

January 16, 2013

Susan Haberstroh, Regulation Review
Department of Education
35 Commerce Way, Suite 1
Dover, Delaware

RE: DOE Proposed Cyberbullying Regulation [16 DE Reg. 694 (January 1, 2013)]

Dear Ms. Haberstroh:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Department of Education proposed Cyberbullying regulation which will implement Senate Bill No. 193. The GACEC and State Council for Persons with Disabilities (SCPD) commented on the initial regulation which was proposed in October of 2012. A copy of the October 17, 2012 GACEC letter is attached for facilitated reference. Rather than adopt a final regulation, the DOE is now publishing a revised proposed regulation. Council would like to share the following observations and recommendations.

First, as background, Council would like to reiterate the following (italicized) commentary from our October 17, 2012 letter:

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.

Second, Council would like clarification on what is meant by "...which (1) interferes with a student's physical well-being..." in section 2.1. What is the definition of 'physical well-being'?

Third, the Councils submitted the following (italicized) comments on §2.3. The January version of the regulation contains an identical section so Council would like to reiterate our earlier comments.

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] 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 is problematic. If the origin is actually misuse of a classroom computer, it is intuitive that the conduct can be more closely regulated. 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.

Fourth, in October, the Councils objected to an “overbroad” definition of Cyberbullying in §2.1:

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.

The January version removes the term “unpleasant”. However, it still omits the concept of “intention” which is explicitly included in the statute:

(a) Definition of bullying. – As used in this section, “bullying” means any intentional written, electronic, verbal or physical act or actions against another student, school volunteer or school employee that a reasonable person under the circumstances should know will have the effect of:...

Title 14 Del.C. §4112D(a) [emphasis supplied] This could easily be corrected by inserting “intentional” prior to “use of uninvited...” in the first line of §2.1.

Fifth, in October, the Councils objected to adoption of a categorical rule that, regardless of privacy settings,

use of prevalent social media was deemed automatically available to a broad audience within the school community. The January version “softens” the categorical rule by converting it to a “presumption”. This is an improvement. However, it still contemplates presumptive “guilt” or “culpability” regardless of “privacy settings or other limitations on those postings”. It would be more logical to establish a presumption of dissemination to the school community only if at least one student in the school community has access to the social network posting. If the only individuals with access to the posting are parents and relatives, the validity of the presumption is highly questionable. Policies restricting free speech should be restrained and “tailored” in scope.

Sixth, in October, the Councils included the following (italicized) recommendation:

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 addressing teacher-student bullying.

The January version does not address teacher-student bullying.

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

Sincerely,

Dafne A. Carnright
Vice Chairperson

DAC:kpc

CC: The Honorable Matthew L. Denn, Lt. Governor
The Honorable Beau Biden, Attorney General
The Honorable Mark Murphy, Secretary of Education
Dr. Teri Quinn Gray, State Board of Education
Charles Michels, Professional Standards Board
Mary Ann Mieczkowski, DOE
John Hindman, Esq., DOE
Terry Hickey, Esq., DOE
Paula Fontello, Esq., DOE
Kathleen MacRae, American Civil Liberties Union (ACLU) of Delaware

Enclosures