



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

John McNeal  
SCPD Director

**MEMORANDUM**

DATE: January 31, 2022

TO: Susan McNatt  
Delaware State Police

FROM: Terri Hancharick, Chairperson *TH*  
State Council for Persons with Disabilities

RE: Proposed DSHS Regulation on 801 Regulations of the Delaware Council  
on Police Training, 25 Del. Register of Regulations 673 (January 1, 2022)

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Safety and Homeland Security's Delaware Council on Police Training ("COPT") proposal to amend this regulation by adding § 801.26, which will set mandatory standards for the use, activation, electronic storage, and dissemination of body worn cameras ("BWC"). The proposed amendments were voted on during a public meeting of the COPT on November 17, 2021 and are the result of the passage of House Bill 195, which was signed by the Governor on July 21, 2021.<sup>1</sup> The proposed regulations seek only to set the standards which agencies employing officers using BWCs will use to develop required policies around BWCs; the agencies are "encouraged to expand and to customize th[e] policies..."<sup>2</sup> The proposed regulation

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<sup>1</sup> <https://legis.delaware.gov/BillDetail/68664>. HB 195 requires certain police officers and other employees of the Delaware Department of Correction and the Delaware Department of Services for Children, Youth, and Their Families to use BWCs to record interactions with members of the public. It also requires the COPT to promulgate regulations for BWCs to ensure consistent use by 2022.

<sup>2</sup> Proposed § 801.26.2.

was published as 25 DE Reg. 673 in the January 1, 2022 issue of the Register of Regulations. SCPD has the following observations and recommendations.

At a “bird’s eye” level, the proposed regulations include standards for:

1 Del. Admin. C. § 801.26.3 – which officers are typically required to wear BWCs as well as those typically not required

§§ 801.26.4-26.8 – when BWCs should be activated

§§ 801.26.9-26.10 – training and inspection of BWCs

§§ 801.26.11-26.13 – recordings and prohibitions on recording

§ 801.26.14 – storage of digital files

§§ 801.26.15-26.17 – dissemination of BWC recordings

Although the proposed regulations are consistent with the required actions outlined in HB 195, they are inconsistent with many of the current recommended best practices. Where individuals with disabilities are specifically impacted, the discrepancies will be discussed, along with suggested revisions.

Although the proposed regulations do not explicitly touch upon the disability community, it is undeniable that individuals with disabilities, especially those with developmental or mental health related disabilities, are at an increased risk for both fatal and non-fatal police interactions.<sup>3</sup> This reality also holds true for students with disabilities.<sup>4</sup> A 2021 American Psychological Association article indicates that two separate studies found that “[s]ince 2015, close to a quarter of people killed by police officers in the United States had a known mental health condition and...that 20% to 50% of law enforcement fatalities involved an individual with a mental illness.”<sup>5</sup> Relatedly, a report by the Treatment Advocacy Center finds that “people with untreated mental illness are 16 times more likely to be killed during a police encounter[.]”<sup>6</sup>

BWCs, when implemented properly, can be a win-win for both law enforcement and communities. BWCs have been shown to strengthen the accountability and transparency of law enforcement agencies<sup>7</sup> – a positive for both law enforcement and the communities in which they serve. Despite the benefits of BWCs, their use also

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<sup>3</sup> <https://bjs.ojp.gov/library/publications/disabilities-reported-prisoners-survey-prison-inmates-2016>. Bureau of Justice Statistics brief finding nearly 2 in 5 state and federal prisoners had at least one disability in 2016.

<sup>4</sup> See generally the Civil Rights Data Collection, <https://ocrdata.ed.gov/>. Because the proposed regulations include BWC requirements for school resource officers (“SROs”), the implications for students with disabilities will be discussed.

<sup>5</sup> See <https://www.apa.org/monitor/2021/07/emergency-responses>.

<sup>6</sup> See <https://www.treatmentadvocacycenter.org/key-issues/criminalization-of-mental-illness/2976-people-with-untreated-mental-illness-16-times-more-likely-to-be-killed-by-law-enforcement>.

<sup>7</sup> See <https://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>.

raises several concerns which include, most notably, the intrusion into the privacy of citizens in the community as well as the impact on the relationship between law enforcement and the community.<sup>8</sup>

The following includes a discussion of the relevant concerns raised by the use of BWCs, if and how the COPT proposed regulations touch upon those concerns, and instances where the proposed regulations are either not aligned with best practices / recommendations from the field or with the best interests of individuals with disabilities.

For ease, the following entities, their recommendations, and how they will be referred to in the below review are included here:

1. (“ABA”) American Bar Association, ABA Principles on Law Enforcement Body-Worn Camera Policies, <https://www.americanbar.org/content/dam/aba/administrative/news/2021/08/annual-meeting-resolutions/604.pdf>
2. (“PERF”) Police Executive Research Forum, Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned, <https://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>
3. (“ACLU”) American Civil Liberties Union, POLICE BODY-MOUNTED CAMERAS: WITH RIGHT POLICIES IN PLACE, A WIN FOR ALL, <https://www.aclu.org/other/police-body-mounted-cameras-right-policies-place-win-all>
4. (“FOP”) Fraternal Order of Police, BWC RECOMMENDED BEST PRACTICES, <https://files.fop.net/wp-content/uploads/2021/03/nfop-body-worn-camera-recommended-best-practices.pdf>
5. (“NACDL”) National Association of Criminal Defense Lawyers, POLICING BODY CAMERAS: Policies and Procedures to Safeguard the Rights of the Accused, <https://www.nacdl.org/Document/PolicingBodyCamerasPoliciesToSafeguardRights>
6. (“DPCC”) Delaware Police Chiefs’ Council, Body Worn Cameras-Model Policy, <https://attorneygeneral.delaware.gov/wp-content/uploads/sites/50/2018/03/Model-Policy-Body-Worn-Cameras.pdf>

BWCs, unlike many traditional surveillance methods, allow law enforcement to record in ways and areas never before possible – such as recording of both audio and

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<sup>8</sup> See <https://www.aclu.org/other/police-body-mounted-cameras-right-policies-place-win-all> and <https://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>.

video; capturing close-up images that could be used for facial recognition; and the ability to record inside private homes. This expansion necessitates policy considerations for when law enforcement should have their BWCs activated (addressed more fully below due to the impact on individuals with disabilities), how the recordings are stored and for how long, as well as if, when, and under what circumstances the recordings should be disseminated. The difficulty in crafting policies around the use of BWCs lies with striking the right balance between ensuring transparency and accountability on the one hand and the Constitutionally protected right to privacy on the other.

## **Privacy Considerations & When BWCs Should be Activated / Deactivated**

*Proposed §§ 26.4-26.7 and 26.13.*

The proposed regulations require that BWCs be active “to record contacts with citizens in the performance of official duties, including:

- 26.4.1 During calls for service;
- 26.4.2 Where an arrest or detention appears to be likely;
- 26.4.3 Where use of force appears to be likely;
- 26.4.4 Where it appears doing so may promote the safety of people and property; and
- 26.4.5 Where doing so may be helpful to preserve evidence.

...

26.6 BWC shall remain activated until the entire contact is completed in order to ensure the integrity of the recording unless the contact moves into an area restricted by these regulations.

26.7 If BWC are not activated for an entire contact, or a recording is interrupted, the officer shall document why a recording was not made, was interrupted, or was terminated.

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26.13 Recording Prohibitions. BWC shall be used only in conjunction with official law enforcement duties and to record interactions with the public and, absent exigent circumstances, shall not be used to record:

- 26.13.1 Private communications with other police personnel without the permission of the Chief;
- 26.13.2 Encounters with undercover officers or confidential informants;
- 26.13.3 Moments while on break or otherwise engaged in personal activities;
- 26.13.4 Any location where individuals have a reasonable expectation of privacy, such as a restroom or locker room;
- 26.13.5 A strip search;

- 26.13.6 Court proceedings by non-court personnel officers, except where an incident occurs during a court proceeding; and
- 26.13.7 Any other situation where applicable law or regulation provides for confidentiality including but not limited to:
- 26.13.7.1 HIPAA;
  - 26.13.7.2 Conversations between medical treatment providers and patients;
  - 26.13.7.3 Conversations with counsel or union representatives; and
  - 26.13.7.4 Any other privileged conversations.”

There are numerous recommended best practices which are absent from the proposed regulations. While the proposed regulations do recommend that law enforcement agencies expand upon and customize these standards to their particular needs, SCPD recommends that the following suggested changes be adopted across the board and included in COPT’s proposed regulations to protect the rights and privacy of individuals with disabilities.

1. The proposed regulations must include a requirement that, where feasible, officers announce and / or notify individuals when they are recording.<sup>9</sup> This not only helps address privacy concerns but has also been shown to improve the interactions between law enforcement and community members. As explained by many of the recommended policies, this notification does not need to be verbal, but can also be accomplished by other means such as an easily visible pin or sticker indicating that a camera is in operation or a red blinking light. This would help in situations where it is not safe or practical to verbally notify as well as for interactions with individuals who are deaf, hard of hearing, or are otherwise unable to process verbal information.
2. The proposed regulations must include a requirement that, where feasible, officers obtain consent prior to recording (1) in a private home during non-exigent circumstances; (2) interviews with crime victims and witnesses; and (3) interviews with community members wishing to report or discuss criminal activity in the neighborhood. This consent should be recorded by the BWC or in writing. Where consent is not obtained upfront, officers must stop recording when requested by the individual.<sup>10</sup>

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<sup>9</sup> Recommended by the ABA, PERF, ACLU, NACDL, and DPCC.

<sup>10</sup> Recommended by the ABA, PERF, ACLU, NACDL, FOP, and DPCC. See also Aequitas, [To Record or Not To Record: Use of Body-Worn Cameras During Police Response to Crimes of Violence Against Women](https://aequitasresource.org/wp-content/uploads/2018/09/To-Record-or-Not-To-Record-Use-of-Body-Worn-Cameras-During-Police-Response-to-Crimes-of-Violence-Against-Women-SIB29.pdf), <https://aequitasresource.org/wp-content/uploads/2018/09/To-Record-or-Not-To-Record-Use-of-Body-Worn-Cameras-During-Police-Response-to-Crimes-of-Violence-Against-Women-SIB29.pdf>

3. The proposed regulations must expand its list of instances and locations where BWC activation is prohibited, to include mental health treatment facilities (e.g., in- and out-patient treatment facilities, counseling centers) and medical treatment facilities (e.g., hospitals, in- and out-patient treatment centers) unless the officer is lawfully present (such as the instances enumerated in proposed §§ 26.4).<sup>1112</sup> The proposed regulations at § 26.13.7 do include a prohibition on recordings where “law or regulation provides for confidentiality,” which includes the Health Insurance Portability and Accountability Act (“HIPAA”) and conversations between medical treatment providers and patients. However, the proposed regulations, as written, fail to contemplate or consider those instances where bystanders, such as other patients, could be captured on BWC recordings. Including more specific prohibitions around the use of BWCs in medical and mental health treatment facilities will help individuals with disabilities, especially those hospitalized, retain their privacy rights. SCPD recommends that COPT consider Section 7.1 of the BWC Policy from the State of New Jersey as an exemplar.<sup>13</sup>
4. The proposed regulations must explicitly and unequivocally prohibit the activation of BWCs in childcare or educational settings where minors are present (e.g., elementary, middle, and high schools) unless the officer is responding to an imminent threat to life or health.<sup>14</sup>

The proposed regulations at § 26.3.3 require that “School Resource Officers [(‘SROs’)] performing in a law enforcement capacity and not an educational capacity shall follow Section 26.0 of this regulation.” There are several privacy and community-relations concerns which arise with the proposed use of BWCs by SROs. First, the use of BWCs in schools contributes to the already over-surveilled environment in which students are educated. Most, if not all, Delaware public schools have surveillance technology installed. Secondly, the risk of recordings of childhood mistakes being shared online outweighs any conceivable benefits – and as is now well known, it is essentially impossible to remove anything from the Internet. Furthermore, many of the BWC recordings of students currently circulating around the Internet are of children with disabilities – including those in the middle of a behavioral crisis. It is imperative that we craft policies which protect our most vulnerable, not put them on display for the world to see. It should be noted

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<sup>11</sup> Recommended by the FOP.

<sup>12</sup> See <https://www.brennancenter.org/our-work/research-reports/police-body-camera-policies-privacy-and-first-amendment-protections>, which includes a sampling of BWC policies around the country.

<sup>13</sup> See <https://www.nj.gov/oag/dcj/agguide/ag-Directive-2021-5-BWC-Policy.pdf>, pg. 15

<sup>14</sup> Recommended by the ACLU.

that BWCs do provide the benefit of being able to identify where students with disabilities have been improperly restrained or otherwise abused by SROs; however, as noted above, the costs do not outweigh the benefits.<sup>15</sup> Thirdly, the U.S. Department of Education exempts BWC recordings by SROs from the privacy protections of the Family Educational Rights and Privacy Act because it is considered a “law enforcement unit record.”<sup>16</sup>

In support of restricting or otherwise prohibiting the activation or use of BWCs by SROs, it should be noted that PERF’s publication on recommendations for BWCs is completely silent on the use of BWCs by SROs or in school settings; there is no mention of it anywhere. The use of BWCs by SROs is also absent in a report by the U.S. Department of Justice Office of Community Oriented Policing Services which recommends ten actions to improve school safety.<sup>17</sup> Instead, the recommended actions focus on building a positive school climate which encourages students to come forward with concerns – an action which BWCs have repeatedly been shown to discourage. Similar to the above recommendation, Council recommends that COPT consider Section 7.1 of the BWC Policy from the State of New Jersey as an exemplar.

There are obvious issues with SROs using BWCs; therefore, if COPT retains the proposed language, SCPD recommends that COPT clarify what it means by the terms “law enforcement capacity” and “educational capacity” by including definitions for each. A cursory search of Delaware code and regulations do not yield any clarity on their meanings nor are examples of either provided within this proposed regulation, including examples of where these roles change could prove useful as well. However, SCPD prefers that SROs are prohibited from activating their BWCs while on school grounds absent the imminent threat to life or health over the clarifying of language.

The following are additional suggested changes to the proposed regulations, which are critically important to the interests of all Delawareans but which pose less of a specific concern or issue for Delawareans with disabilities. The suggested changes are in line with the best practices and policies put forth by the entities noted above: ABA, PERF, ACLU, NACDL, FOP, and DPCC. It should be cautioned that not every recommendation listed below was or is endorsed by every entity; for most

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<sup>15</sup> See <https://www.fox13news.com/news/bodycam-video-shows-elementary-school-student-handcuffed-after-shoving-deputy>.

<sup>16</sup> See [https://studentprivacy.ed.gov/sites/default/files/resource\\_document/file/SRO\\_FAQs\\_2-5-19\\_0.pdf](https://studentprivacy.ed.gov/sites/default/files/resource_document/file/SRO_FAQs_2-5-19_0.pdf).

<sup>17</sup> Ten Essential Actions to Improve School Safety, <https://cops.usdoj.gov/RIC/Publications/cops-w0891-pub.pdf>.

suggestions, at least a majority has put it forth as a best practice or policy for adoption.

1. The proposed regulations must include an officer statement on camera, where feasible, when deactivating the BWC during an encounter.
2. The proposed regulations must include a requirement that all BWCs be equipped with, and at all times have activated, a pre-event buffering mode.
3. The proposed regulations must include a specified timeframe in which the officer has to download and tag the BWC recordings.
4. The proposed regulations must prohibit officers from using privately-owned BWCs while on duty.
5. The proposed regulations must include a prohibition on activating cameras to gather evidence based on First Amendment protected speech, associations, or religion.
6. The proposed regulations must include a clear and unequivocal ban on using BWC recordings with facial and biometric recognition technologies.
7. The proposed regulations must include disciplinary measures for officers who fail to comply with the regulations and their agency's policies around the use of BWCs.

The proposed regulations merely indicate that enforcement of the policies is within the discretion of the law enforcement agencies. There should be more concrete consequences for an officer's violation of the proposed regulations and their departmental policies concerning BWCs. "[R]esearchers report that compliance rates with body camera policies are as low as 30%." <sup>18</sup>

8. The proposed regulations must include a requirement for the creation and maintenance of an audit trail documenting any editing, redaction, or deletion of BWC data as well as the identity of any individual who viewed, accessed, copied, transmitted, redacted, or deleted any BWC data and the date of such action.
9. The proposed regulations must require prompt deletion of BWC recordings following the retention period unless preservation is required for litigation or other appropriate purposes.
10. The proposed regulations must include a requirement for no less than annual re-training on the use of BWCs.
11. The proposed regulations must include a requirement that all Delaware law enforcement agencies publish their policies and guidance concerning BWCs and recordings in a way that is easily and readily accessible by the community.

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<sup>18</sup> ACLU, <https://www.aclu.org/other/police-body-mounted-cameras-right-policies-place-win-all>.



12. The proposed regulations must provide for the public release of BWC recordings where relevant to the public interest (e.g., incidents of police use of force or if the subject of a police complaint), with exceptions for specific circumstances. These would include circumstances such as interviews with children, victims of sexual assault, and individuals experiencing a mental health crisis (unless consent is provided).<sup>19</sup>
13. The proposed regulations must include a requirement that agencies collect statistical data concerning the use of BWCs.

SCPD supports the development of a comprehensive policy concerning BWCs provided they address the concerns posed to individuals with disabilities, including students with disabilities. To that end, SCPD recommends the COPT revise its proposed regulation to be consistent with the suggestions included herein as well as with best practices and standards from the field. Finally, Council suggests that COPT engage with relevant stakeholders in revising their proposed regulations, including the disability community.

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

cc: DSHS Cabinet Secretary, Nathaniel McQueen, Jr.  
DSHS Deputy Secretary, Kimberly Chandler  
Ms. Laura Waterland, Esq., DLP  
Governor's Advisory Council for Exceptional Citizens  
Developmental Disabilities Council

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<sup>19</sup> See DelawareOnline Editorial Delaware police will wear body cameras. Great — but the footage must be public. <https://www.delawareonline.com/story/opinion/2021/08/06/delaware-police-body-camera-footage-must-public/5490827001/>.