



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
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October 25, 2013

Ms. Susan K. Haberstroh, Ed.D.
Department of Education
35 Commerce Way – Suite 1
Dover, DE 19904

RE: 17 DE Reg. 367 [DOE Proposed Uniform Definitions for Student Conduct]

Dear Ms. Haberstroh:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposal to adopt a new regulation regarding *Uniform Definitions for Student Conduct Which May Result in Alternative Placement or Expulsion*. The proposed regulation was published as 17 DE Reg. 367 in the October 1, 2013 issue of the Register of Regulations. As background, legislation (H.B. 42) was enacted in 2011 requiring the DOE to promulgate such regulations and the DLP submitted the attached August 10, 2012 comments to a pre-publication draft of the regulations. SCPD has the following observations and recommendations on the proposed definitions.

Alcohol: SCPD assumes the main concern for possession of alcohol in schools is ingestion. SCPD recommends 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: SCPD recommends 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; Coca-cola; Pepsi). SCPD recommends 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: SCPD recommends 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. SCPD recommends 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: SCPD recommends substituting “1353” for “1353(2)” since the conduct proscribed by §1353(1) could occur within a school environment.

Use: SCPD recommends 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 (Vandalism): 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: SCPD recommends 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 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”. SCPD recommends 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. SCPD recommends insertion of “intentional” prior to “conduct”. Council also recommends limiting the definition to occurrences within the “school environment” which is previously defined.

Disruption of the Educational Process: SCPD recommends 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, as defined, is overbroad and 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. SCPD recommends that DOE either consider elimination of the definition or adoption of a more restrained definition which would be limited to criminal enterprises or large-scale commercial enterprises (e.g. complex football pools).

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: SCPD had previously recommended deletion of “sexual act” and therefore the definition of “sexual misconduct” would be effected. This latter definition is overbroad and could result in expulsion if students kiss or hug. If two 18 year old dents kissed at their high school prom, application of this standard could result in expulsion or placement in an alternative school.

Teen Dating Violence: The DOE should consider cross-referencing 14 Del.C Section 4112E.
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: SCPD recommends 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.

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

Sincerely,



Daniese 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.
Ms. Ilona Kirshon, Esq.
Ms. Kathleen MacRae, ACLU
Mr. Brian Hartman, Esq.
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