



# DISABILITIES LAW PROGRAM

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## MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Recent Regulatory Initiatives

Date: July 5, 2017

There was only one (1) regulation published in the July issue of the Register of Regulations identified for analysis by the Councils. My analysis of that final regulation is reproduced below.

### 1. DOE Final Processing of Attorney General's Reports Regulation [21 DE Reg. 41 (7/1/17)]

The SCPD and GACEC commented on the proposed version of this regulation in May, 2017. A copy of the SCPD's May 23 letter is attached for facilitated reference. The Department of Education (DOE) is now adopting a final regulation which incorporates some edits prompted by the commentary.

First, the Councils identified many inconsistencies in references to districts and charter schools. In response, the DOE amended the definition of "district" to remove the inclusion of charter schools in the definition. The DOE then modified more than a dozen references to districts and charter schools throughout the regulation.

Second, the Councils noted that references to "criminal conduct" were problematic since minors who commit certain offenses are characterized as "delinquent" but not "criminal". No change was made. The DOE recited that "the term 'criminal conduct' is defined where used". At 41. I could not identify any definition of "criminal conduct" in the regulation.

Third, the Councils characterized the definition of "appropriate educational services" as "anemic" and inconsistent with State law and federal special education caselaw. No change was made. The DOE responded that it adopted definitions used in other regulations.

Fourth, the Councils questioned the use of several definitions which contained unnecessary substantive standards, were too brittle, and were unnecessary. No change was made. The DOE responded that it adopted definitions used in other regulations.

Fifth, the Councils observed that the definition of “parent” omitted persons appointed by a power of attorney or DOE grant of authority form or appointed by an IEP team. No change was made. The DOE responded that a “catch-all” disclaimer (§5.0) at the end of the regulation was sufficient. The problem with this approach is that the DOE is eschewing its role in providing useful guidance to districts and charter schools. Reciting that nothing in the regulation alters a school’s duties under the IDEA or §504 does not provide useful guidance within the regulation.

Sixth, the Councils characterized a 71-word sentence defining “regular school program” as too lengthy and convoluted. No change was made. The DOE responded that “the lengthy definition is important to clarify what is meant by this term”.

Seventh, the Councils observed that the definition of “suspension, long-term” was inconsistent with federal guidance holding that a pattern or practice of short-term removals aggregating 11 days in a school year may constitute a long-term suspension. No change was made. The DOE responded that a “catch-all” disclaimer (§5.0) at the end of the regulation resolved the concern. The problem with this approach is that the DOE is eschewing its role in providing useful guidance to districts and charter schools. Reciting that nothing in the regulation alters a school’s duties under the IDEA or §504 does not provide useful guidance within the regulation.

Eighth, the Councils recommended modifying a section on retention of a report to include a reference to §504 students. No change was made. The DOE reiterated that a “catch-all” disclaimer (§5.0) at the end of the regulation resolved the concern. The problem with this approach is that the DOE is eschewing its role in providing useful guidance to districts and charter schools. Reciting that nothing in the regulation alters a school’s duties under the IDEA or §504 does not provide useful guidance within the regulation.

Ninth, the Councils observed that §4.1.2 authorized disciplinary action based on off-campus conduct which did not present a risk to school students and employees. No change was made. The DOE responded that districts have discretion in identifying conduct justifying discipline.

Tenth, the Councils questioned a provision (§6.0) authorizing any memorandum of understanding or agreement to supersede the regulation. The DOE modified the section to only refer to a single, specific agreement and then added a definition of the single agreement.

Since the regulation is final, and the DOE responded to the Councils’ comments, no further action appears warranted.

Attachment

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STATE OF DELAWARE  
**STATE COUNCIL FOR PERSONS WITH DISABILITIES**  
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The Honorable John Carney  
Governor

John McNeal  
SCPD Director

May 23, 2017

Ms. Tina Shockley, Education Associate  
Department of Education  
401 Federal Street, Suite 2  
Dover, DE 19901

RE: 20 DE Reg. 867 [Proposed Processing of Attorney General's Report Regulation (5/1/17)]

Dear Ms. Shockley:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposed regulation to adopt a new regulation establishing uniform procedures for processing Attorney General's reports as authorized by Title 14 Del.C. §122(b)(26). The proposed regulation was published as 20 DE Reg. 867 in the May 1, 2017 issue of the Register of Regulations. The reports address "1) an enrolled student's alleged criminal conduct, regardless of jurisdiction, which shows disregard for the health, safety, or welfare of others, including, but not limited to, acts of violence, weapons offenses, and drug offenses; 2) wanted persons enrolled in a school and 3) missing persons enrolled in a school." See §2.0, definition of "Attorney General's Report".

SCPD has the following observations.

First, Section 1.0 applies the regulation to both public school districts and charter schools. Section 2.0, definition of "district", then recites that a "district" includes a "charter school". This is counterintuitive and contrary to the commonly understood concept of a district. The Delaware Administrative Code & Style Manual, §7.2, offers the following guidance:

In general, keep the language in the text as clear and simple as possible. When drafting, remember that documents should be written so that the general public can understand them....Consistency of expression, ...and adherence to accepted usage aid readability. ...Avoid using the same word or term in more than one sense. Conversely, avoid using different words to denote the same idea.

To add to this confusing approach, there are several references to charter schools as distinct from districts. See, e.g., §2.0, definition of “administration”; §2.0, definition of “board of education”; §2.0, definition of “consortium discipline alternative program”; §2.0, definition of “principal”; §2.0, definition of “school property”; and §2.0, definition of “superintendent”. In other cases, the regulation uses the term “school district/charter”. See, e.g., §2.0, definition of “alternative program”; §2.0, definition of “assignment to an alternative program”; and §5.1.

Second, the regulation contains several references to “crimes” and “criminal conduct”. In general, minors who commit certain offenses are characterized as “delinquent” but not “criminal”. See, e.g., Title 10 Del.C. §901(7), 1002, and 1009(c)(h). At a minimum, the DOE could consider incorporating a definition. See, e.g., 14 DE Admin Code 614.2.0, definition of “crime”; and 14 Del.C. §4112.

Third, in §2.0, the definition of “appropriate educational services” establishes an “anemic” level of entitlement which is, particularly for special education students, inconsistent with law. See Title 14 Del.C. §3101(5). See also Andrew E. v. Douglas County School District, No. 15-827 (March 22, 2017).

Fourth, in §2.0, many of the definitions (“disciplinary action”; expulsion; suspension long term; suspension short-term) are problematic since a) they contain many substantive standards; and b) are unnecessarily brittle. The Delaware Administrative Code & Style Manual, §4.3, provides the following admonition:

Regulatory information should not be included in the definition.

Example of a Definition that is Too Substantive:

“Lockup facility” means a secure adult detention facility used to confine prisoners waiting to appear in court and sentenced prisoners for not more than 90 days. In addition to the cell, a lockup facility must include space for moderate exercise and activity, such as weight lifting, ping-pong, table games, reading, television, and cards.

This definition should end at “90 days”. [emphasis supplied]

Even on a practical level, there is no need for detailed information about the ramifications of suspension, expulsion, etc. since the standards are designed to solely focus on processing of Attorney General’s Reports. There are other regulations (e.g. Parts 611-616) which contain specifics on suspension, expulsion, due process, etc. Finally, public schools have discretion to relax some of the normal consequences of a suspension. For example, if the school is a student’s polling place, the school could make an exception to allow a suspended student to be on school property to vote or obtain health services at a wellness center.

Fifth, in §2.0, the definition of “parent” omits persons appointed by a power of attorney or DOE grant of authority form or appointed by an IEP team. See 14 DE Admin Code 926.20 and 14 Del.C. §§3101(7) and 3132.

Sixth, in §2.0, the definition of “regular school program” consists of a single 71-word sentence with many clauses. It is convoluted and difficult to understand.

Seventh, if the DOE opts to retain substantive standards in the definition of “suspension, long term”, it merits correction since it ignores federal guidance holding that a pattern or practice of short-term removals aggregating 11 days in a school year may constitute a long-term suspension. See codification of caselaw at 34 C.F.R. 300.536.

Eighth, Section 3.1.4 contemplates retention of the report during the time for initiating a dispute resolution application under the IDEA. The DOE may wish to consider adopting a conforming standard for Section 504-identified students since they are also entitled to a manifestation determination meeting. See e.g. OCR Senior Staff Memo, 16 IDELR 491, 493 (November 13, 1989).

Ninth, Section 4.1.2 ostensibly authorizes disciplinary action based on off-campus conduct which does not present a risk to school students and employees. Delaware caselaw authorizes schools to consider off-campus activities if they present a risk to school students and employees. Cf. Howard v. Colonial School District, 621 A.2d 362 (Del. Super 1992), aff'd 615 A.2d 531. Thus, an otherwise exemplary student who faces a single charge of driving under the influence of alcohol who rides the school bus to school should not be the subject of school discipline. There is simply no nexus to a risk of harm to the school body. The recitation that “all off-campus, non-school activity conduct which shows disregard for the health, safety and welfare of others... may subject a student to Disciplinary Action” is “overbroad”.

Tenth, Section 6.0 contains the following standard: “If any portion of this regulation is in conflict with any Memorandum of Understanding or Agreement in existence, the Memorandum of Understanding or Agreement shall control.” This is an “odd” recitation. It is difficult to interpret. First, query if this is a “grandfather” provision which allows an agreement currently “in existence” to “trump” the regulation while a prospectively revised agreement would not “trump” the regulation. Second, query if a district or charter school could avoid the entire regulation by simply adopting a memorandum of agreement with any entity? There is some “tension” between the enabling statute [14 Del.C. §122(b)(26)] promoting uniform processing regulations and authorizing non-uniformity based on undefined agreements which supersede the uniform regulatory standards.

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

Sincerely,

*Jamie Wolfe*

Jamie Wolfe, Chairperson  
State Council for Persons with Disabilities

cc: The Honorable Susan S. Bunting, Ed.D., Secretary of Education  
Mr. Chris Kenton, Professional Standards Board  
Dr. Teri Quinn Gray, State Board of Education  
Ms. Mary Ann Mieczkowski, Department of Education  
Ms. Laura Makransky, Esq., Department of Justice  
Ms. Terry Hickey, Esq., Department of Justice  
Ms. Valerie Dunkle, Esq., Department of Justice  
Ms. Kathleen MacRae, ACLU  
Mr. Brian Hartman, Esq.  
Developmental Disabilities Council  
Governor's Advisory Council for Exceptional Citizens

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