

**Testimony on behalf of the
American Civil Liberties Union of the National Capital Area**

By

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Before the

Committee of the Whole

of the

Council of the District of Columbia

on

District of Columbia Public Schools Fiscal Year 2010 Budget

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The American Civil Liberties Union of the National Capital Area launched a Fair Discipline Project in September of 2008 aimed at ensuring consistent, equitable, and proportionate discipline in D.C. public schools. As part of this project, I represent D.C. public and public charter school students facing suspension or expulsion, or having other problems with discipline in school (such as involuntary transfers or unlawful, informal suspensions/"cooling off" periods). On Friday, March 27, 2009, District of Columbia Public Schools ("DCPS") issued two notices of proposed rulemaking that substantially impact how students are disciplined. The first, issued under the Mayor's emergency rulemaking authority and effective retroactively to March 5, 2009, reversed existing District policy on uniforms and dress codes.² The second proposed rulemaking replaces Chapter 25 of Title V of the D.C. Municipal Regulations (DCMR), the regulations on student discipline, with revised regulations now codified as Chapter B25.³ My testimony will focus on the implications of these new regulations and urge the Council to hold hearings on these proposed regulations before they are adopted as final rules.

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² D.C. Register, Vol. 56, No. 13 at 2443-2447 (March 27, 2009).

³ D.C. Register, Vol. 56, No. 13 at 2399-2435 (March 27, 2009).

Section B2408: Uniform and Dress Code Policy

On March 27, 2009, DCPS issued a Notice of Emergency and Proposed Rulemaking reversing DCPS policy on school uniforms by repealing Section 2401.18(d) of Title V of the DCMR and enacting Section B2408. The emergency rulemaking abolishes previous existing dress code and uniform provisions protecting certain student rights of expression and requires all schools to adopt a mandatory dress code or uniform policy. Until now, the law has allowed dress codes but also has prohibited mandatory uniform policies in D.C. public schools.⁴

The emergency rulemaking seeks to retroactively legitimize months of unlawful school uniform policies. The emergency rulemaking acknowledges (at § B2408.7) “those public schools that have already established mandatory uniform policies.” Such policies, of course, were prohibited under the law in effect until this emergency publication.⁵ No school had lawful authority to impose mandatory uniforms or punish students for not obeying. Despite this clear rule, however, the ACLU of the National Capital Area repeatedly heard reports that schools were doing both. Our inquiries began when we called the principal at Cardozo Senior High School to confirm the Washington Post report, on March 16, 2008, of drastic uniform policies in place there. The practice included required dress and segregation of students who did not comply. (DCPS attorneys later wrote us that compliance was voluntary and the school was simply carrying out parents’ wishes, but despite repeated FOIA requests we never saw a specific policy or information for parents spelling out details.) During the year we heard (and saw evidence of) mandatory uniforms at Ballou, Anacostia, and McKinley Tech. As late as a public roundtable in December 2008, a parent testified her son was suspended for uniform violations. Thus, even though no D.C. public school should have had a mandatory uniform policy before these emergency rules became effective, they did. Retroactively authorizing past violations smells strongly of *ex post facto* legislation. That DCPS officials for months tolerated schools unlawfully punishing students for violations of unlawful policies is a shame, and if any such cases come to our attention we will not hesitate to take action to set aside such unlawful discipline.

The American Civil Liberties Union of the National Capital Area strongly urges the Council to review and disapprove of this emergency regulation pursuant to its authority under D.C. Code § 38-172(c)(2). The rule is an abuse of the emergency powers of the executive because there is simply no emergency justifying the adoption of an emergency rule. If the Council decides not to disapprove of this emergency rule, it should at least review the substance of the rule, in particular directing DCPS to include a uniform approval process so that such drastic limits on expression are imposed at a school only after a formal ballot of parents and students that wins at least a 75% majority vote for uniforms. Further, the Council should ensure that the disciplinary responses for failing to comply with the uniform policy are not unduly harsh.

⁴ 5 D.C.M.R. § 2408.4 (“Parents and students shall be specifically informed of their rights and of the voluntary nature of their participation in the uniform policy. No student shall be penalized, in any way, for noncompliance with the local school uniform policy.”)

⁵ *Id.*

(1) There is No Emergency Necessitating an “Emergency” Rule.

The District of Columbia Public Education Reform Amendment Act of 2007 authorizes the Mayor and his designees to promulgate rules and regulations governing DCPS, following rules governing the Mayor’s general rulemaking authority.⁶ That rulemaking authority *requires* that the Mayor give notice and the opportunity for public comment at least thirty days prior to the adoption of any rule.⁷ Here, the Chancellor, as a designee of the Mayor operating under his rulemaking authority, failed to provide notice and an opportunity to comment before implementing this rule.

The Mayor and his designees can depart from the notice and public comment requirements only when there is an emergency, in which case a rule can be immediately effective.⁸ The Mayor or an independent agency must show that the rule is “necessary for the immediate preservation of the public peace, health, safety, welfare, or morals.”⁹ But DCPS assertions of an emergency beg the question: the Notice of Emergency and Proposed Rulemaking states only that, in addition to generally preserving welfare and safety, “the emergency is necessitated by the need ... to permit mandatory uniform policies...”¹⁰ The emergency justifying this restrictive rule is that the Chancellor wants uniforms. Her action is contemptuous of the law.

Mandatory school uniform policies, and the discipline resulting from failure to comply, raise significant issues of freedom of speech, freedom of religion, due process, and equal protection. In 1969, the Supreme Court emphatically affirmed that “[n]either students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹¹ One way in which people (including students) express themselves is through dress, and for that reason the ACLU believes the Constitution protects dress as a manner of expression and personal liberty.¹² While the courts have

⁶ D.C. Code § 38-172(c)(1).

⁷ *Id.* § 2-505.

⁸ *Id.* § 2-505(c).

⁹ *Id.*

¹⁰ D.C. Register, Vol. 56, No. 13 at 2443

¹¹ *Tinker vs. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969).

¹² See *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 440-41 (5th Cir. 2001) (finding that “[a] person's choice of clothing is infused with intentional expression on many levels. In some instances, clothing functions as pure speech. A student may choose to wear shirts or jackets with written messages supporting political candidates or important social issues. Words printed on clothing qualify as pure speech and are . . . protected under the First Amendment. Clothing may also symbolize ethnic heritage, religious beliefs, and political and social views. Individuals regularly use their clothing to express ideas and opinions....The choice to wear clothing as a symbol of an opinion or cause is undoubtedly protected under the First Amendment if the message is likely to be understood by those intended to view it . . . Finally, students in particular often choose their attire with the intent to signify the social group to which they belong, their participation in different activities, and their general attitudes toward society and the school environment. While the message students intend to communicate about their identity and interests may be of little value to some adults, it has a considerable [e]ffect, whether positive or negative, on a young person's social development.....” The court ultimately upheld the uniform policy at issue in *Canady* because the government met its burden of showing that the policy was necessary to a substantial government interest and because it was not aimed at the suppression of speech. *Id.* at 443-44.

granted schools great flexibility in creating and enforcing dress codes and uniform policies, rules restricting civil liberties and human rights should not be undertaken lightly, particularly when there is no emergency to justify their adoption without proper public notice and comment. Using the emergency rulemaking procedure for this purpose is an abuse of discretion, and the Council should disapprove of this rule.

(2) The Council Should Require Schools to Obtain Broad Parental Approval Before Implementing Mandatory Uniform Policies.

The emergency regulations appear to authorize two different ways in which schools can create mandatory uniform policies. First, Section B2408.6 gives principals broad power to implement and enforce mandatory school uniform policies for the 2009-2010 school year and successive school years regardless of parent and student input. Second, Section B2408.7 authorizes principals to retroactively legitimize previously unlawful mandatory school uniform policies that have been in place for the 2008-2009 school year if: (1) the principal “sought and received” parent and student input and a majority of parents support the policies; (2) there is a process to accommodate families requiring financial assistance; and (3) the principal established and published disciplinary measures to deal with non-compliance with uniform rules.¹³

Before new rules are approved on this topic, the Counsel should ensure that parent input and approval is always part of the process. The Council should require that a school gain the support of a super-majority of 75% of parents before implementing a mandatory uniform policy that strips students of expressive rights. For example, in the Prince George’s County Public Schools, any principal that wants to implement a mandatory uniform program must establish a uniform committee, disseminate ballots and a brief statement about school uniforms, and receive a 75% affirmative vote before implementing a school uniform policy.¹⁴

The Council should also require that the school actually canvass the parents and document the results in a form that can be available for public review afterwards before implementing a mandatory uniform policy. The Chancellor’s office and individual schools should not be allowed to merely assert that “at meetings” or “in conversations” they have heard “many parents support” uniform policies.

(3) Disciplinary Responses to Uniform Code Violations Must Be Fair.

The emergency rulemaking creates a system of disciplinary action to respond to students who violate mandatory uniform policies. For the first four offenses, students are subject to progressive disciplinary actions, culminating at the fourth infraction with

¹³ The rules may actually authorize a third method, as well, although the drafting is unclear. Section B2408.9 may authorize schools without a uniform policy to implement a uniform policy for the remainder of the 2008-2009 school year if they comply with the requirements in B2408.7. (That is, if: (1) the principal “sought and received” parent and student input and a majority of parents support the policies; (2) there is a process to accommodate families requiring financial assistance; and (3) the principal established and published disciplinary measures to deal with non-compliance with uniform rules).¹³

¹⁴ Prince George’s County Public Schools, Administrative Procedure 0600, § IV(B) (2006).

in-school suspension.¹⁵ After more than four offenses, Section B2408.17 allows schools to create a behavior contract that can include referring students to “a more appropriate setting” if more infractions occur. While Section B2408.14 prohibits schools from suspending students for failure to abide by the uniform policy, after five offenses the student may be involuntarily transferred from their school. This set of disciplinary responses is separate and distinct from other regulations on student discipline; in fact, the *only* time involuntary transfer can be used as a disciplinary response is when a student fails to abide by the uniform code.¹⁶

The Chancellor has consistently stated that out-of-school suspensions should be used sparingly, and we are pleased that no student will be suspended because of the way they dress. However, the disciplinary responses in Chapter B2408 are at best incomplete. The emergency rules require no notice, no conference, and no opportunity to appeal an in-school suspension or involuntary transfer.¹⁷ Because they are exempt from the general requirements of Chapter B25, it appears that students being suspended or transferred for failure to comply with the uniform policy will receive no due process. The rules also fail to state what “a more appropriate setting” might be for a student who does not comply with the uniform policy. If the Council allows the emergency rulemaking to become final, at the very least, the regulations should clearly outline the procedure by which students can be disciplined and transferred for uniform violations.

For the above reasons, we believe there is a compelling need for the Council to disapprove the DCPS emergency rules concerning uniforms. The Council reserved that power when it passed the District of Columbia Public Education Reform Amendment Act of 2007, and granted authority to the Mayor to issue rules and regulations concerning DCPS. We request that the Council exercise its authority and conduct an independent review of these “emergency” rules and ensure that the Mayor and Chancellor are not abusing their power to issue rules affecting the civil liberties of students in our public schools. When the Council announces a hearing on the topic, we will be pleased to offer further testimony and help in any way we can.

Chapter B25: Student Discipline

Chapter 25 of the Title V of D.C. Municipal Regulations is the basic student discipline code for DCPS. It defines offenses and procedures for disciplining students. The Proposed Rulemaking established sets of offenses, from more to less severe, called tiers, each with corresponding penalties. The Proposed Rulemaking replacing Chapter 25 is currently in its second iteration, and as the Council is aware, the ACLU-NCA

¹⁵ D.C. Register, Vol. 56, No. 13 at 2446-47.

¹⁶ The proposed rulemaking on Chapter B25 on student discipline, exempts uniform violations from the normal disciplinary procedure. Section B2500.13, D.C. Register, Vol. 56, No. 13 at 2403 (“Except for those corrective and disciplinary measures performed pursuant to § B2408 of this title, involuntary transfers pursuant to Chapter 21 shall not be used as a disciplinary response”).

¹⁷ For example, all other disciplinary actions are subject to the notice, conference, hearing, and appeal requirements contained in 5 D.C.M.R. 2500 et al.

submitted comments and actively advocated for changes between the first and second publication of the Proposed Rulemaking.

Many of the changes we suggested were incorporated, particularly in the section addressing the notice and hearing procedures for students facing out-of-school suspension or expulsion.¹⁸ However, DCPS failed to address concerns about what we view as inappropriate disciplinary responses to certain behaviors. The rules can, and should, go further to ensure that no student is subject to excessive or arbitrary disciplinary measures that punish rather than teach.

(1) The Regulations Should Mandate Intervention Before Discipline.

School discipline should be a teaching moment and the regulations should be aimed at addressing underlying causes of behavior problems rather than imposing draconian punishments. Section B2500.4 states: “whenever possible, prevention, intervention, and remediation strategies shall be used in addition to disciplinary responses.” This is a positive change from the original draft, which merely encouraged schools to use prevention, intervention, and remediation. However, the rules should clearly mandate that principals and teachers implementing the rule use progressive, instructive disciplinary measures. The intervention and remediation strategies should be included as part of the available responses for each tier of objectionable behavior. In the absence of such intervention and remediation, it becomes far more likely that a disciplined student will become a permanent dropout, not only to his or her detriment but to the detriment of society as a whole.¹⁹ The Council should both require that the regulations mandate behavior interventions and provide appropriate budget allocations to support those interventions.

(2) The Rules Should Prescribe Appropriate and Proportional Punishment.

If the Council holds a hearing on the Proposed Rulemaking, testimony from parents, students, and educators, as well as legal services and community organizations, will demonstrate that the regulations treat many disciplinary infractions too harshly.

The Proposed Rulemaking creates five tiers of grounds for disciplinary action, and lists corresponding responses. For any offense listed in Tiers IV and V, schools must suspend or expel students, creating “zero-tolerance” for those infractions. The excesses for youth of zero-tolerance policies have been extensively researched, and a Harvard research group found:

¹⁸ D.C. Register, Vol. 56, No. 13 at 2399 – 2435.

¹⁹ The consequences of high dropout rates are severe. The lost lifetime earnings in D.C. for dropouts from the class of 2007 alone total more than \$614 million. *Justice For All? An Examination of the Civil Legal Needs of the District of Columbia’s Low-Income Community*, District of Columbia Access to Justice Commission (October 2008), available at <http://www.dcaccesstojustice.org/files/CivilLegalNeedsReport.pdf>, p. 52.

A great deal of statistical and anecdotal evidence support the conclusion that children are being unfairly suspended and arbitrarily kicked out of school for incidents that could have been very easily handled using alternative methods. As a result, every day Zero Tolerance Policies force children to be suspended or expelled for sharing Midol, asthma medication (during an emergency), and cough drops, and for bringing toy guns, nail clippers, and scissors to school. Even the common schoolyard scuffle has become a target, regardless of severity and circumstances.²⁰

The study found that, in addition to creating illogical and harsh results, zero tolerance policies actually harm at-risk youth.²¹ Suspensions and expulsions conflict with students' ability to develop strong relationships with adults in their life, negatively influence youth's formation of attitudes towards fairness and justice, and send the message to students that they are not wanted.²² In addition to the harmful effects of zero-tolerance, there is little evidence that zero tolerance policies make schools safer.²³

The student discipline code has many examples of infractions for which zero-tolerance suspension or expulsion is not the appropriate remedy. The treatment of alcohol or drug possession as a Tier V offense is illustrative. Any student found with any drugs or alcohol on campus or at a school-sponsored event will be suspended for at least 11 days. Of course, the ACLU-NCA does not condone alcohol and drug use and abuse. However, the appropriate response to drug and alcohol use should not be an automatic two-week or longer suspension. While alcohol or drug use is a serious offense, the disciplinary responses for Tier V behavior are too harsh and lack any room for leniency. In some cases discipline may be appropriate, but in other cases it may be more appropriate to treat an underlying substance-abuse problem or a bedrock family problem.

Similarly, under the proposed rules, possession of a weapon or replica or imitation of a weapon is a Tier IV behavior punishable only by suspension. If, for example, an elementary school student brought a water pistol or a slingshot to school, the student would automatically be sentenced to an out-of-school suspension.

Policies that are this rigid do not serve the interests of students and are not necessary to protect the safety of schools. The Council can use its considerable authority and influence by urging DCPS to allocate money for prevention and intervention strategies and requiring flexible regulations permitting fair-minded educators to make a considered decision whether to use less-severe discipline or alternative strategies to work

²⁰ Advancement Project and Civil Rights Project at Harvard University, *Opportunity Suspended: The Devastating Consequences of Zero Tolerance and School Discipline* (Washington, DC: Advancement Project, 2000), available at http://www.civilrightsproject.ucla.edu/research/discipline/opport_suspended.php#fullreport, at v. Some have suggested expulsions and long suspensions may also violate international legal norms. See also *Dignity Denied: The Effect of Zero Tolerance Policies on Student's Human Rights* (ACLU, 2008), available at <http://www.aclu.org/intlhumanrights/gen/37768pub20081117.html>.

²¹ *Opportunity Suspended: The Devastating Consequences of Zero Tolerance and School Discipline* at 10 – 12.

²² *Id.*

²³ *Id.* at 17.

with misbehaving students where that seems more appropriate than suspending or expelling them. It appears that, despite comments from numerous groups to this effect after the first publication of Chapter B25, DCPS did not reorganize the tiers in any meaningful way. A hearing will help Council solicit community feedback to determine what other behaviors are dealt with inappropriately under the proposed tiers of disciplinary infractions.

(3) The Rules Should Engage Parents and Families.

Section B2500.5 states that “DCPS shall involve family members in efforts to determine the causes of misbehavior and in efforts to support appropriate school behavior.”²⁴ This must include advanced notice of the disciplinary regulations in an easy-to-understand format and training parents to understand the rights their children have when faced with suspension and expulsion. These documents should be considered vital documents and provided to any student, parent, or guardian with limited or non-English proficiency in his or her native language.²⁵ The Council can support the laudable goals of Section B2500.5 by allocating budget resources for the following:

- a. A district-wide student and parent handbook that contains a clear statement of the rights and responsibilities of students and parents when interacting with DCPS and individual schools.
- b. A list of organizations or advocates that can provide parents with free legal assistance for school discipline issues that each school maintains and provides to parents along with the written notice of disciplinary actions.

DCPS does sometimes distribute referral lists to parents with notification of disciplinary action; however, none of the information contained on the referral list is accurate. Of the five sources of legal help on the latest list we have seen, one organization no longer exists, three organizations do not take school discipline cases, and three organizations are listed at the wrong address or phone number. Not one organization included both takes school discipline cases and contains accurate contact information. Although DCPS officials have assured us that this list is no longer being sent to parents, we have had at least one client who received it after those assurances. DCPS has also delayed creating a new and accurate referral list, despite repeated offers of ACLU-NCA assistance. As far as we know, parents are receiving either inaccurate or no information about sources of legal assistance.

(4) The Rules Should Require Staff Training.

The regulations should include a requirement that all staff responsible for implementing Chapter B25 be trained on the regulations at least annually. This will help ensure consistent enforcement across the District.

²⁴ D.C. Register, Vol. 56, No. 13 at 2400.

²⁵ D.C. Language Access Act of 2004, D.C. Code § 2-1933 (2004).

(5) The Rules Should Require Data Collection.

The regulations should require that DCPS track and publish records of in-school suspensions, out-of-school suspensions, and expulsions at each school. Each record of a disciplinary action should contain a description of the behavior that warranted the action, what action was taken, what school the student attends, and demographic data such as race, ethnicity, sex, disability, and English Language Learner status. The regulations should state that this data will be reviewed and published on the DCPS website at least annually, in aggregate form.

The Proposed Regulations do not establish standards for collecting, analyzing, or reviewing data on disciplinary actions, and current tracking methods are insufficient. After several requests under the D.C. Freedom of Information Act, the ACLU has not been successful in getting sound data on DCPS suspensions and expulsions. Data provided in response to those requests contained incomplete information in an inconsistent format that makes analyzing that data impossible. Collecting and analyzing data on disciplinary actions is the only way DCPS can review whether schools are implementing Chapter 25 in a fair and consistent manner. Accurate data will show how the policies are working in practice to reduce suspensions and expulsions and improve school culture. Data will also allow for appropriate revisions for policies that need improving. Publication of that data is the only way the Council and the public will be able to oversee the system's operation.

For the above reasons, we believe there is a compelling reason for the Council to conduct a hearing to review and revise Chapter B25. Although DCPS has solicited and incorporated some public comments into the current Proposed Rulemaking on Chapter B25, the regulations do not fully meet the stated goal of creating a safe school environment conducive to learning. When the Council announces a hearing on the topic, we will be pleased to offer further testimony and help in any way we can.