



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. 941 [DOE Proposed Prohibition of Discrimination Regulation (June 1, 2018)]

Dear Ms. Cunningham:

The State Council for Persons with Disabilities (SCPD) has reviewed Delaware Department of Education's (DDOE) proposed regulation to provide guidance to school districts and charter schools (collectively "schools" or "districts") on establishing anti-discrimination policies. The proposed regulation was published as 21 DE Reg. 941 in the June 1, 2018 issue of the Register of Regulations. SCPD has the following comments.

The regulations include "disability" as a one of the "protected characteristics," but the regulations are primarily aimed at addressing issues that may arise with other protected characteristics. This analysis is focused solely on matter specifically affecting the students with disabilities and their family members. In relevant part, the regulations prohibit discrimination on the basis of protected characteristics in school programs and activities, extracurricular activities, and career and educational and career guidance.<sup>1</sup> It also instructs districts to establish notification and complaint procedures for students who wish to report discrimination.

Because persons with disabilities are already protected by various state and federal laws, the regulations do not create any substantive rights that do not already exist. That said, they provide some clarity and specific instruction to districts. They also require districts to set up a formal complaint process that, depending on how the processes are set up, may create a low cost and

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<sup>1</sup>There are carve outs for activities legally constituted as single gender activities (e.g., sports), activities with the purpose of assisting students with disabilities (e.g., special education classes), and sexual education classes (i.e., one can have those classes separated by gender).

high speed way to address potential discrimination in schools. The SCPD is supporting the new regulation with the following notes:

- 4.1 The end of this section currently reads “. . . assisting students with a disability.” It should read “. . . assisting students with disabilities.”
  
- 10.1 The section on formal complaints envisions a school staff member who will “address the formal student complaint at each level” and a “final decision-maker at the school or School District levels.” 10.1.2.3.2. It is unclear whether the final decision-maker must be at the district level in school districts or whether the school or district can decide to have that be a school-level position. For charter schools not in districts, the final-decision maker would have to be a school-level position. It can be extremely problematic to have school employees running investigations about discrimination, and making the final decision-maker a district-level position (when possible) does not remove the problem.

The problem is that, if there has been discrimination, the school may have financial liability. Having school staff run the investigation might be acceptable if the perpetrator is another student (because the school might not have liability unless there was a failure to address a known problem), but it creates a conflict of interests if the alleged perpetrator is an employee of the school. The school employee, if he or she finds that there has been discrimination by another employee, is opening the school up to a lawsuit. This creates an incentive to find that there was no discrimination. Even if the employee is being perfectly fair, the relationship would inherently taint any finding that there was no discrimination. Using staff from the school district is better, but it doesn't really fix the problem, because the liability flows to the district as well. In charter schools without a district, there is no way to limit the appearance of the conflict. The SCPD strongly feels that the final decision-maker should be totally independent entity from the school district or charter school.

- 10.2 The regulation contemplates the posting of information on a website for the 2018-2019 school year because the regulations go into effect in the middle of the year. Hard copies are to be provided upon request. This is, presumably, to avoid the expense of reprinting handbooks or codes of conduct in the middle of the year. As always, care should be taken to ensure that persons without access to the internet are informed about the new regulations, and the online version should be checked for accessibility.

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

Sincerely,



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

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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