



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
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October 24, 2016

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

RE: 20 DE Reg. 223 [Proposed Possession, Use or Distribution of Drugs/Alcohol Regulation
(10/1/16)]

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 set of amendments to its regulation covering possession, use and distribution of drugs and alcohol. The proposed regulation was published as 20 DE Reg. 223 in the October 1, 2016 issue of the Register of Regulations. SCPD has the following observations.

First, §1.0 merits reconsideration. The current preface to the regulation contemplates public schools complying with its terms. The proposed change would make the terms "minimums" from which public schools could vary:

The purpose of this regulation is to outline the minimum requirements to be included in all public school district and charter school policies on the Possession, Use, or Distribution of Drugs and Alcohol.

This approach is at odds with legislation directing the DOE to adopt "uniform" definitions of student conduct subject to discipline and "uniform" disciplinary due process. See 14 Del.C. §122(b)(26) and 14 DE Admin Code 614.1.0. The "minimum requirements" reference is an invitation to public schools to adopt non-uniform standards resulting in the hodgepodge of standards the Legislature sought to eliminate.

Second, proposed §4.1.7 should be deleted since it refers to "the following penalties" which are being deleted. Standing alone, §4.1.7 is meaningless.

Third, in §4.2, it would be preferable to delete the reference to a release of liability. As a practical matter, students reliant on an insulin pump, asthmatic inhaler, or autoinjectable epinephrine will be covered by Section 504 and their access to such life-saving supports cannot be conditioned on a parental release of liability. Moreover, the DOE regulation is literally mandatory, i.e., public schools must incorporate the release requirement into local standards even if they disfavor it. It would simplify the regulation to eliminate the requirement altogether.

Fourth, §4.3 is based on S.B. 181. There is some "tension" between S.B. 181 and disability-related laws. S.B. 181 (and §4.3) categorically bars a school nurse, employee or contractor from serving as a designated caregiver

for the purpose of administering prescribed medical marijuana oil. In contrast, schools are required to accommodate the needs of students with disabilities under the ADA, Section 504, and the IDEA. In the medication context, public schools have been required to administer insulin, epinephrine, and other drugs. See, e.g., Region IX OCR LOF to Conejo Valley (CA) Unified School District, 20 IDELR 1276 (October 27, 1993) [district violated Section 504 by declining to establish an appropriate emergency response system for insulin-dependent child and disallowing trained laypersons to administer injections]; and Region III OCR LOF to Berlin Brothersvalley (PA) School District, 14 IDELR 353: 124, 125 (December 23, 1988) [district violated Section 504 by requiring parent to sign waiver of liability as precondition of administration of allergy medication]. Cf. Cedar Rapids School District v. Garrett, 526 U.S. 66 (1999) [adopting broad view of school responsibility to provide school health services to students with disabilities]. Administration of medications is a type of school health service. See 34 C.F.R. 300.34. Thus, if an IEP team determined that administration of prescribed marijuana oil were necessary to permit a student to attend school and receive a FAPE, the school would be responsible for implementing/facilitating that determination. At a minimum, the DOE may wish to include a non-regulatory note:

For students with disabilities, limitations on administration of medications are subject to exceptions based on the Americans with Disabilities Act, Section 504, and the IDEA, including a duty to provide school health services and health-related accommodations.

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

Sincerely,



Jamie Wolfe, Chairperson
State Council for Persons with Disabilities

cc: The Honorable Matt Denn, Attorney General
The Honorable Steven Godowsky, 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
Mr. Brian Hartman, Esq.
Developmental Disabilities Council
Governor's Advisory Council for Exceptional Citizens

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