



STATE OF DELAWARE  
**STATE COUNCIL FOR PERSONS WITH DISABILITIES**

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June 28, 2018

Ms. Emily Cunningham  
Department of Education  
401 Federal Street, Suite 2  
Dover, DE 19901

RE: 21 DE Reg. 947 [DOE Proposed Unsafe School Choice Option Policy (June 1, 2018)]

Dear Ms. Cunningham:

The State Council for Persons with Disabilities (SCPD) has reviewed Delaware Department of Education's (DDOE) proposed regulation that is being amended to provide the current federal statutory reference, remove language that is no longer included in the amended federal statute, modify language for school choice when a school is identified as persistently dangerous, and remove the definition of Terroristic Threatening as it is no longer a mandatory report under 14 Del.C. 4112(b). The proposed regulation was published as 21 DE Reg. 947 in the June 1, 2018 issue of the Register of Regulations. SCPD has the following comments.

The Elementary and Secondary Education Act ("ESEA"), as amended by the Every Student Succeeds Act ("ESSA") makes ESEA funding received by the State contingent upon the State giving students who attend a "persistently dangerous" school or who are the victims of "violent criminal offense[s]" at school the opportunity to attend a "safe" school within the school district. 20 USCA § 7912 (a). The State, with input from school districts, determines the definition of a "persistently dangerous" school. Additionally, State law is used to determine what constitutes a "violent criminal offense." Id.

In Delaware, a school is "persistently dangerous" if it "has five or more unsafe incidents for every one hundred students enrolled for three consecutive fiscal years." 14 Del. Admin., C. 608. The current version of 608 defines "unsafe incidents" as any of the following: (1) the out-of-school suspension or expulsion of a student for a gun free schools violation; (2) the out-of-school suspension or expulsion of a student for the commission on school property of a crime that must be reported, pursuant to 14 Del. C. § 4112; (3) a non-student commits a crime on school

property that must be reported, pursuant to 14 Del. C. § 4112; (4) the out-of-school suspension or expulsion of a student for terroristic threatening.

The most important change is to the definition of “unsafe incidents.” The proposed amendment would remove suspension or expulsion for terroristic threatening from the definition of unsafe incidents. The synopsis to the proposed regulation states that the definition of terroristic threatening is being removed because 14 Del. C. § 4112 no longer includes it as a mandatory report offense. However, changes to 14 Del. C. § 4112 do not require terroristic threatening be removed from the definition of “unsafe incidents.” First, no Delaware code could be located that defines “unsafe incidents.” The present version of 14 Del. Admin., C. 608 makes it clear that unsafe incidents are not, by definition, only mandatory report crimes.

The definition of unsafe incidents means any of the following:

- The school suspended or expelled a student for a gun free schools violation; *or*
- The school suspended or expelled a student for a crime committed on school property which is required to be reported under 14 Del.C. §4112; *or*
- The school reported a crime committed by a non-student on school property that is required to be reported under 14 Del. C. § 4112; *or*
- The school suspended or expelled a student for terroristic threatening as that term is defined in 11 Del. C. § 621.” (emphasis added)

Put another way, an unsafe incident may be expulsion or suspension for mandatory report crimes *or* it may be expulsion or suspension for terroristic threatening.

Furthermore, no other provision in the amendment compels a reading that limits “unsafe incidents” to those involving suspensions or expulsions for mandatory report offenses. “Persistently Dangerous Schools” are identified by DDOE “using data reported to it pursuant to the provisions of 14 Del. C. § 4112, 14 DE Admin. C. 601, and any expulsion and suspension data as required by the Department.” 14 DE Admin. Code 608.2.1 (emphasis added). 14 DE Admin. C. 601 requires school districts and charter schools to report “incidents of misconduct,” including terroristic threatening to DDOE.

If the proposed amendment were approved, then the DDOE’s argument that only mandatory report offenses pursuant to § 4112 are unsafe incidents would become correct.<sup>1</sup>

The removal of terroristic threatening could have a large impact on the number of “unsafe incidents” that occur. During the 2016-2017 school year, 315 terroristic threatening incidents with a student as the victim occurred throughout the school districts in the State.<sup>2</sup> There were 292 terroristic threatening incidents with an employee as the victim. Finally, there were 695 total

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<sup>1</sup> Gun free school violations would likely be a mandatory report crime pursuant to 14 *Del. C.* 4112(c).

<sup>2</sup> The State distinguishes between incidents and offenses. The data for incidents was used, because the numbers were smaller. No definitions for incident or offense could be located.

mandatory report incidents. In total, 607 terroristic threatening incidents occurred, which almost equals all mandatory report crime incidents that occurred. Removing terroristic threatening from the definition of “unsafe incidents” might give schools the ability to expel or suspend students without having to worry about being labeled a persistently dangerous school. Please note it is not possible to determine how many of these incidents qualify as “unsafe incidents” because the data does not show how many of these incidents resulted in out-of-school expulsions or suspensions. An incident would not qualify as an “unsafe incident” if there were no out-of-school expulsion or suspension unless it was committed by a non-student. See 14 DE Admin., Code 608.

The other potentially problematic change is that a student who is electing to leave a school that is persistently dangerous or who is leaving because they were the victim of a violent felony would no longer be guaranteed the option to move to a school that “is making adequate yearly progress and has not been identified as being in school improvement, corrective action or restructuring.”<sup>3</sup>

The other amendments are minor, e.g. renumbering, capitalization changes, updating a citation and the location where certain information must be posted.

The SCPD is opposing the portion of the proposed amendment that changes the definition of “unsafe incidents.” The proposed change to the definition of “unsafe incidents” makes it easier for schools to avoid being identified as persistently dangerous because there would be fewer types of incidents that meet the definition “unsafe incidents.” This may make it more difficult for a child in an unsafe school to leave. Additionally, it might encourage school districts to utilize out-of-school suspensions and expulsions to address terroristic threatening incidents because they will not have to worry about being labeled a “persistently dangerous school.” Functionally, though, the change in definition may not make much of a difference. Even using the broader definition of “unsafe incidents,” no public schools were designated as “persistently dangerous” for the 2016-2017 school year.<sup>4</sup>

The SCPD is opposing the amendment that does not guarantee students the right to move to a school that “is making adequate yearly progress and has not been identified as being in school improvement, corrective action or restructuring.”

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

Sincerely,



Nicholas J. Fina, Ed.D.  
Chair - State Council for Persons with Disabilities

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<sup>3</sup> See sections 4.1 and 5.1 of the proposed amendment.

<sup>4</sup> No information could be located about whether any public charter schools were designated as “persistently dangerous.”

cc: The Honorable Susan S. Bunting, Ed.D. Secretary of Education  
Mr. Chris Kenton, Professional Standards Board  
Dr. Dennis Loftus, 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. Laura Waterland, Esq.  
Developmental Disabilities Council  
Governor's Advisory Council for Exceptional Citizens

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