



STATE OF DELAWARE  
**STATE COUNCIL FOR PERSONS WITH DISABILITIES**  
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410 Federal Street  
Dover, Delaware 19901  
302-739-3621

The Honorable John Carney  
Governor

John McNeal  
SCPD Director

November 30, 2017

Ms. Susan K Haberstroh, Education Associate  
Department of Education  
401 Federal Street, Suite 2  
Dover, DE 19901

RE: 21 DE Reg. 364 [Proposed Prohibition of Discrimination Regulation (11/1/17)]

Dear Ms. Haberstroh:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposed regulation to repeal its current Prohibition of Discrimination regulation in its entirety and substitute a more detailed version. The DOE review and revision of the regulation was prompted by a July 17, 2017 directive from Governor Carney. At 364. While the new regulation is well intentioned, it is flawed. The proposed regulation was published as 21 DE Reg. 364 in the November 1, 2017 issue of the Register of Regulations.

The SCPD has the following observations.

First, the existing regulation bans discrimination "under any program or activity receiving approval or financial assistance from or through the Delaware Department of Education." [emphasis supplied] The proposed regulation eliminates this protection in favor of a myopic application of the anti-discrimination mandate exclusively to districts and charter schools. Consider the following effect of this approach:

A. The current regulation covers post secondary institutions and degree granting institutions of higher education which must be "approved" by the DOE. See 14 DE Admin Code 292. The proposed regulation omits higher education institutions.

B. The current regulation covers institutions and programs receiving financial assistance from or through the DOE. This includes a wide variety of entities, ranging from the University of Delaware's

Center for Disabilities Studies to non-profits such as the Parent Information Center. See <https://aimdelaware.org/> See also 14 DE Admin Code 926.19.0 and <http://picofdel.org/services/educational-surrogate-parent-program.html>. Complementary federal law generally bars state educational agencies from providing financial assistance to entities which engage in discrimination. See, e.g., 34 C.F.R. 104.4(b)(v).

C. Department of Education internally approved or funded programs are literally subject to the current regulation. Thus, the Delaware Interscholastic Athletic Association is currently subject to the anti-discrimination mandate. See 14 Del.C. §303(a). The proposed regulation eliminates application of the anti-discrimination mandate to all DOE programs, including the DIAA. Likewise, the proposed regulation abrogates application of the anti-discrimination protection in the DOE's nonpublic school driver education program. See 14 Del.C. §127. Finally, all DOE scholarship programs would no longer be subject to the anti-discrimination regulation. Compare 14 Del.C. §3460 and 14 DE Admin Code 1200.

The Department should consider retaining the time-honored existing regulation and then including a more detailed supplement covering districts and charter schools.

Second, in the "purposes" section of the proposed regulation, the DOE asserts that it is banning discrimination not simply by entities receiving DOE approval or financial assistance, but any entity receiving "State of Delaware" approval or financial assistance. While this may have a salutary effect, the DOE's authority to ban discrimination in programs or activities approved or funded by other State agencies is questionable.

Third, the proposed regulation does not adequately address age-based considerations. For example, §6.1 recites as follows:

No Charter School or School District shall make available, sponsor or supervise any Extra-Curricular Activities that restrict student participation on the basis of Protected Characteristic(s).

Thus, a high school age student could demand the right to participate in an elementary school club or intermural team and vice versa. A three year old could apply to attend kindergarten. The DOE may wish to consider whether it intends to authorize such results.

Fourth, §9.0 requires schools to have informal and formal complaint procedures. As a practical matter, discrimination covered by the regulation will also constitute discrimination subject to other complaint resolution systems, including the U.S. DOE OCR complaint system. See <https://www2.ed.gov/about/offices/list/ocr/complaintprocess.html> . See also 14 DE Admin Code 258, 34 CFR 104.36, and 6 Del.C. Ch. 45. If schools solely provide notice of the complaint system in the regulation, families could easily be misled into believing this is their sole avenue of redress and miss a deadline. Moreover, 14 DE Admin Code 258 establishes a competing complaint system within public schools. For example, an LEP student may be aggrieved by a lack of language-based accommodations which could be the basis of a complaint under both the proposed regulation and DOE federal program complaint regulation (14 DE Admin Code 258.3.0). If the public school only provides a "Formal Student Complaint form" described in the proposed regulation, without notice of other complaint systems, this may be inherently misleading. The school would be directing the student to a less efficacious system since, in contrast to the DOE's federal program complaint procedure, it lacks an explicit right to appeal to the DOE and does not include a DOE investigation. The proposed regulation should include a "notice" provision identifying other grievance systems.

Fifth, the proposed regulation is silent on a student's right to appeal a district decision to the DOE. It's unclear if 14 Del.C. §1058 could be invoked to solicit State Board of Education review.

Sixth, in §9.1.2.3.2, the DOE should consider substituting "specify" for "specifies".

Seventh, in §11.0, first sentence, the DOE should consider substituting "at the beginning" or "by the beginning" for "for the beginning".

Eighth, in §12.0, the DOE should correct the reference to the "Individuals with Disabilities Education Act".

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, Chairperson  
State Council for Persons with Disabilities

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

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