I was thinking I was cold," Johnson said of why he wore the garment. "I figure out in the open, wearing a hoodie is OK. I wouldn't want to go into a bank wearing one."

The News Journal interviewed dozens of people wearing hoodies this week, from Wilmington to Rehoboth Beach, about the garment. Most said they wear the item simply because they want to be warm and comfortable -- not for sinister reasons, and not in remembrance of Martin.

Ryan Biddle, of Lewes, said hoodies are the preferred wear when it cools, adding after putting them away last week he had to retrieve them this week.

"I'm back with a hoodie. I love it," said Biddle, who wasn't aware of the Florida shooting, but appalled when he heard about it.

Biddle hoped he isn't judged because he wears a hoodie. "I know I'm a nice guy."

Rachel Dooley had her University of Delaware hoodie on as she ate at Klondike Kate's Restaurant & Bar in Newark.

"It's a comfortable thing to wear," the 20-year-old said. "You just throw it on."

Hoodies hold no status for 20-year-old Perna Brown of Philadelphia, who was walking in Newark on Friday.

"It's sad what happened to [Martin], but it's still regular clothing," she said.

Micah Adams, 24, of Wilmington, said he was wearing his hoodie Thursday as he waited for a bus on Rodney Square because it is warm and comfortable. But he admitted to thinking about Martin when he put it on.

"I still do it for the memory of him and out of respect," Adams said. "But I also wear it for me, for comfort."



William Penn seniors Warren Veney Jr. (from left), 18, and classmates Sareif Simpson and Prince Collins wear their hoodies in Mr. Erik Jones' marketing and communications class this afternoon at school as a silent demonstration calling for justice in the Trayvon Martin case. William Penn


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High School students staged a silent "hoodie" demonstration Friday, March 30, in response to the shooting death of 17-year-old Trayvon Martin, who was shot and killed by a neighborhood watch volunteer Feb. 26 in Sanford, Fla.



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William Penn seniors Warren Vensy Jr., 18, (left), joined by classmates Sareif Simpson (center) and Prince Collins, wear their hoodies in Erik Jones' Marketing and Communications class Friday afternoon as a silent demonstration calling for justice in the Trayvon Martin case. / THE NEWS JOURNAL/SUCHAT PEDERSON

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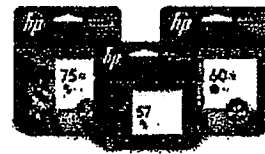
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3-20-12

Honors student banned from school for pink hair



Twelve-year-old Brianna Moore sits on the steps of her family's home after being suspended from Shue-Medill Middle School for dyeing her hair pink. Her parents will home-school her while they fight the decision. THE NEWS JOURNAL/ROBERT CRAIG

Sixth-grader earns dye job by raising grades but Shue-Medill officials say it's disruptive

By MIKE CHALMERS
The News Journal

Sixth-grader Brianna Moore is tickled pink with her new hair color. School officials, not so much.

Brianna's parents let her dye her hair pink last week as a reward for good grades, but when she showed up at Shue-Medill Middle School in Newark, officials told her and her parents that the hair color is so disruptive that Brianna can't come back until her hair is back to its natural color.

"I don't think you should be allowed to

tell me - as a parent - what color my daughter's hair should be," said her father, Kevin.

Officials were following the school's new uniform policy, which took effect in August, said Wendy Lapham, spokeswoman for the Christina School District. Staff, students and parents helped draft the policy.

"Whether that will be up for review in the future, I can't speak to that," Lapham said.

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EXHIBIT
6

Pink: Supreme Court has upheld a student's right to express individuality

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Legal experts say the school is on shaky ground. "Just saying that her pink hair is causing a substantial disruption seems like a stretch," said Alan Garfield, a professor of constitutional law at Widener University.

"Why is it OK for the school to say it's OK to dye your hair blond but not another color?" Garfield asked. "The state doesn't get to play the totalitarian role of making the students fit into the mold." Kathleen MacRae, executive director of the ACLU of Delaware, agreed.

"The student's choice of hair color is a statement about who they are, so it should be treated as free speech," she said.

Last year, when Brianna was a fifth-grader at Mansfield Elementary, she and her sister and brother, Woody Moore, let their daughter dye her hair pink if she improved her grades. She did, and school officials voiced no opposition to the

hair dye job, which many parents may have until the end of the

school year, her father said. As Brianna adjusted to Shute-Medill this year, her grades dropped. "We brought the incentive back out," Kevin Moore said. "If you hit these benchmarks, we'll let you dye your hair again."

Not only did Brianna's grades improve, she also became a cheerleader. So Moore dyed his daughter's hair pink last Wednesday night and sent her to school Thursday. Soon, a school official called Moore to the principal's office. "The principal told me that she was a natural color," Moore said. "The school's policy, which is posted on its website, bans 'excessive' hair colors, including 'bright colors' like pink, blue, green, purple, yellow, orange, red, brown, blond, black, natural red/brown."

Moore said he pointed out a student with brown hair with a clearly dyed blond patch to a school official. "That's OK because they're both natural colors, the official told me."

A follow-up meeting Monday morning frustrated him even further. "I could tell right off the bat that this would be a waste of time," Moore said. "They'd already made their minds up."

Moore still the school gave the family three options: dress her in the dye job, wait several weeks for her hair to grow out, or sit in in-school suspension or take her to another school in the Christiana district.

The dress codes at Gauger-Cobbs and Bayard middle schools do not mention hair color, while the code at X-RT Middle School bans "unconventional hair colors that distract or disrupt" the school.

"You'd think they'd be worrying about test scores, not this," Moore said. "It doesn't make any sense that they're digging in their heels over this."

For more than 40 years, courts have been guided by its so-called Tinker decision.

Teenagers John and Mary Beth Tinker and their friend Christopher Eckhardt wore black armbands to their Des Moines, Iowa, school in 1965 to protest the Vietnam War. Their case went to the U.S. Supreme Court, which ruled in 1969 that students' free-speech rights should be curtailed only when their "conduct would substantially interfere" with school operations.

Since then, courts have allowed students to express political and social messages as well as their individuality, Garfield said. Rude, vulgar, obscene and threatening speech can still be banned, along with messages promoting drug use and other illegal activities.

Pink hair isn't so disruptive that it should be banned, MacRae said.

"Everybody might be talking about it for the first day, but after that, it's probably back to business as usual," MacRae said.

Garfield agreed, saying the school should use more discretion in making rules.

"There are so many other ways kids could be disruptive that in the scheme of things, they could be overreacting this," he said.

Moore said he'll home-school Brianna while the family continues to fight Shute-Medill's policy.

Contact Mike Chalmers at 314.2790 or mchalmers@shuteonline.com. Subscribe at facebook.com/WATCHDelaware or follow on Twitter at @WCHalmers.

After hue and cry, girl with pink hair returns to her school

By MIKE CHALMERS
The News Journal



Sixth-grader Brianna Moore arrives home Tuesday from Shue-Medill Middle School. Pictured with her are her father, Kevin Moore, and her mother, Wendy Lapham.

ident was behind her, but doesn't regret her stance.

"I need to stand up for myself when it's right," she said after getting off the bus Tuesday.

Her father, Kevin Moore, said he's glad the district resolved the issue quickly.

"It's a crazy thing to get so uptight about," he said.

The incident has prompted a second look at the school's policy, which was unique among the district's four middle schools, said district spokes-

woman Wendy Lapham. "It's likely we'll be reviewing those policies," Lapham said. "It would be best to do that with all our middle schools."

Brianna returned to school after negotiations between the district's attorney and the ACLU of Delaware, which had begun working on the Moore family's behalf after The News Journal published a story about the case Tuesday.

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NEWS WATCH

WORLD
Bloody attacks kill 46 people across Iraq
This morning's four-day holiday in Iraq was marred by deadly attacks in several cities, including Baghdad. At least 46 people were killed and more than 100 wounded in a series of bombings and shootings across the country, according to the Iraqi government.

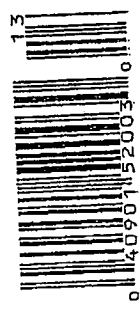
NATION
Potential new slug in Amelita Eshari case
A new twist in the ongoing case of Amelita Eshari, a woman charged with the murder of her husband, was revealed Tuesday when a judge ruled that the state must prove to a jury that she was the one who shot her husband.



Quake rocks parts of Mexico
A 7.4-magnitude earthquake hits southern Mexico, damaging some 800 homes and spreading fear and panic hundreds of miles away in the capital of Mexico City. **WORLD, A3**

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Pink: ACLU negotiated with school district

The policy is unique to Shue-Medfill. Dress codes at two other Christina middle schools do not mention hair color, while a third bans "unconventional hairstyles."

On Monday afternoon, Lapham said Shue-Medfill officials were following the school policy, a copy of which parents received at the beginning of the school year. When the story appeared in The News Journal on Tuesday, the Moores fielded phone calls and interviewed requests from several media outlets.

The matter was resolved by lunchtime, and Kevin Moore drove Brianna back to classes in the afternoon. Kathleen MacRae, executive director of the ACLU of Delaware, said too many schools suspend or expel students over minor rule violations that aren't related to disruptive behavior.

"Every hour a child spends out of school affects their education," MacRae said. "I wish the schools would think twice before they do that."

Contact Mike Chalmers at 324-2790 or mchalmers@delawareonline.com. Subscribe at facebook.com/MITChalmers or follow on Twitter at @MITChalmers.



Brianna with her father, Kevin Moore, who said he's glad the issue was resolved quickly. "It's a crazy thing to get so uptight about," he said. THE NEWS JOURNAL/SUCHAT PEDERSON

Continued from Page A1

"She is not going to be suspended tomorrow, next week, next month, etc. for the pink hair," the district's attorney, James H. McMackin III, wrote in an email to ACLU attorney Richard Morse. "District policy does not apply with regard to the hairstyle at issue."

The issue began a week ago when Brianna's parents, Kevin and Wendy Moore, dyed her hair pink as a reward for raising her grades and making the honor roll for the first time. They had done the same thing, without any objections, when she was a fifth-grader at Marshall Elementary School.

Brianna went to school Thursday morning but was immediately turned away; a school official told her father that her hair violated the school's policy.

At a follow-up meeting Monday morning, school officials told Kevin Moore that Brianna would not be allowed back into regular classes with pink hair. She could bleach her hair, wait for it to fade while on in-school suspension or go to another Christina middle school, he said he was told.

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April 25, 2013

Deborah Harvey
Division of Public Health
417 Federal Street
Dover, DE 19901

RE: DPH Proposed Medical Facility Regulation [16 DE Reg. 1033 (April 1, 2013)]

Dear Ms. Harvey:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Division of Public Health (DPH) proposal to adopt a regulation to implement House Bill No. 47 and House Bill No. 144 enacted in 2011. That legislation authorized the Department to issue regulations covering medical facilities where invasive medical procedures using anesthesia are performed. The regulation is comprehensive and prescriptive. Council would like to share the following observations.

First, the regulation contains inconsistent standards for adverse events. Compare §§1.4.2 and 2.1 (definition of "adverse event"). The latter definition is based on the statutory definition in House Bill No. 47. The inconsistency will lead to confusion and errors in reporting. For example, initiation of criminal investigation is covered by the latter definition but not mentioned in §1.4.2. It would be preferable to adopt a single standard.

Second, §3.3.7 lacks a verb.

Third, §6.1 contains the following requirement:

The medical facility must post written notice of patient rights in a place or places within the facility likely to be noticed by patients (or their representatives, if applicable) waiting for treatment.

This posting standard could be improved. For example, the notice could be small (not prominent) and the text could be in 8 point type without violating the regulation. In contrast, §8.1.4 contains a more robust posting standard:

The accreditation certificate shall be posted in a conspicuous place on the Level II or III

medical facility premises at or near the entrance in a manner which is plainly visible and easily read by the public.

Consider the following substitute standard in §6.1:

The medical facility must post written notice of patient rights near the entrance and places within the facility likely to be noticed by patients (or their representatives, if applicable) waiting for treatment. Such notices shall be plainly visible, at least 8 ½ X 11 inches in size, and easily read by the public.

Council would also ask that consideration be given to posting patient rights compilations in a variety of methods to include Braille, Spanish, 14 point type font and/or review of the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO) patient rights posting standards.

Fourth, consider requiring facilities to honor patient requests for copies of patient rights compilations.

Fifth, §6.2.9 confers a patient right to "be free from all forms of abuse, mistreatment or harassment." Section 1.4.2 requires the reporting of "abuse, neglect or mistreatment". The Division could consider adding a reference to "neglect" to §6.2.9. "Neglect" is a distinct from "mistreatment". Compare Title 16 Del.C. §1131.

Sixth, §7.2.1.1.1 categorically caps the duration of an order of closure to 60 days in the absence of a request for continuance of the date of a Departmental hearing. This is problematic.

A. Under §§7.3.3.3.1.1 and 7.3.3.3.1.3 a hearing could be convened on the 60th day and a hearing decision issued on the 90th day. Literally, since the closure order is "capped" at 60 days, the facility could reopen during days 61-89.

B. Under §7.3.3.1, if the facility takes no action on an order of closure, the order of closure remains in effect. It is not "capped" at 60 days per §7.2.1.1.1.

Seventh, in §9.0, the reference to "clause or section" is unduly narrow. The more common term for a severability section is "provisions or application". Compare House Bill No. 35 in 147th General Assembly.

Thank you for your time and consideration of our comments and recommendations. Please feel free to contact me or Wendy Strauss should you have any questions.

Sincerely,



Dafne A. Carnright
Vice Chairperson

DAC:kpc

Wilmington News Journal 04/07/2012, Page A01

HEALTH NEW DETAILS

Medical marijuana regulations outlined

Distribution remains law's sticking point

By DOUG DENISON and JONATHAN STARKEY

The News Journal

Delaware Gov. Jack Markell is moving forward with regulations that enable Delawareans to possess marijuana for medical purposes even though they will have no way to legally obtain the drug. Markell remains entangled with the federal government after halting plans in February to build a state-regulated marijuana distribution network. U.S. Attorney Charles M.

Oberly III warned the administration in writing that state employees involved in the processing and sale of marijuana could be prosecuted under federal drug laws.

Some patients are peeved.

"Our governor, in my opinion, has lost his spine," said Dagsboro resident Chris McNeely, who has used marijuana in the past to help cope with extreme nausea caused by a failing digestive system, itself damaged by powerful opiate painkillers used to treat a severe neck and back injury. Markell is merely giving patients "a license to give money to drug dealers," he said.

"Where are the people going to get it? Buy it off the corner of Fourth and Union

The Markell administration is moving forward with implementing the medical marijuana law.

GETTY IMAGES FILE

Marijuana: State to pursue 'another path,' Markell says

Continued from Page A1

up in Wilmington? That's ridiculous," McNeely said. "I can't and I won't go to a street corner; the danger alone is unbelievable."

Markell places the blame squarely on the federal government.

"I am highly frustrated that the signal that is being sent by the U.S. Department of Justice to these people who benefit from this is that it's OK for you to obtain it, but the way that the state of Delaware came up with for you to obtain it in a highly regulated fashion is not acceptable," Markell said. "I just think that is an unbelievable disconnect and really bad public policy."

"We are going to continue to try to figure out whether there is another path that we can go down," Markell added. "... I'm really unhappy that the public policy from the federal level could be saying to patients: 'Go ahead, you can have it but you're on your own in terms of how you're going to go get it.' As a result, you really don't know what it is you're buying."

When Delaware's Medical Marijuana Act was signed into law, it immediately established an "affirmative defense" to any criminal charges levied on a patient related to marijuana intended for that patient's medical use.

Proposed new medical marijuana regulations were published this week in the April edition of the Delaware Register of Regulations, the cover of which was emblazoned with a photo of a marijuana leaf. The draft rules, which are open for public comment until April 30, explain how a patient can apply for and receive an identification card certifying his or her legal right to possess up to six ounces of marijuana at a time for medicinal purposes. Markell said the cards are important to assure Delawareans who need marijuana for medicinal uses that they won't be arrested for possessing the drug.

According to the regulations, an applicant will have to submit personal identifying information and a written statement from a physician testifying to the patient's need for marijuana.

Wilmington resident Joe Scarborough, who used marijuana to battle the effects of HIV and cancer, said he is pleased the administration is implementing a part of the law that will help patients. "I'm glad that, through it all, they're at least proceeding in some way," he said. "I'm proud of Delaware for this." Scarborough is also con-

fidant that someday Delaware will get a wellregulated distribution system for medical marijuana. "It has seemed, historically, that the compassion centers are exactly where the feds have an issue," he said. "If Delaware is really going to try to do this exactly right, I think us re-examining the distribution is what we should be doing." The regulations also set out the procedures and requirements for obtaining a "Designated Caregiver" identification card, which allows its bearer to manage medicinal marijuana supplies for as many as five qualifying patients. Caregivers must submit written authorization from their patients and those patients' doctors, and pass a criminal background check. If a person arrested for marijuana possession produces a doctor's note and otherwise was obeying the provisions of the Medical Marijuana Act, that person is immune from prosecution for that offense.

The identification card is intended to make it easy for law enforcement to determine who are authorized medical marijuana patients.

What the draft regulations don't contain are any provisions related to the state-sanctioned marijuana distribution system. That framework provides for a network of "Compassionate Care Centers" run by nonprofits, which would grow marijuana and sell it to authorized patients and caregivers.

Those centers would be tightly regulated by the Department of Health and Social Services, with state workers conducting regular on-site inspections and running a testing lab to ensure the quality of the marijuana being sold. Medical marijuana supporters have kept pressure on the administration to push ahead with parts of the law that did not conflict with Oberly's letter. "The dialogue never stopped about how we were going to still continue to move forward," said Wilmington Rep. Helene Keeley, a lead sponsor of the Medical Marijuana Act. "By putting the regulations out there, from the patient's perspective, it sends a strong message that this is something Delaware still believes in." McNeely, however, says the state is "allowing an illegal business to flourish" by implementing only a portion of the law.

"The first person that dies, either killed by a drug dealer or killed by the drugs they get off the street, this state is going to have a serious problem," McNeely said. "Why would anyone think it would be a good thing to fuel a drug industry, an illegal drug industry?"

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Wilmington resident Joe Scarborough has used marijuana for medical purposes.

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04/07/2012

OPINION

The NewsJournal ...

Ellen Leifeld,
Interim Publisher
David F. Lefford,
Executive Editor
John Sweeney,
Editorial Page Editor

QUOTE OF THE DAY
"The sensible and humane aim of state policy in Delaware remains to ensure that medical marijuana is accessible via a safe, well-regulated channel of distribution to patients with demonstrated medical need." GOV. JACK MARKELL

SATURDAY, AUG. 17, 2013

A8

OUR VIEW

State-federal pot split means trouble

The headline read: "Fog over medical pot policy lifted."

Almost. It is clearing in Delaware. At the national level, however, the fog remains as thick as ever. In fact, it might be getting even thicker.

Gov. Markell moved to implement Delaware's medical marijuana program. It has been stalled since 2011

FIX THE US LAW because federal law does not allow the use of marijuana for medical or any other purpose. The federal approach, which is on the books if not in the mind of the president, would hold any state employee liable for selling marijuana under whatever controlled system Delaware devises.

The governor, therefore, must move cautiously.

However much sense the marijuana law makes, and we believe it makes a lot of sense, the state-federal disagreement creates a problem. Congress, given its current paralyzed state, is unlikely to amend the Controlled Substances Act. The states, meanwhile, have been jumping into the act. Seventeen states have authorized medical marijuana

laws. Two states, Washington and Colorado, have legalized the use and distribution of marijuana for non-medical reasons.

Ideally under circumstances like this, Delaware and the other states would come to some kind of accord with the U.S. Department of Justice about the rules of the game: No sales outside the state-regulated system, any large quantities, strict control on growing the product and no sales of adulterated products. It would be a hard task, but a doable one.

But we do not live under accommodating circumstances.

The victories of the pro-marijuana forces in the voting booth in Washington and Colorado have revitalized the movement for legalization. Public opinion across the nation is moving toward approval of relaxed marijuana laws. The push to ease up on drug arrests is winning adherents in both liberal and conservative camps. We can't afford the prison space. But these changes in attitude are not going to neatly translate into legislative actions.

However, the push for marijuana reform is suddenly getting a lot of

attention from people labeling it the "new gay marriage," a reference to the political movement that successfully pushed for same-sex marriage laws in states like Delaware and at the U.S. Supreme Court.

As we know, marijuana is a big, if illegal business. But turning it legal brings out the supporters. For example, backers of legalized marijuana outspent opponents in the Washington state referendum by 400 to 1. So don't be surprised if a push to legalize marijuana pops up in more states.

Now let's flip the politics. Legalized marijuana doesn't have a lot of organized opposition — yet. But abortion rights and same-sex marriage do. The states are dividing along cultural lines. In recent years, as National Journal columnist Ronald Brownstein points out, 13 strongly Democratic states legalized same-sex marriage while 13 strongly Republican states banned abortion at 22 weeks or earlier.

"These parallel, but polarized, advances mostly reflect the electorate's re-sorting," Mr. Brownstein wrote. More to the point, support for

abortion restrictions is growing in states we label as red while support for same-sex marriage is growing in blue states.

As Dylan Scott wrote in *Government Magazine*, "Red states are red; blue states are blue."

Some red states have even turned down attempts to legalize medical marijuana. Imagine the opposition to the legalization of all-purpose marijuana. Legalization would be a complicated affair under the best of circumstances.

There are too many unknowns and few people have thought through the consequences. However, a political debate based on TV commercials and targeted Internet ads will turn the fog machine on full blast.

Even with medical marijuana Gov. Markell is right to move cautiously. The current national administration seems unlikely to move on the states with medical marijuana markets. But will a future one be as indulgent?

If the states are to make their own way on this topic, it is better that Congress amends the law to reflect that reality.

From: Delaware State House of Representatives [mailto:contact@delawarestatehouse.com]

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Delaware House of Representatives'
e-Newsletter

Issue 130 - August 17, 2013

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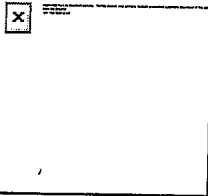
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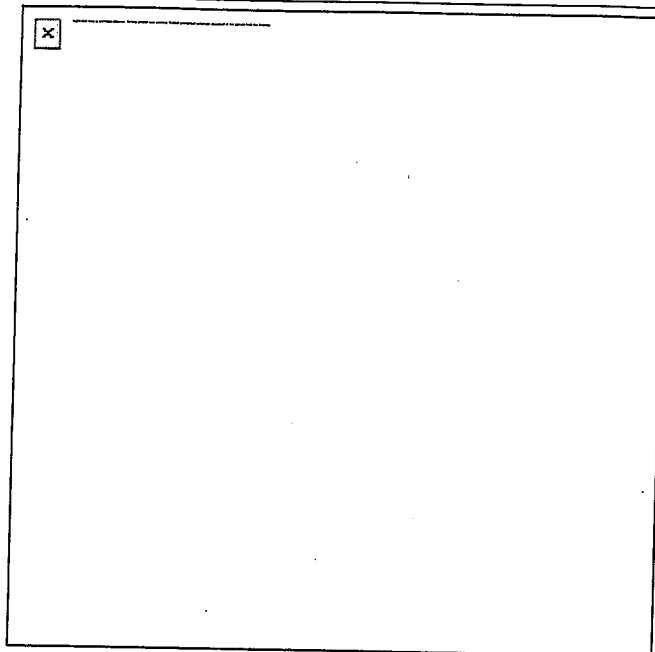
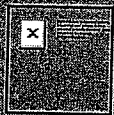
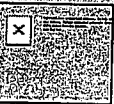


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NEWS:

Delaware Moving Ahead on Medical Marijuana

After more than two years in limbo, efforts to implement Delaware's medical marijuana law are again in motion.

Enacted in 2011, Senate Bill 17 sought to allow people with particular ailments to gain access to marijuana with a doctor's approval. Proponents of the legislation successfully argued that while marijuana is not a panacea, there was evidence it could provide relief of pain and nausea for some people not benefiting from pharmaceuticals.

While legislators in a growing number of states have embraced medical marijuana, the federal government classifies the drug under Schedule I of the Controlled Substances Act, making it illegal for citizens to grow or possess and prohibiting pharmacists from dispensing it.

In the wake of the enactment of Delaware's law, the U.S. Justice Department seemingly reversed its hands-off policy on medical marijuana, indicating in a staff memo that the

agency might prosecute people facilitating or participating in such programs.

Faced with the uncertainty of the shifting federal position, Gov. Jack Markell suspended implementing Delaware's law.

Delaware is just one of many states that have been pushing back against the federal prohibition. According to the National Conference of State Legislatures, 19 states now have a version of the law on their books with Illinois Gov. Pat Quinn inking that state's statute earlier this month.

In a letter sent this week to legislative leaders and the prime sponsors of the medical marijuana law, Gov. Markell said his administration has reassessed the legal landscape and now plans to have a Delaware program in operation sometime next year.

Under policies modeled after those instituted in Rhode Island and New Jersey addressing the U.S. Justice Department's concerns, Delaware will initially operate only a single pilot "compassion center." The facility will cultivate no more than 150 plants and maintain an on-site marijuana stockpile of less than 1,500 ounces.

State Rep. Don Blakey, R-Camden, who supported medical marijuana in the House of Representatives, said he was glad the program was moving ahead.

"Before I voted for this bill two years ago, I spoke with cancer patients at Bayhealth Kent General as well as doctors and pharmacists," Rep. Blakey said. "I came to believe that if we have the means to help relieve the pain of people with serious illnesses, without causing harm to anyone else, we should do so."

Rep. Blakey said he was comfortable with the Markell administration's cautious approach to implementing the law, especially the aspects of the plan relating to security and verification.

In his letter, Gov. Markell said the compassion center will be subject to constant video surveillance, random inspections and audits. Additionally, the Department of Health and Social Services will require mandatory verification of marijuana recipients to ensure that they have debilitating conditions; that they are medically approved; and that marijuana use could benefit them.

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INFORMATION

Medical Marijuana Program

The Division of Public Health has implemented Title 16, Ch 49A of the Delaware Code, the Delaware Medical Marijuana Act, which became effective July 1, 2012. The Delaware Medical Marijuana Act regulates the medical use of marijuana in Delaware. The State of Delaware is moving forward with implementation of its medical marijuana program joining other states, including New Jersey and Rhode Island, which have issued licenses for marijuana distribution centers, known as compassion centers in Delaware. Physicians may authorize a patient to use marijuana to treat symptoms of cancer, multiple sclerosis, HIV and AIDS, Hepatitis C, Lou Gehrig's disease, Alzheimer's disease or the physical manifestations of post-traumatic stress disorder. Conditions that cause severe, debilitating pain, wasting syndrome, intractable nausea and seizures also fall under the state's medical marijuana law.

Delaware Health and Social Services will issue a request for proposal late in 2013 to open a pilot compassion center in Delaware next year. The Department will issue a permit to the compassion center to begin growing medical marijuana on July 1, 2014. The policy change will allow medical marijuana patients in Delaware to buy the drug in a state-regulated center. To address Federal Justice Department concerns, the proposed regulations for the compassion center will include tight security requirements, including around-the-clock video monitoring, financial accounting controls, random inspections, and requiring that center employees verify that patients are registered with the state before selling them marijuana. The center will only be allowed to cultivate up to 150 marijuana plants, and keep inventory of no more than 1,500 ounces of the drug.

Medical Marijuana Questions & Answers

[FAQs for Patients](#)

[FAQs for Compassion Center Owners](#)

FAQs for Patients

- [How do I apply for a medical marijuana card?](#)
- [What are the qualifications for a patient to get a card?](#)
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- [Does the program have a list of doctors that they can refer me to who will certify me for the program?](#)

Q: How do I apply for a medical marijuana card?

A: A patient who wishes to apply for the medical marijuana registry card program should go to the [program's website](#) and download the application documents. The patient application is a four-page, self-explanatory form that should be completed and signed by the patient. The physician certification is a two-page form that the patient's Delaware-licensed physician should complete and sign. The release of medical information is a one-page form that is signed by the patient, allowing the Office of Medical Marijuana to contact the patient's physician for the purpose of verifying the doctor/patient relationship and the validity of the physician's signature on the Physician Certification form.

Patients must mail all three forms, along with the application fee of \$125 and a copy of the patient's Delaware state-issued driver's license or identification card, to the Division of Public Health, Office of Medical Marijuana, 417 Federal Street, Suite 205, Dover, DE 19901.

The applicant's approval or denial will be returned within 45 days of receiving a complete application. Incomplete applications will not be accepted. If approved, the applicant will be invited to the Division of Public Health's Dover office to have a picture taken and be issued their registry card.

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Q: What are the qualifications for a patient to get a card?

A: The qualifications for a patient to receive a medical marijuana card include

- being a resident of the state of Delaware;
- possessing a current State of Delaware driver's license or identification card;
- being 18 years of age or older;

- being under the care of a physician currently licensed to practice in Delaware in accordance with 24 DEL.C. Chapters 17 and 19;
- possess a physician's certification indicating a qualifying debilitating medical condition. "Debilitating medical condition" means one or more of the following:
 - cancer, positive status for human immunodeficiency virus, acquired immune deficiency syndrome (HIV and AIDs), decompensated cirrhosis (Hepatitis C), amyotrophic lateral sclerosis (Lou Gehrig's disease), and agitation of Alzheimer's disease or the treatment of these conditions. Post-traumatic stress disorder (PTSD) can qualify as a debilitating medical condition when it manifests itself in severe physical suffering, such as severe or chronic pain or severe nausea and vomiting, or otherwise severely impairs the patient's physical ability to carry on the activities of daily living.
 - a chronic or debilitating disease or medical condition or its treatment that produces 1 or more of the following: cachexia or wasting syndrome; severe, debilitating pain that has not responded to previously prescribed medication or surgical measures for more than 3 months or for which other treatment options produced serious side effects; intractable nausea; seizures; or severe and persistent muscle spasms, including but not limited to those characteristic of multiple sclerosis.

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Q: What medical conditions are covered by the program?

A: As mentioned above, cancer, positive status for human immunodeficiency virus, acquired immune deficiency syndrome (HIV and AIDs), decompensated cirrhosis (Hepatitis C), amyotrophic lateral sclerosis (Lou Gehrig's disease), and agitation of Alzheimer's disease or the treatment of these conditions. Post-traumatic stress disorder (PTSD) can qualify as a debilitating medical condition when it manifests itself in severe physical suffering, such as severe or chronic pain or severe nausea and vomiting, or otherwise severely impairs the patient's physical ability to carry on the activities of daily living.

A chronic or debilitating disease or medical condition or its treatment that produces 1 or more of the following: cachexia or wasting syndrome; severe, debilitating pain, that has not responded to previously prescribed medication or surgical measures for more than 3 months or for which other treatment options produced serious side effects; intractable nausea; seizures; or severe and persistent muscle spasms, including but not limited to those characteristic of multiple sclerosis

If you have questions about obtaining a physician's certification or whether you may qualify, talk to your physician or medical specialist.

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Q: How much does it cost to get a medical marijuana card?

A: The base annual fee is \$125 and is non-refundable.

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Q: What if I can't pay the application fee?

A: There is a sliding payment scale for patients who demonstrate financial need.

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Q: How long is the card valid?

A: One year from the month it was issued. As required by the law, patients must re-apply annually.

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Q: Where do I get the marijuana from?

A: The State currently recognizes properly permitted compassion centers as the only legal way to obtain marijuana. The Department will issue a permit to the compassion center to begin growing medical marijuana on July 1, 2014.

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Q: Is my out of state medical marijuana card accepted in Delaware?

A: No, there are no reciprocity agreements with other states.

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Q: Can I have my out-of-state doctor certify me for the card program?

A: No, physicians must be currently licensed to practice in Delaware in accordance with 24 DEL.C. Chapters 17 and 19.

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Q: Does the program have a list of doctors that they can refer me to that will certify me for the program?

A: No, patients must discuss health-related decisions with their primary care physician or specialist as part of any determination that medical marijuana is the best medical choice for their treatment.

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FAQs for Compassion Centers

- [What are the next steps if my organization would like to apply to be the Delaware compassion center?](#)

Q: What are the next steps if my organization would like to apply to be the Delaware compassion center?

The request for proposals (RFP) to open a compassion center will be advertised in December 2013. Questions and answers will be posted on the state's website in February and completed bids will be due in mid-March 2014. This RFP progression will follow the established State of Delaware contracting process. There will be a substantial cost associated with submitting an application.

The applications for opening a compassion center will be graded using "an impartial and numerically scored competitive bidding process."

In so doing, DHSS will consider the following:

- Documentation of not-for-profit status;
- The suitability of the proposed location, including compliance with local zoning laws and geographic convenience to patients from throughout the state;
- The character and relevant experience of the principal officers and board members;
- The proposed compassion center's plan for operations and services, including its staffing and training plans and whether it has sufficient capital to operate;
- The sufficiency of the applicant's plans for record keeping, safety, security, and the prevention of diversion, including the security devices to be used;
- The applicant's plan for making medical marijuana available on an affordable basis; and
- The applicant's plan for safe and accurate packaging and labeling, including the applicant's plan for ensuring that all medical marijuana is free of contaminants.

Once a vendor has been selected and the contract process completed, the vendor will be responsible for submitting payment for the permit. The Department will issue a permit for growing Medical Marijuana on July 1, 2014.

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SERVING CENTRAL AND
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Del. medical marijuana program regulations released

By Jen Rini
Delaware State News

Last Modified: Oct 1, 2013 07:38PM

DOVER — The state's medical marijuana program is moving forward as the Delaware Division of Public Health published preliminary regulations for the program Tuesday.

Gov. Jack A. Markell signed the Delaware Medical Marijuana Act in 2011, but implementation had been stalled for the past three years due to the suspension of medical marijuana compassion centers per guidance by the federal Department of Justice.

However, in August, the governor lifted that suspension, to move forward with the establishment of one pilot compassion center where licensed physicians can authorize marijuana treatment for a slew of conditions, including multiple sclerosis and Lou Gehrig's disease as well as intractable nausea and seizures.

Thom May, the division's Health Systems Protection chief, said new regulations basically cover the bidding identification process and operation for the compassion center as well as the safety and security conditions.

Requirements range from instituting 24-hour video monitoring and random inspections to financial accounting controls.

"We spent a lot of time reviewing other states throughout the country, in particularly those in this geographic region," Mr. May said. "Every state's situation is different and unique with themselves."

In terms of a unique provision for Delaware, in order to place a bid for the pilot compassion center entities must submit a \$5,000 bid fee, he said.

The Division of Public Health will release an official request for proposal for the pilot center by December, and by March 2014 will be evaluating bids.

Once permitted, the center is on schedule to begin growing up to 150 plants by July 1, 2014 for an inventory of no more than 1,500 ounces.

Public comment on the proposed regulations must be submitted to Deborah Harvey by Thursday Oct. 31, via email at Deborah.Harvey@state.de.us or mail to Deborah Harvey, Division of Public Health, 417 Federal St., Dover.

Contact 744-4700 with any questions.

Staff writer Jen Rini can be reached at 741-8250 or jrini@newszap.com. Follow [DSNJen_Rini](#) on Twitter.

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