

October 17, 2012

Susan Haberstroh, Education Associate  
Regulation Review  
John G. Townsend Building  
401 Federal Street, Suite 2  
Dover, DE 19901

**RE: DOE Proposed Cyberbullying Regulation [16 DE Reg. 351 (October 1, 2012)]**

Dear Ms. Haberstroh:

On July 27, 2012, the Governor signed Senate Bill No. 193 which requires the Department of Education to promulgate a uniform cyberbullying policy based on a model developed by the Department of Justice. The Lt. Governor and Attorney General conducted public hearings to obtain input on the model.

Students with disabilities are disproportionately victims of bullying. The attached article, “Teens with Disabilities Face High Rates of Bullying” (September 4, 2012), describes research demonstrating that 57% of students with intellectual disabilities are bullied and slightly less than half of students with autism, learning disabilities and speech/language impairments are victimized. The research also concluded that bullying of students with disabilities is more prevalent in general education settings. Moreover, bullying does not “build character”. See attached article entitled “Myths and Facts About Bullying in Schools” (April, 2005). Students who are victimized are often characterized by low self-esteem, depression, and poor coping skills. Bullying also results in diminished academic performance. See attached article, “Academic Consequences Follow Social Rejection” (March 23 2006). Therefore, the concept of deterring bullying, including cyberbullying, merits our endorsement.

At the same time, some students with disabilities may be more subject to discipline for cyberbullying based on their lack of deliberative functioning. For example, a student with Attention Deficit Hyperactivity Disorder (ADHD) may impulsively post a picture or publish communication without appreciating the consequences or intending any harm.

Given this background, Council is very interested in regulations on this issue and would like to share the following observations on the proposed regulation.

First, §2.3 recites as follows:

The place of origin of speech otherwise constituting cyberbullying is not material to whether it is considered cyberbullying under this policy, nor is the use of school district or charter school materials.

At a minimum, the word “communication” should be substituted for “speech”. The Delaware Bullying Prevention Association website [[www.bullyprevention.org/aboutdbpa.html](http://www.bullyprevention.org/aboutdbpa.html)] defines cyberbullying as including “denigration: spreading information or pictures to embarrass”. The term “speech” may not cover publication of a hostile or embarrassing photo and §2.1 uses the broader term, “communication”. For the same reason, the term “communication” should be substituted for the term “speech” in §2.2.

However, the premise that the place of origin is completely immaterial creates additional problems. If the origin is actually misuse of a classroom computer, that conduct may be more closely regulated. Council would ask that you consider the following alternatives:

Communication may qualify as cyberbullying irrespective of place of origin and irrespective of use of school district or charter school materials.

Or

Communication may qualify as cyberbullying regardless of both place of origin and lack of reliance on school district or charter school materials.

Second, the term “unpleasant” in §2.1 is “overbroad”. Communication may be “unflattering”, “not pleasant”, or “negative” without rising to the level of bullying. Moreover, the regulation should preferably conform to the statutory definition of bullying in Title 14 Del.C. §4112D(a). To the extent the regulatory definition conflicts with the statutory definition (which includes “electronic” actions); the regulation is subject to judicial invalidation. Moreover, the regulation omits the concept of “intention” which is contained in the statute. For these reasons, the Department could consider the following substitute:

Cyberbullying means the use of uninvited and unwelcome electronic communication directed at an identifiable student or group of students intended to cause embarrassment, humiliation, fear, or emotional harm.

The terms “embarrass”, “humiliating”, “fear”, and “emotional harm” are contained in the statute. The term “unpleasant” is not in the statute.

Third, Council has no expert opinion on privacy settings used in social networks. Clearly, broad dissemination of “bullying” communication should be covered in the regulation. See, e.g., the attached article, “Internet ‘Burn Books’ Sparking Controversy” (August 19, 2012) which describes anonymous postings with broad dissemination. However, if a student restricts access to his social media postings to non-students, parents, or relatives, the student should not be considered to be “bullying” since the student has no intention of critical communication being

disseminated to other students or faculty. Section 2.4 is overbroad by establishing a categorical rule that, regardless of privacy settings, use of prevalent social media is “considered to be automatically available to a broad audience within the school community”. If a student describes a faux pas or embarrassing behavior of a fellow student only to a parent via Facebook, the student has violated the regulation despite no intention of bullying or harming the other student. Conceptually, if a student describes some activity in the equivalent of a personal diary, it should not be grounds for punishment. Council recommends consideration of more discriminating standards than the conclusive presumption that the use of prevalent social media, regardless of privacy settings, is considered to be available to a “broad audience within the school community”.

Fourth, the regulation only covers student-student bullying. Consistent with the attached article, “When the Bully Is the Teacher” (September 12, 2011), research confirms that teacher bullying of students is “a common problem” with 93% of teachers and students surveyed reporting that teacher bullying is occurring in schools. The bullying statute [Title 14 Del.C. §4112D] is not limited to student-student bullying and the regulation could be improved by also addressing teacher-student bullying.

Thank you in advance for your consideration of our comments. Please feel free to contact me or Wendy Strauss should you have any questions.

Sincerely,

Terri A Hancharick  
Chairperson

TAH:kpc

CC: The Honorable Mark Murphy, Secretary of Education  
Dr. Teri Quinn Gray, State Board of Education  
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