



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES

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June 27, 2016

Ms. Tina Shockley, Education Associate
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

RE: 18 DE Reg. 1057 [Alternative Placement Meetings & Expedited Hearing Due Process Regulation (6/1/16)]

Dear Ms. Shockley:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposal to adopt a new regulation defining uniform due process standards for disciplinary matters and placement in alternative disciplinary settings. The regulation was originally published in the December 1, 2015 issue of the Register of Regulations but has been republished to incorporate some recommendations. SCPD commented on the original proposed version of the regulation in the attached December 21, 2015 memo. The latest proposed version of the regulation was published as 19 DE Reg. 1057 in the June 1, 2016 issue of the Register of Regulations. SCPD appreciates that some of its comments were addressed but still has the following observations on the revised proposed regulation.

- i. In §2.0, the definition of "Alternative Placement Team" contains the following recital: "Other individuals may be invited as determined by the APT." This is ambiguous. Does this mean that any single member of the team can invite a participant or does the entire team have to agree to invite a participant? The latter interpretation would be highly objectionable since it would mean that the DSCY&F could be barred from having more than 1 participant and that a parent could not invite a participant (e.g. school psychologist; Wellness Center therapist).
- ii. In §2.0, definition of "Alternative Placement Team", the student is not a member of the team. The student should be a member to provide input. Individuals are more likely to accept a decision if they have had a voice in the decision-making. By law, alternative school programs are required to reflect "research best-practice models". See FY16 budget epilog, H.S. 1 for H.B. 225, §32
- iii. In § 2.0, definition of "parent" includes "a student who has reached the age of majority. While this corrects some problems where an adult student might not receive information that only goes to a parent, it creates odd language anywhere there is a reference to both the student and the parent. Moreover, it creates an ambiguity where something is to be communicated only to the "parent."

The way the definition is written, notice to a “parent” of an adult student could arguably be accomplished by contacting the adult student’s parent and not the adult student. This is unacceptable. It can be corrected by fixing language throughout the regulation or, more simply, by changing the definition of parent to “‘Parent’ is defined as the student, if the student has reached the age of majority. If the student has not reached the age of majority, ‘parent’ is defined as [biological parent, adopted parent, etc.]”

- iv. In §2.0, definition of “Building Level Conference”, the contemplated meeting “is held by phone or in person”. The regulation is silent on who decides whether the meeting is held by phone or in person. The regulation should be amended to clarify that the choice should be that of the parent/student. There are two advantages to this approach: 1) an in-school meeting reinforces the importance of the conference; and 2) a phone call from a school representative could easily be misconstrued as an informal communication and not a “Building Level Conference” required by Goss v. Lopez. Since the definition of “principal” includes a “designee”, the parent could receive the call from a guidance counselor, educational diagnostician, or other support staff which could easily be misconstrued.
- v. In §2.0, the definition of “Expulsion” contains a plethora of substantive standards and ramifications of expulsion. Such substantive information does not belong in a definition. See Delaware Administrative Code Style Manual, §4.3.
- vi. In §2.0, the definition of “Grievance” envisions a complaint to a school administrator. However, there are no specific “due process” procedures for such grievances in the regulation. The regulation sets minimum procedures as “similar to the grievance guidelines posted as posted on the Department of Education website.” At present, there are no guidelines posted that can be easily located. As such, it is unclear whether this provides any significant due process protections.
- vii. In §2.0, definition of “Student Review”, the sole focus is on student progress with no mention of whether the student’s required “Individual Service Plan (ISP)” has been implemented. See 14 DE Admin Code 611.6.1. In fairness, the “Review” should include an assessment of the extent to which the services and supports included in the ISP were provided.
- viii. In §2.0, definitions of “Suspension (Long-term Suspension)” and “Suspension, Short-term (Short-term Suspension), the DOE establishes different due process standards for suspensions up to 11 consecutive school days versus 11 or more school days. While such benchmarks may be appropriate general standards, they completely ignore the alternate significant deprivation/change of placement standard - a pattern of short-term removals of less than 11 days. Consider the following:
 - A. The IDEA regulation (34 C.F.R. 300.536) codifies caselaw and long-standing federal policy as follows:
 - ...(A) change in placement occurs if -
 - (1) The removal is for more than 10 consecutive school days; or
 - (2) The child has been subjected to a series of removals that constitute a pattern -

- (I) Because the series of removals total more than 10 school days in a school year;
- (ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
- (iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

B. The federal Department of Education Office for Civil Rights has adopted a similar approach for decades. See attached OCR Senior Staff Memo, IDELR, SA-52 ((October 28, 1988). For a consistent view, see Region VI LOF to Ponca City (OK) School District, 20 IDELR 816 (July 19, 1993); and Region IV OCR LOF to Cobb County (GA) School District, 20 IDELR 1171 [district cited for maintaining a disciplinary policy which did not address series of short suspensions amounting to a change in placement].

Apart from the "pattern" approach, the Delaware regulation could reinstate the approach adopted by the Department, and promoted by the Attorney General's Office, that characterized a "suspension for more than 10 days, either consecutively or cumulatively, in any school year ...a change in placement". See attached excerpt from AMPEC. Thus, if a student has had a 5 day suspension and a district proposes to impose a second 6-day suspension, it would trigger due process consistent with a single 11-day suspension. This approach has the advantage of simplicity in administration and facilitates earlier reviews and interventions.

- ix. In §2.0, the definitions of "Suspension (Long-term Suspension)" and "Suspension, Short-term (Short-term Suspension)" refer to "being removed from the Regular School Program". The definition of "Regular School Program" is limited to "participation in daily course of instruction and activities within the assigned classroom or course". The regulation ignores suspensions from bus transportation which should be treated the same as an exclusion from school. See Region IV OCR LOF to Tennessee State Dept. Of Education, IDELR 305:51 (April 24, 1989); OCR Policy Letter to C. Veir, 20 IDELR 864, 867 (December 1, 1993).
- x. Under §3.1.1.3, a principal's preliminary investigation of offending student conduct makes requires the principal to make "reasonable efforts" to "*include* the allegedly offending student" (emphasis added). Lack of interviewing a student to obtain the student's version of events may manifestly undermine the validity and reliability of the investigation results. It may also lead to unjustified police referrals under §3.2.1. Thus, the language should be stronger. First, "include" should be changed to "interview." To further strengthen the language, the regulation could read "the principal shall interview the allegedly offending student or state with specificity the reasons the student could not be interviewed." This places an obligation on the principal but leaves an "out" in cases where it would not be practicable to interview the student.
- xi. §§4.1 and 4.1.1 should be amended consistent with "ix." above. The definition of "Regular School Program" is limited to "participation in daily course of instruction and activities within the assigned classroom or course". The regulation ignores suspensions from bus transportation which should be treated the same as an exclusion from school. See Region IV OCR LOF to Tennessee State Dept. Of Education, IDELR 305:51 (April 24, 1989); OCR Policy Letter to C. Veir, 20

IDELR 864, 867 (December 1, 1993).

- xii. §4.1.1.3 could be improved as follows:

The student shall be given an explanation of the evidence supporting the allegation(s), including statements of each witness, and an opportunity to present his/her side of the story including any evidence.
- xiii. In §4.2.1, SCPD recommends deletion of the term “welfare” since it is obtuse and immediate removal should be justified based on a threat to health or safety. Cf. Title 14 Del.C. §4112F(b)(2).
- xiv. §5.1.2 allows a Superintendent to extend a short-term (up to 10 days) suspension with no time limit. For example, if the student is being referred for action to the Board of Education, and the Board will not meet for a month, a 10-day suspension becomes a 40-day suspension. On the 11th day, the student is offered “Appropriate Educational Services” which can be in another setting (e.g. homebound) with no additional due process. Switching a child to homebound, or a different setting with new instructors, will predictably prevent a child from maintaining academic progress. Providing educational services on the 11th day should also be reconsidered. The analogous N.J. regulation, §6A:16-7.2(a)(5)1 (attached), reinstates academic instruction within 5 days of suspension. This is a more progressive approach which allows a student to “keep up” with coursework.
- xv. In §5.4 the notice should include the protocol for appeal, including the timetable and method to appeal pursuant to §5.4.1. As it currently reads, the regulation only requires the provision of “information regarding the districts/charters appeal or grievance process.” Information about the grievance process and the appeals process should be included. Additionally, there should be more specificity as to the information provided. For example, the time allowed to file an appeal should be included.
- xvi. In §5.5, the decision whether to convene a conference in-person or by phone should be at the option of the student/parent. See discussion in “iv.” above. Moreover, the following sentence is obtuse: “The Principal may waive the conference requirement.” This could be interpreted in 2 ways: 1) the principal can waive the conference upon parental request; or 2) the principal may unilaterally decide to not convene a conference even if a student or parent wants one. The former approach would be preferable.
- xvii. §§7.2.1.3 and 7.2.1.4 should include a requirement that the notices include a description of due process and appeal rights.
- xviii. §7.2.1.5.1 could be improved by explicitly authorizing the Committee to include parent/student participation.
- xix. §7.2.1.7 authorizes the Principal to convene a “Building Level Conference” to inform the parent/student of a referral to an Alternative Placement. The section explicitly applies to special education students. The Principal should not be making a unilateral referral to change a special

education student's placement. That is the province of the IEP team.

- xx. §7.2.1.7.2 allows a conference to be held by phone or in person. Consistent with "iv." above, this section should be amended to clarify that the choice should be that of the parent/student.
- xxi. §7.2.1.8 contemplates advance written notice but does not identify the time period (e.g. 3 business days).
- xxii. §7.4.1.4 solely focuses on the student's responsibilities to the exclusion of the program's responsibilities, i.e., to fulfill services and supports identified in the required Individual Service Plan (ISP). See 14 DE Admin Code 611.6.1. This is not balanced. Although the regulation refers to the ISP, it does not refer to the program's obligations under the ISP.
- xxiii. §8.1.1 contemplates a "Student Review" which omits an assessment of the extent to which the program provided the services and supports required by the Individual Service Plan. The "Review" is incomplete without the inclusion of such information. See discussion under "vii." above. The reference to "the student's strengths and weaknesses in connection with their individualized goals and expectations" is not sufficient because it does not reference the extent to which the program provided the required services and supports.
- xxiv. §10.2.3.1 allows a conference to be held by phone or in person. Consistent with "iv." above, this section should be amended to clarify that the choice should be that of the parent/student.
- xxv. §10.2.3 recites that the Principal will inform the parent/student that "the student will be serving a Short-term Suspension pending the outcome of the Expulsion hearing". This is not accurate. In many cases, this process will exceed the duration of a "short-term" suspension. Moreover, this section should be amended to explicitly advise the parent/student that "Appropriate Educational Services" will be provided during the pendency of proceedings. See discussion in "xiv." above. See also attached Appeal of Student W.D. from Decision of the W. Board of Education, Decision & Order (Delaware State Bd. Of Education March 21, 1991), at 15-16 [districts cannot simply place students on indefinite suspension pending an expulsion hearing without alternative educational services].
- xxvi. In §10.3.4, the term "If requested" should be deleted. There is very little time to prepare for the hearing and processing a "request" may take days. The notice should automatically include the information. Compare Title 14 Del.C. §3138(a)(4) reflecting better practice.
- xxvii. §10.3.11.1 appears to limit representation to an attorney. Historically, non-attorneys were permitted to represent students in expulsion hearings. See, e.g., p. 14 of attached excerpt from Guidelines on Student Responsibilities & Rights prepared by Attorney General's Office and adopted by State Board of Education, Appeal of Student W.D. from Decision of the W. Board of Education, Decision & Order (Delaware State Bd. Of Education March 21, 1991), at 16 [authorizing representation by "an adult advisor"]. The Department may wish to clarify whether representation in expulsion hearing is limited to attorneys.

- xxviii. §10.3.11.4 recites that the student can obtain a transcript of the expulsion hearing “at the student’s expense”. In most cases, the student would request the transcript in connection with an appeal to the State Board of Education. Unless changed in recent years, State Board Rules have historically required the district to submit the transcript at the district’s expense. See 9 DE Reg. 1997, 2009, 2011 (June 1, 2006), Rules 3.4.1 and 4.6 [“The transcript shall be prepared at expense of the agency below.”] At a minimum, this should be disclosed to the student and parent rather than simply advising them that they can obtain a transcript at their expense.
- xxix. §10.3.12 authorizes a waiver of the expulsion hearing accompanied by an admission of the charges which “does not absolve the student from required consequence”. It would be preferable to include another option, i.e., admission of the conduct but contested hearing on the penalty. There are conceptually 2 prongs to the expulsion decision-making: 1) do facts support violation of Code of Conduct; and 2) is penalty commensurate with offense. For example, the student could argue that an expulsion is too harsh or expulsion for 90 days is more appropriate than expulsion for 180 days. See, e.g., attached excerpt from Guidelines on Student Responsibilities & Rights, p. 11 and Appendix, Par. 30, holding that “discipline shall be fair ... and appropriate to the infraction or offense” and authorizing “a detailed hearing on the penalty”.
- xxx. In the entire 9-page regulation, the only section addressing additional protections for students with disabilities is §11.0 which consists of 4 highly ambiguous and unenlightening sentences:

11.0 Students with Disabilities

11.1 Nothing in this regulation shall alter a district/charter school’s duties under the Individual (sic “Individuals”) with Disabilities Act (IDEA) or 14 DE Admin Code 922 through 929. Nothing in this regulation shall prevent a district/charter school from providing supportive instruction to children with disabilities in a manner consistent with the Individuals with Disabilities Education Act (IDEA) and Delaware Department of Education regulations.

11.2 Nothing in this regulation shall alter a district/charter school’s duties under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act to students who are qualified individuals with disabilities. Nothing in this regulation shall prevent a district/charter School (sic “school”) from providing supportive instruction to such students.

This is a grudging and anemic approach to protecting the rights of students with disabilities. Instead of adopting a leadership role in providing districts and charter schools with useful guidance, the negative parenthetical approach adopted in §11.0 offers negligible direction. According to the Parent Information Center, nearly 23% of Delaware students suspended or expelled are students with disabilities and, of those students, 68% are students of color. See attached July 27, 2014 News Journal article. Disproportionate discipline of students with disabilities and other protected classes merits affirmative action by the Department to promote district and charter school conformity with federal and State civil rights protections.

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

Sincerely,

Jamie Wolfe/p

Jamie Wolfe, Chairperson
State Council for Persons with Disabilities

cc: The Honorable Matthew Denn
The Honorable Jea Street, New Castle County Council
Members of Senate Education Committee
Members of House Education Committee
Ms. Kathleen MacRae, ACLU
Mr. Keith Morton, Parent Information Center
The Honorable Steven Godowsky, 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
Mr. Brian Hartman, Esq.
Developmental Disabilities Council
Governor's Advisory Council for Exceptional Citizens

18reg1057 doe – alternative placement meetings & expedited hearing due process



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December 21, 2015

Ms. Tina Shockley, Education Associate
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

RE: 19 DE Reg. 458 [DOE Proposed Alternative Placement Meetings & Expedited Hearing Due Process Regulation]

Dear Ms. Shockley:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposal to create a new regulation defining uniform due process standards for disciplinary matters and placement in alternative disciplinary settings. The proposed regulation was published as 19 DE Reg. 458 in the December 1, 2015 issue of the Register of Regulations. SCPD has the following observations.

First, in §2.0, definition of "Alternative Placement Team", the Department should consider substituting "parent" for "student's custodial adult". Section 1.0 has a broad definition of "parent" and the term "parent" is used extensively within the balance of the regulation.

Second, in §2.0, the definition of "Alternative Placement Team" contains the following recital: "Other individuals may be invited as determined by the APT." This is ambiguous. Does this mean that any single member of the team can invite a participant or does the entire team have to agree to invite a participant? The latter interpretation would be highly objectionable since it would mean that the DSCY&F could be barred from having more than one participant and that a parent could not invite a participant (e.g. school psychologist; Wellness Center therapist).

Third, in §2.0, definition of "Alternative Placement Team", the student is not a member of the team. The student should be a member to provide input. Individuals are more likely to accept a decision if they have had a voice in the decision-making. By law, alternative school programs are required to reflect "research best-practice models". See FY16 budget epilog, H.S. 1 for H.B. 225, §329.

Fourth, throughout the regulation, there is no differentiation between students who are adults versus minors. For example, in §2.0, definition of “Alternative Placement Team”, an adult student will not have a “custodial adult”. Contrast 14 DE Admin Code 611.4.0.

Fifth, in §2.0, definition of “Building Level Conference”, the contemplated meeting “is held by phone or in person”. The regulation is silent on who decides whether the meeting is held by phone or in person. The regulation should be amended to clarify that the choice should be that of the parent/student. There are two advantages to this approach: 1) an in-school meeting reinforces the importance of the conference; and 2) a phone call from a school representative could easily be misconstrued as an informal communication and not a “Building Level Conference” required by Goss v. Lopez. Since the definition of “principal” includes a “designee”, the parent could receive the call from a guidance counselor, educational diagnostician, or other support staff which could easily be misconstrued.

Sixth, in §2.0, definition of “Building Level Conference”, there is a plural pronoun (“their”) with a singular antecedent (student). This is easily corrected by substituting “the student’s” for “their”.

Seventh, in §2.0, the definition of “Expulsion” contains a plethora of substantive standards and ramifications of expulsion. Such substantive information does not belong in a definition. See Delaware Administrative Code Style Manual, §4.3. If retained, the erroneous recital that “the expelled student is not eligible to enroll in any Delaware public school” should be deleted. See Title 14 Del.C. §4130(d) and 14 DE Admin Code 611.4.0. The erroneous recital that the student is “not allowed on School Property” should be deleted since alternative programs include those on school grounds. See 14 DE Admin Code 611.8.1. The last sentence of this definition is also problematic: “The formalized due process hearing may be waived by the student.” If the student is a minor, any such waiver would be invalid.

Eighth, §2.0, the definition of “Grievance” envisions a complaint to a school administrator. However, there are no specific “due process” procedures for such grievances in the regulation. The only brief references to “grievances” appear at §§5.4.1 and 6.0. This is indicative of a patent bias in the overall regulation of minimizing student protections. It is anomalous to have dozens of highly prescriptive standards authorizing schools to discipline students and no comparable standards regulating how schools process grievances.

Ninth, in §2.0, definition of “Student Review”, the sole focus is on student progress with no mention of whether the student’s required “Individual Service Plan (ISP)” has been implemented. See 14 DE Admin Code 611.6.1. In fairness, the “Review” should include an assessment of the extent to which the services and supports included in the ISP were provided.

Tenth, in §2.0, the definition of “Student Review” excludes both parent and student participation in the progress assessment. This is highly objectionable and will contribute to invalid and unreliable assessment results.

Eleventh, in §2.0, definitions of “Suspension (Long-term Suspension)” and “Suspension, Short-term (Short-term Suspension), the DOE establishes different due process standards for suspensions up to 11 consecutive school days versus 11 or more school days. While such benchmarks may be appropriate general standards, they completely ignore the alternate significant deprivation/change of placement standard - a pattern of short-term removals of less than 11 days. Consider the following:

A. The IDEA regulation (34 C.F.R. 300.536) codifies case law and long-standing federal policy as follows:

...(A) change in placement occurs if -

- (1) The removal is for more than 10 consecutive school days; or
- (2) The child has been subjected to a series of removals that constitute a pattern -
 - (i) Because the series of removals total more than 10 school days in a school year;
 - (ii) Because the child’s behavior is substantially similar to the child’s behavior in previous incidents that resulted in the series of removals; and
 - (iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

B. The federal Department of Education Office for Civil Rights has adopted a similar approach for decades. See attached OCR Senior Staff Memo, IDELR, SA-52 ((October 28, 1988). For a consistent view, see Region VI LOF to Ponca City (OK) School District, 20 IDELR 816 (July 19, 1993); and Region IV OCR LOF to Cobb County (GA) School District, 20 IDELR 1171 [district cited for maintaining a disciplinary policy which did not address series of short suspensions amounting to a change in placement].

Apart from the “pattern” approach, the Delaware regulation could reinstate the approach adopted by the Department, and promoted by the Attorney General’s Office, that characterized a “suspension for more than 10 days, either consecutively or cumulatively, in any school year ...a change in placement”. See attached excerpt from AMPEC. Thus, if a student has had a 5 day suspension and a district proposes to impose a second 6-day suspension, it would trigger due process consistent with a single 11-day suspension. This approach has the advantage of simplicity in administration and facilitates earlier reviews and interventions.

Twelfth, in §2.0, the definitions of “Suspension (Long-term Suspension)” and “Suspension, Short-term (Short-term Suspension) refer to “being removed from the Regular School Program”. The definition of “Regular School Program” is limited to “participation in daily course of instruction and activities within the assigned classroom or course”. The regulation ignores suspensions from bus transportation which should be treated the same as an exclusion from school. See Region IV OCR LOF to Tennessee State Dept. Of Education, IDELR 305:51 (April 24, 1989); OCR Policy

Letter to C. Veir, 20 IDELR 864, 867 (December 1, 1993).

Thirteenth, under §3.1.1.3, a principal's preliminary investigation of offending student conduct makes interviewing the student discretionary. Lack of interviewing a student to obtain the student's version of events will manifestly undermine the validity and reliability of the investigation results. It may also lead to unjustified police referrals under §3.2.1.

Fourteenth, §§4.1 and 4.1.1 should be amended consistent with Par. "Twelfth" above. The definition of "Regular School Program" is limited to "participation in daily course of instruction and activities within the assigned classroom or course". The regulation ignores suspensions from bus transportation which should be treated the same as an exclusion from school. See Region IV OCR LOF to Tennessee State Dept. Of Education, IDELR 305:51 (April 24, 1989); OCR Policy Letter to C. Veir, 20 IDELR 864, 867 (December 1, 1993).

Fifteenth, §4.1.1.3 could be improved as follows:

The student shall be given an explanation of the evidence supporting the allegation(s), including statements of each witness, and an opportunity to present his/her side of the story including any evidence.

Sixteenth, in §4.2.1, SCPD recommends deletion of the term "welfare" since it is obtuse and immediate removal should be justified based on a threat to health or safety. Cf. Title 14 Del.C. §4112F(b)(2).

Seventeenth, §5.1.2 allows a Superintendent to extend a short-term (up to 10 days) suspension with no time limit. For example, if the student is being referred for action to the Board of Education, and the Board will not meet for a month, a 10-day suspension becomes a 40-day suspension. On the 11th day, the student is offered "Appropriate Educational Services" which can be in another setting (e.g. homebound) with no additional due process. Switching a child to homebound, or a different setting with new instructors, will predictably prevent a child from maintaining academic progress. Providing educational services on the 11th day should also be reconsidered. The analogous N.J. regulation, §6A:16-7.2(a)(5)1 (attached), reinstates academic instruction within 5 days of suspension. This is a more progressive approach which allows a student to "keep up" with coursework.

Eighteenth, in §5.4 the notice should include the protocol for appeal, including the timetable and method to appeal pursuant to §5.4.1.

Nineteenth, in §5.5, the decision whether to convene a conference in-person or by phone should be at the option of the student/parent. See discussion in "Fifth" above. Moreover, the following sentence is obtuse: "The Principal may waive the conference requirement." This could be interpreted in 2 ways: 1) the principal can waive the conference upon parental request; or 2) the principal may unilaterally decide to not convene a conference even if a student or parent wants one. The former approach would be preferable.

Twentieth, §§7.2.1.3 and 7.2.1.4 are inconsistent in the provision of notice. The former section contemplates notice to the student and parent. The latter section contemplates notice to the parent alone. The sections should be consistent. Moreover, as discussed in “Fourth” above, the regulation does not differentiate between students who are minors versus students who are adults.

Twenty-first, §§7.2.1.3 and 7.2.1.4 should include a requirement that the notices include a description of due process and appeal rights.

Twenty-second, §7.2.1.5.1 could be improved by explicitly authorizing the Committee to include parent/student participation.

Twenty-third, §7.2.1.7 authorizes the Principal to convene a “Building Level Conference” to inform the parent/student of a referral to an Alternative Placement. The section explicitly applies to special education students. The Principal should not be making a unilateral referral to change a special education student’s placement. That is the province of the IEP team.

Twenty-fourth, §7.2.1.7.2 allows a conference to be held by phone or in person. Consistent with “Fifth” above, this section should be amended to clarify that the choice should be that of the parent/student.

Twenty-fifth, §7.2.1.8 contemplates advance written notice but does not identify the time period (e.g. 3 business days). This should be clarified.

Twenty-sixth, §7.3.1.2.1, contemplates notice only to the “parent” even if a student is an adult. Contrast §§7.3.1.1. and 7.3.1.2 (student and parent receive notices). See also 14 DE Admin Code 611.4.0.

Twenty-seventh, §7.4.1.4 solely focuses on the student’s responsibilities to the exclusion of the program’s responsibilities, i.e., to fulfill services and supports identified in the required Individual Service Plan (ISP). See 14 DE Admin Code 611.6.1. This is not balanced. A reference to ISP services should be included.

Twenty-eighth, §8.1.1 contemplates a “Student Review” which omits an assessment of the extent to which the program provided the services and supports required by the Individual Service Plan. The “Review” is incomplete without the inclusion of such information. See discussion under “Ninth” above.

Twenty-ninth, §10.2.3.1 allows a conference to be held by phone or in person. Consistent with “Fifth” above, this section should be amended to clarify that the choice should be that of the parent/student.

Thirtieth, §10.2.3 recites that the Principal will inform the parent/student that “the student will be serving a Short-term Suspension pending the outcome of the Expulsion hearing”. This is not accurate. In many cases, this process will exceed the duration of a “short-term” suspension.

Moreover, this section should be amended to explicitly advise the parent/student that “Appropriate Educational Services” will be provided during the pendency of proceedings. See discussion in “Seventeenth” above. See also attached Appeal of Student W.D. from Decision of the W. Board of Education, Decision & Order (Delaware State Bd. Of Education March 21, 1991), at 15-16 [districts cannot simply place students on indefinite suspension pending an expulsion hearing without alternative educational services].

Thirty-first, §10.3.2 contemplates notice only to the “parent” even if a student is an adult.

Thirty-second, in §10.3.4, the term “If requested” should be deleted. There is very little time to prepare for the hearing and processing a “request” may take days. The notice should automatically include the information. Compare Title 14 Del.C. §3138(a)(4) reflecting better practice.

Thirty-third, §10.3.11.1 appears to limit representation to an attorney. Historically, non-attorneys were permitted to represent students in expulsion hearings. See, e.g., p. 14 of attached excerpt from Guidelines on Student Responsibilities & Rights prepared by Attorney General’s Office and adopted by State Board of Education, Appeal of Student W.D. from Decision of the W. Board of Education, Decision & Order (Delaware State Bd. Of Education March 21, 1991), at 16 [authorizing representation by “an adult advisor”]. The Department may wish to clarify whether representation in expulsion hearing is limited to attorneys.

Thirty-fourth, §10.3.11.4 recites that the student can obtain a transcript of the expulsion hearing “at the student’s expense”. In most cases, the student would request the transcript in connection with an appeal to the State Board of Education. Unless changed in recent years, State Board Rules have historically required the district to submit the transcript at the district’s expense. See 9 DE Reg. 1997, 2009, 2011 (June 1, 2006), Rules 3.4.1 and 4.6 [“The transcript shall be prepared at expense of the agency below.”] At a minimum, this should be disclosed to the student and parent rather than simply advising them that they can obtain a transcript at their expense.

Thirty-fifth, §10.3.12 authorizes a waiver of the expulsion hearing accompanied by an admission of the charges which “does not absolve the student from required consequence”. It would be preferable to include another option, i.e., admission of the conduct but contested hearing on the penalty. There are conceptually 2 prongs to the expulsion decision-making: 1) do facts support violation of Code of Conduct; and 2) is penalty commensurate with offense. For example, the student could argue that an expulsion is too harsh or expulsion for 90 days is more appropriate than expulsion for 180 days. See, e.g., attached excerpt from Guidelines on Student Responsibilities & Rights, p. 11 and Appendix, Par. 30, holding that “discipline shall be fair ... and appropriate to the infraction or offense” and authorizing “a detailed hearing on the penalty”.

Thirty-sixth, §10.4.5 requires the Board to send the expulsion decision to the parent and student but recites that only the student can appeal. This is odd and underscores the common problem with not differentiating between minor and adult students.

Thirty-seventh, §10.4.3 should be embellished to explicitly include the statutory presumption that students sixteen and under are to be offered an alternative education program. See attached H.B. 326 enacted in 2008, codified at 14 Del.C. §1604(8):

A student sixteen years of age or less who is expelled or suspended pending expulsion by a local district or charter school shall be presumed appropriate for placement in a Consortium Discipline Alternative Program site, provided the student is not otherwise ineligible by statute or regulation for placement in such a program. The burden of establishing that a student is not appropriate for placement in a Consortium District Alternative Program shall be on the local school district or charter school. Any student not shown by preponderance of evidence to be inappropriate for placement in a Consortium District Alternative Program shall be placed in such a program.

This is an extremely important student right which districts and charter could easily overlook. Despite the enactment of the above statutory mandate in 2008, the Department of Education has never amended its regulation to include this student protection. See 14 DE Admin Code 611.

Thirty-eighth, in the entire regulation, the only section addressing additional protections for students with disabilities is §11.0 which consists of 4 highly ambiguous and unenlightening sentences:

11.0 Students with Disabilities

11.1 Nothing in this regulation shall alter a district/charter school's duties under the Individual (sic "Individuals") with Disabilities Act (IDEA) or 14 DE Admin Code 922 through 929. Nothing in this regulation shall prevent a district/charter school from providing supportive instruction to children with disabilities in a manner consistent with the Individuals with Disabilities Education Act (IDEA) and Delaware Department of Education regulations.

11.2 Nothing in this regulation shall alter a district/charter school's duties under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act to students who are qualified individuals with disabilities. Nothing in this regulation shall prevent a district/charter School (sic "school") from providing supportive instruction to such students.

This is a grudging and anemic approach to protecting the rights of students with disabilities. Instead of adopting a leadership role in providing districts and charter schools with useful guidance, the negative parenthetical approach adopted in §11.0 offers negligible direction. According to the Parent Information Center, nearly 23% of Delaware students suspended or expelled are students with disabilities and, of those students, 68% are students of color. See attached July 27, 2014 News Journal article. Disproportionate discipline of students with disabilities and other protected classes merits affirmative action by the Department to promote district and charter school conformity with federal and State civil rights protections.

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

Sincerely,



Daniese McMullin-Powell, Chairperson
State Council for Persons with Disabilities

cc: The Honorable Matthew Denn
The Honorable Jea Street, New Castle County Council
Members of Senate Education Committee
Members of House Education Committee
Ms. Kathleen MacRae, ACLU
Mr. Keith Morton, Parent Information Center
The Honorable Steven Godowsky, 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. Kathleen Geiszler, Esq., Department of Justice
Ms. Terry Hickey, Esq., Department of Justice
Ms. Ilona Kirshon, Esq., Department of Justice
Mr. Brian Hartman, Esq.
Developmental Disabilities Council
Governor's Advisory Council for Exceptional Citizens

19reg458 doe-alternative placement meetings & expedited hearing due process 12-21-15

EHLR SPECIAL REPORT: U.S. Department of Education Policy Memo
on Long-term Disciplinary Suspensions of Handicapped Students

Editorial Note: This memorandum clarifies the position of the Office for Civil Rights (OCR) on serial suspensions of less than ten days each, and implies that several short suspensions totalling more than ten days may not always be a change in placement triggering reevaluation. OCR points out that the memo applies only to requirements under Section 504 of the Rehabilitation Act, and that requirements under EHA may differ.

UNITED STATES DEPARTMENT OF EDUCATION
Washington, D.C. 20202

MEMORANDUM

TO: OCR Senior Staff
FROM: LeGree S. Daniels, Assistant Secretary for Civil Rights
SUBJECT: Long-term Suspension or Expulsion of Handicapped Students
DATE: October 28, 1988

This memorandum provides guidance on the application of the Section 504 regulation at 34 C.F.R. Part 104 to the disciplinary suspension and expulsion of handicapped children from school,¹ an issue not addressed directly by the regulation. This guidance supersedes previous memoranda on this issue.

Legal Authority

The Section 504 regulation requires that a school district evaluate a handicapped child before making a significant change in his or her placement. Specifically, the regulation pertaining to evaluation and placement states:

A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of . . . this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.

34 C.F.R. Sec. 104.35(a).

The Supreme Court's recent decision in *Honig v. Doe*, 108 S. Ct. 592 (1988), interpreted the Education of the Handicapped Act (EHA), rather than Section 504. Nevertheless, it lends support to OCR's regulatory provision that a recipient may not make a significant change in a handicapped child's placement without reevaluating the child and affording the due process procedures required by the Section 504 regulation at 34 C.F.R. Sec. 104.36. The decision also supports OCR's longstanding policy of applying the regulatory provision regarding "significant change in placement" to school disciplinary suspensions and expulsions of handicapped children.

OCR Policy

1. If a proposed exclusion of a handicapped child is permanent (expulsion) or for an indefinite period, or for more than 10 consecutive school days, the exclusion constitutes a "significant change in placement" under Sec. 104.35(a) of the Section 504 regulation.

¹ This memorandum addresses only the requirements under the Section 504 regulation. Requirements of the Education of the Handicapped Act may be different in some respects.

EHLR SPECIAL REPORT: U.S. Department of Education Policy Memo
on Long-term Disciplinary Suspensions of Handicapped Students (continued)

2. If a series of suspensions that are each of 10 days or fewer in duration creates a pattern of exclusions that constitutes a "significant change in placement," the requirements of 34 C.F.R. Sec. 104.35(a) also would apply. The determination of whether a series of suspensions creates a pattern of exclusions that constitutes a significant change in placement must be made on a case-by-case basis. In no case, however, may serial short exclusions be used as a means to avoid the Supreme Court's prohibition of suspensions of 10 days or longer. An example of a pattern of short exclusions that would clearly amount to a significant change in placement would be where a child is suspended several times during a school year for eight or nine days at a time. On the other hand, OCR will not consider a series of suspensions that, in the aggregate, are for 10 days or fewer to be a significant change in placement. Among the factors that should be considered in determining whether a series of suspensions has resulted in a "significant change in placement" are the length of each suspension, the proximity of the suspensions to one another, and the total amount of time the child is excluded from school.
3. In order to implement an exclusion that constitutes a "significant change in placement," a recipient must first conduct a reevaluation of the child, in accordance with 34 C.F.R. Sec. 104.35.
4. As a first step in this reevaluation, the recipient must determine, using appropriate evaluation procedures that conform with the Section 504 regulation, whether the misconduct is caused by the child's handicapping condition.
5. If it is determined that the handicapped child's misconduct is caused by the child's handicapping condition, the evaluation team must continue the evaluation, following the requirements of Sec. 104.35 for evaluation and placement, to determine whether the child's current educational placement is appropriate.
6. If it is determined that the misconduct is not caused by the child's handicap, the child may be excluded from school in the same manner as similarly situated nonhandicapped children are excluded. In such a situation, all educational services to the child may cease.²
7. When the placement of a handicapped child is changed for disciplinary reasons, the child and his or her parent or guardian are entitled to the procedural protections required by Sec. 104.36 of the Section 504 regulation; that is, they are entitled to a system of procedural safeguards that includes notice, an opportunity for the examination of records, an impartial hearing (with participation of parents and opportunity for counsel), and a review procedure. Thus, if after reevaluation in accordance with 34 C.F.R. Sec. 104.35, the parents disagree with the determination regarding relatedness of the behavior to the handicap, or with the subsequent placement proposal (in those cases where the behavior is determined to be caused by the handicap), they may request a due process hearing.

Note that these procedures need not be followed for students who are handicapped solely by virtue of being alcoholics or drug addicts with regard to offenses against school disciplinary rules as to the use and possession of drugs and alcohol. Appendix A Para. 4 to the Section 504 regulation states:

Of great concern to many commenters was the question of what effect the inclusion of drug addicts and alcoholics as handicapped persons would have on school disciplinary rules prohibiting the use or possession of drugs or alcohol by students. Neither such rules nor their application to drug addicts or alcoholics is prohibited by this regulation, provided that the rules are enforced evenly with respect to all students.

² The provision of this policy which permits total exclusion of handicapped children from educational services should not be applied in Alabama, Georgia, Florida, Texas, Louisiana, and Mississippi. In *S-I v. Turlington*, 635 F.2d 342, 348 (5th Cir. Unit B 1981), the court of appeals ruled that under both Section 504 and the EHA, a handicapped child may be expelled for disruptive behavior that has been properly determined not to have been caused by the handicapping condition, but educational services may not be terminated completely during the expulsion period.

EHLR SPECIAL REPORT: U.S. Department of Education Policy Memo
on Long-term Disciplinary Suspensions of Handicapped Students (continued)

For example, if a student is handicapped solely by virtue of being addicted to drugs or alcohol, and the student breaks a school rule that no drugs are allowed on school property, and the penalty as to all students for breaking that rule is expulsion, the handicapped student may be expelled with no requirement for a reevaluation. This exception, however, does not apply to children who are handicapped because of drug or alcohol addiction and, in addition, have some other handicapping condition. For children in that situation, all the procedures of this policy document will apply.

Further, this policy does not prevent a school from using its normal reasonable procedures, short of a change in placement, for dealing with children who are endangering themselves or others. Where a child presents an immediate threat to the safety of others, officials may promptly adjust the placement or suspend him or her for up to 10 school days, in accordance with rules that are applied evenhandedly to all children.

If you have any questions about the content of this memorandum, feel free to call me or have a member of your staff contact Jean Peelen at 732-1641.

EXCERPT

STATE BOARD OF EDUCATION
and
DEPARTMENT OF PUBLIC INSTRUCTION

ADMINISTRATIVE MANUAL:
PROGRAMS FOR EXCEPTIONAL CHILDREN

JULY 1, 1993
Amended 8/9/93,
& 6/20/96

STATE OF DELAWARE

I. STUDENT MANAGEMENT AND DISCIPLINE

1. SUSPENSION/EXPULSION

a. Suspension for More than 10 Days or Expulsion

- (1) Suspension for more than 10 days, either consecutively or cumulatively, in any one school year, or expulsion for any offense must be considered a change in placement of a student with a disability as defined in this Part, if: *
- (a) the offense was a manifestation of, or related to, the student's disabling condition; and/or
 - (b) the student was inappropriately placed at the time of the offense or there is a likelihood that a change in the student's program and/or placement would alleviate the misconduct which led to the offense. 34 CFR 104.33, 104.36; Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978); Doe. v. Koger, 480 F. Supp. 225 (N.D. Ind. 1979); S-I. v. Turlington, 635 F. 2d 342 (5th Cir.) (Unit B), cert. denied, 454 U.S. 1030 (1981).
- (2) Suspensions as set out in paragraph (1) of this Subsection shall include:
- (a) in-house suspension for more than 10 days, either consecutively or cumulatively, if it deprives a student of a significant component of his or her IEP;
 - (b) suspension or exclusion from transportation, if it results in the student's absence from school for more than 10 days, either consecutively or cumulatively; and
 - (c) suspension, exclusion, expulsion, or withdrawal under a behavioral contract pursuant to a student disciplinary code, which is not part of an IEP, if it results in the student's absence from school for more than 10 days, either consecutively or cumulatively.
- (3) Determination of the relationship of the offense to the student's handicapping condition shall be made by the IEP Team. Stuart v. Nappi. If the student's behavior is determined to meet the conditions set out in subparagraphs (a) and/or (b) of paragraph (1) of this subsection, then suspension and/or expulsion are not acceptable management or discipline procedures; any discipline for the behavior shall be in accordance with the student's IEP.

7. A current list of community-based health and social service provider agencies available to support a student and the student's family, as appropriate, and a list of legal resources available to serve the community.
- (d) A district board of education may deny participation in extracurricular activities, school functions, sports, graduation exercises or other privileges as disciplinary sanctions when designed to maintain the order and integrity of the school environment.

6A:16-7.2 Short-term suspensions

- (a) In each instance of a short-term suspension, a district board of education shall assure the rights of a student suspended for one, but not more than 10 consecutive school days by providing for the following:
 1. As soon as practical, oral or written notice of charges to the student.
 - i. When charges are denied, an explanation of the evidence forming the basis of the charges also shall be provided;
 2. Prior to the suspension, an informal hearing during which the student is given the opportunity to present his or her version of events regarding his or her actions leading to the short-term suspension and is provided notice of the school district's actions taken pursuant to N.J.A.C. 6A:16-7.1(c)2 and 5:
 - i. The informal hearing shall be conducted by a school administrator or his or her designee;
 - ii. To the extent that a student's presence poses a continuing danger to persons or property or an ongoing threat of disrupting the educational process, the student may be immediately removed from the student's educational program and the informal hearing shall be held as soon as practical after the suspension;

- iii. The informal hearing shall take place even when a school staff member has witnessed the conduct forming the basis of the charge; and
 - iv. The informal hearing and the notice given may take place at the same time;
 3. Oral or written notification to the student's parents of the student's removal from his or her educational program prior to the end of the school day on which the school administrator decides to suspend the student. The notification shall include an explanation of:
 - i. The specific charges;
 - ii. The facts on which the charges are based;
 - iii. The provision(s) of the code of student conduct the student is accused of violating;
 - iv. The student's due process rights, pursuant to N.J.A.C. 6A:16-7.1(c)3 and this section; and
 - v. The terms and conditions of the suspension.
 4. Appropriate supervision of the student while waiting for the student's parent to remove the student from school during the school day; and
 5. Academic instruction either in school or out of school that addresses the Core Curriculum Content Standards.
 - i. The student's academic instruction shall be provided within five school days of the suspension.
 - ii. At the completion of a short-term suspension, the district board of education shall return a general education student to the general education program from which he or she was suspended.
 - iii. The academic instruction provided to a student with a disability shall be provided consistent with N.J.A.C. 6A:14.



- (b) The suspending principal shall immediately report the suspension to the chief school administrator, who shall report it to the district board of education at its next regular meeting, pursuant to N.J.S.A. 18A:37-4.
- (c) An appeal of the district board of education's decision affecting the general education student's educational program shall be made to the Commissioner, in accordance with N.J.S.A. 18A:37-2.4 and N.J.A.C. 6A:3-1.3 through 1.17.
- (d) For a student with a disability, the provisions of this section shall be provided in addition to all procedural protections set forth in N.J.A.C. 6A:14.

6A:16-7.3 Long-term suspensions

- (a) In each instance of a long-term suspension, the district board of education shall assure the rights of a student suspended for more than 10 consecutive school days by providing the following:
 - 1. Notification to the student of the charges prior to his or her removal from school;
 - 2. Prior to the suspension, an informal hearing during which the student is given the opportunity to present his or her version of events regarding his or her actions leading to the long-term suspension and is provided notice of the school district's actions taken pursuant to N.J.A.C. 6A:16-7.1(c)2 and 5;
 - 3. Immediate notification to the student's parents of the student's removal from school;
 - 4. Appropriate supervision of the student while waiting for the student's parents to remove the student from school during the school day;
 - 5. Written notification to the parents by the chief school administrator or his or her designee within two school days of the initiation of the suspension, stating:
 - i. The specific charges;

STATE OF

DELAWARE



STATE BOARD OF EDUCATION

THE TOWNSEND BUILDING
P.O. BOX 1402
DOVER, DELAWARE 19903

PAUL R. FINE
PRESIDENT

APPEAL OF STUDENT W [REDACTED] D [REDACTED] FROM A
DECISION OF THE [REDACTED] BOARD OF EDUCATION
DECISION AND ORDER

This is an appeal by a student, W [REDACTED] D [REDACTED]
("Appellant") from the January 16, 1991 decision of the
[REDACTED] Board of Education (" [REDACTED] Board") to expel
him for the remainder of the 1990-91 school year. The State
Board of Education (the "State Board") heard argument at its
meeting in Dover, Delaware on February 21, 1991. Present were
Paul R. Fine, President; Dr. Kent S. Price, Vice President;
Arthur W. Boswell, Howard E. Cosgrove, Richard M. Farmer, R.
Jefferson Reed and Dorothy H. Smith, constituting the full
membership of the State Board. Marcia Rees, Deputy Attorney
General, acted as law officer for the State Board. Appellant
was present and represented by [REDACTED], Esquire, and
accompanied by his mother, Mrs. [REDACTED] D [REDACTED].
[REDACTED], Esquire, represented the [REDACTED] School District
(the "District") in the appeal; he was accompanied by [REDACTED]
[REDACTED], District Superintendent, and [REDACTED]
[REDACTED], Assistant Principal of [REDACTED] Junior-
Senior High School.

The hearing was held pursuant to 14 Del.C. Sec. 1058 and
the State Board regulations pertaining thereto. At the
request of the Appellant, the State Board heard this matter in
closed session, as authorized by 29 Del.C. Sec. 10004.

MAR 9 6 1991

RECEIVED

SUMMARY OF EVIDENCE:

The record on appeal consists of the following submitted by the District:

1. A copy of the transcript of the student hearing held before the [REDACTED] School District on January 16, 1991 in the matter of W [REDACTED] D [REDACTED];

2. Copies of the exhibits presented at the January 16, 1991 hearing, of documents from the 1989-90 suspensions and expulsion leading up to Appellant's placement in the Level IV Program in 1990-91, and of the correspondence leading up to the January 16, 1991 hearing;

3. The Statement of Position of the [REDACTED] School District, dated February 13, 1991.

The Appellant submitted a Letter Brief on February 14, 1991, with attached exhibit.

The uncontradicted evidence is that Appellant is 14 years old and is a 7th grade student at [REDACTED] Junior-Senior High School. This is his second year in the seventh grade, having received an "indefinite" suspension on May 1, 1990 and ultimately being expelled on May 14, 1990 for the remainder of the 1989-90 school year "due to five (5) suspensions and violations of the school attendance policy."

1. Appellant was suspended indefinitely pending a hearing for expulsion. As noted below, such a suspension lasting more than 10 school days presumes guilt. If a student cannot be provided with a hearing within 10 days, alternative education should be provided. The 1990 hearing was held within this time frame, however the State Board wishes to express its disapproval of the use of "indefinite" suspensions.

Appellant reentered school in Fall, 1990 subject to a behavioral contract under the Level IV Program. While in the Level IV program, Appellant was alleged to have committed a theft of \$51.00 worth of candy on November 29, 1990, to have skipped school on December 5, 1990 and to have engaged in "fighting" on December 6, 1990. These "violations" led to Appellant's being given, on December 7, 1990, another "indefinite" suspension pending a hearing before the [REDACTED] Board for consideration for expulsion, which took place on January 16, 1991. The hearing had originally been scheduled for January 8, 1991, but was postponed at the request of Appellant's counsel. Appellant was not provided with any alternative education after December 21, 1990, the tenth day of suspension.

Testimony from the parties indicated that Appellant was noted to still commit letter reversals (T-18) and that he had been referred for screening for special education, but that the testing was never done. Despite not being classified as a special education student, he was being taught by special education teachers in the Level IV program.

Appellant argued that he was denied an opportunity to present mitigative evidence at the hearing, that there was a mingling of prosecutorial and advisory roles by the [REDACTED] Board's counsel, that the [REDACTED] Board was not an impartial tribunal, and that the [REDACTED] Board failed to make findings of fact and conclusions of law.

Appellant stated that the [REDACTED] Board did not allow him to place mitigative evidence before it about the violations he was alleged to have committed, and that he was not given access to the student's teachers to be able to ascertain the facts. Although he may have committed some infractions, they were not as severe as represented, and he was not allowed to show that they did not warrant expulsion. He argued that although he may have taken some candy in the theft alleged on November 28, 1990, he only took a small amount along with a number of other children who also took some, that he did not take \$51.00 worth and that he was being unfairly singled out. He argued that his "confession" was coerced and that he did not know what he was signing. He acknowledged skipping school, but stated that the "fight" was nothing more than a shoving match and that he was acting in self-defense. He alleged that he was not allowed to present witnesses to show mitigation, and that his expulsion appeared to be "automatic."

Appellant objected to the [REDACTED] Board's counsel that evening sitting first with the Board and then getting up and acting as prosecutor for the District. Dr. Sutton, the District Superintendent acting for the Board, decided that the counsel should act as both prosecutor and advisor.

Appellant also objected to the lack of impartiality of the [REDACTED] Board, citing in particular the recitation of an opinion of Appellant's reading teacher that Appellant had been "set ... up to fail," and [REDACTED]'s "objection" to that evidence and [REDACTED]'s comment that introducing this

evidence was "a slight on this Board, on this school district; and I'm offended, and I think it's ridiculous." (T-18-21) Appellant also pointed to other places in the transcript where the [REDACTED] Board was argumentative (T-5, 26, 27, 29).

Finally, Appellant noted that the [REDACTED] Board made no findings of fact nor conclusions of law, other than to expel Appellant. He pointed to these requirements in State Board regulations.

The District argued that it had substantial evidence that Appellant had committed the three offenses, and that not only were these offenses in violation of the behavior contract, but that fighting is an expellable offense standing on its own. The District argued that Appellant had stipulated to committing all of the offenses. On questioning by the State Board, the District could not point to the place in the transcript where any evidence was presented by anyone with personal knowledge of the offenses to the [REDACTED] Board in regard to any of the "violations" committed.

[REDACTED] stated that a violation of a Level IV contract did not automatically require expulsion, but that the student be brought before the Board for an expulsion hearing. He stated that the Board was not deprived of its discretion by the District's behavior contract. On the other hand, the District's Statement of Position stated that "[t]he Contract further provided that "any suspendable violation of your Level IV status will result in automatic expulsion." Further, an August 21, 1990 letter from the Principal sent to Appellant

was read into the record stating that "immediate expulsion will follow any offense which the Principal feels warrants same." (Emphasis added.)

The District also argued, although its counsel had sat with the Board on other matters, that he had assumed a prosecutorial role throughout the hearing, that he had left the building at the termination of the hearing, and that he did not sit with the [REDACTED] Board during its deliberations.

Although it did not render a decision with findings of fact and conclusions of law, the District stated that it had substantial evidence upon which it could base Appellant's expulsion.

FINDINGS OF FACT:

1. Appellant reentered school in Fall, 1990 subject to a behavioral contract under the Level IV Program. While in the Level IV program, Appellant was alleged to have committed a theft of \$51.00 worth of candy on November 29, 1990, to have skipped school on December 5, 1990 and to have engaged in "fighting" on December 6, 1990.

2. These "violations" led to Appellant's being given, on December 7, 1990, an "indefinite" suspension pending a School Board hearing for consideration for expulsion. The hearing was originally scheduled for January 8, 1991, but was postponed at the request of Appellant's counsel to January 16, 1991.

3. Appellant was not provided with any alternative education after December 21, 1990, the tenth day of suspension.

4. Appellant still commits letter reversals; he was referred for screening for special education, but that testing was never done. Despite not being classified as a special education student, he was being taught by special education teachers in the Level IV program.

5. Appellant's teachers did not testify in regard to the incidents alleged, nor was Appellant allowed access to them in regard to the incidents at issue.

6. No evidence was placed before the [REDACTED] Board by any witness with first-hand knowledge of the violations alleged to be committed by Appellant.

7. Appellant was not allowed by the [REDACTED] Board to place before it mitigative evidence.

8. The [REDACTED] Board treated Appellant's acknowledgements of the infractions as if they resulted in "automatic" expulsion.

9. The District's counsel did sit with the Board as advisor and then act as prosecutor; however, he did not deliberate with the Board.

10. Some [REDACTED] Board members and administrative staff interrupted and were argumentative with Appellant's counsel when Appellant was attempting to put on its case in chief.

11. The [REDACTED] Board rendered no findings of fact nor conclusions of law, other than that Appellant should be expelled.

12. The District did not cite any rules or regulations of the [REDACTED] School District, nor submit any copies of same to the State Board of Education. Nor did it submit a copy of the minutes showing the result of the decision made by the [REDACTED] Board.

13. The District did not submit certified copies of the record before it to the State Board.

CONCLUSIONS OF LAW:

The State Board of Education hears disciplinary matters on appeal from local boards of education pursuant to 14 Del.C. Sec. 1058 and its Regulations for the Conduct of Hearings Before the State Board of Education Pursuant to 14 Del.C. Sec. 1058, Handbook of Personnel Administration, pp. 1-4 to 1-7. In such matters the State Board considers the application of the rules and regulations of the local board in a particular factual context, Id. at 1-4, whether the conclusion of the local board was arbitrary or capricious, and whether there was substantial evidence to be able to reach that conclusion. Id. at 1-5. The State Board makes independent judgments with respect to matters of law. Id.

In the scheme of student discipline, it is the role of the local board to ensure that due process has been accorded the student, not only in its own proceedings, but by the school district under its general control, before appeal is

made to the State Board. In this matter, Appellant was expelled after alleged violations of a behavioral contract, none of which were proved by the District nor shown to have been of an expellable nature. Further, the student did not receive due process from the district or the local board. Thus, the State Board rules in this case to reverse the District's decision.

Expulsion is a serious event in the life of a student, depriving him of the very education necessary for him to become a productive member of society. Thus, before a student is expelled, it is the duty of the local board to ensure that there is an adequate basis for the expulsion and that the student is accorded due process prior to being subject to such a "grievous loss." Goss v. Lopez, 419 U.S. 565 (1975).

In light of the gravity of expulsion, the State Board takes a very strict view of the requirements necessary for expulsion as the result of violation of a behavioral contract. This is particularly the case when a student is being expelled for an offense which would not otherwise be cause for expulsion.

"Automatic" expulsion for the violation of a behavioral contract does not afford a student due process, for it places the decision to expel in the hands of administrators, not in the hands of the local board where the decision must be made. See the September 21, 1990 Memorandum from [REDACTED], Principal, to Students Assigned to the Level IV Program, which states "any suspendable violation of your Level

IV status will result in an automatic suspension." A decision for expulsion which can be made for "any offense which the Principal feels warrants same" not only robs the Board of its discretion, but provides an inadequate standard by which to judge the student's behavior. See August 21, 1990 letter of [REDACTED], Ph.D., to Mrs. [REDACTED] D. [REDACTED] (emphasis added).

The State Board would note that the primary purpose of schools is to keep students attending and learning. Thus, in general, students should be expelled only for expellable offenses. Behavior contracts by their very nature make an accumulation of lesser offenses grounds for expulsion. An expulsion under such a contract should only occur when there is such an accumulation of offenses, and they are of such a serious nature and were committed with such disregard for the disciplinary process that, when taken as a whole, expulsion is warranted.

Local boards which do decide to expel as the result of violations of behavior contracts must be punctilious about their observance of due process in the decision to expel. The underlying need for the behavior contract must be carefully placed in the record. Substantive evidence must be placed in the record of each violation of the behavior contract. And, the seriousness of each violation and the cumulative nature of serious violations must be shown. Further, procedural due process must be adhered to carefully.

In this matter, the District provided that violation of its Level IV rules would result in "automatic" expulsion. When Dr. Kingery interrupted the testimony of Mr. [REDACTED] being elicited by Appellant's counsel, he stated, "If there is any breach of the discipline code, it would be grounds for immediate expulsion. That was in writing to the family which they received. At that point, everything else becomes moot." (T-12) This absolute position was not refuted by the Board, and later when Appellant's counsel tried to call Appellant's family members with regard to the penalty of expulsion, the District Superintendent interrupted the proceedings to object that their testimony was not relevant, and gave them 12 minutes to finish the hearing. (T-20-21) The Board members did not object to this course of action. Thus, the State Board finds that the [REDACTED] Board's own actions confirmed the "automatic" nature of Appellant's expulsion and its unwillingness to exercise its discretion about whether the penalty of expulsion was warranted.

Further, the District presented no clear and convincing evidence of the seriousness of the violations, or that they occurred as the District alleged. Appellant did not stipulate, as the District alleged, to the District's version of the violations committed. Appellant argued that both the character of the alleged candy stealing and the "fight" were other than as the District alleged, and that Appellant's counsel was not permitted access to his teachers to try to find out what did occur. Additionally, the testimony of those

teachers was not presented at the hearing. Therefore, the State Board finds that substantive evidence was not presented of violations of the behavioral contract warranting expulsion. Further, the District's unwillingness to allow Appellant's counsel access to the teachers involved and its failure to produce those witnesses at the hearing deprived Appellant of his right to be able to prepare a defense and to confront his accusers. See Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir.0, cert. denied, 368 U.S. 930 (1961)); DeJesus v. Penberthy, 344 F.Supp. 70 (1972).

It should be noted that the conduct of the hearing itself caused many of the due process violations which occurred in this matter. First, there was no clear-cut chairman of the hearing; a number of persons seemed to be making rulings about the course of the presentation. Second, persons who were not part of the presentation interrupted the proceeding at will, and no one ruled them out of order. Third, there was a great deal of confusion over roles; and at times the Board appeared to be arguing on behalf of the District, and vice versa.

An orderly hearing helps preserve the rights of the student and ensure that bias does not enter into a case. The State Board's Resource Checklist for Due Process Procedures in Suspension and Expulsion, a copy of which is attached hereto, details at paragraph 23 how a hearing should proceed. At a minimum, the District should go first and present its entire case; only one person should do the questioning, and no other person should speak unless they are the witness and they are

answering in response to a question asked by the person doing the questioning. Then, the student has the right to an uninterrupted presentation of his case, save for reasonable objections by the opposing party and a prompt ruling on those objections by the hearing officer. At the end of the presentation, after each party has had time to make a closing statement, and only then, should the local board members ask questions or otherwise speak.

The District's counsel did sit with the Board prior to the hearing taking place, and then take on the role of prosecutor in the case. It is unfortunate that it was ruled that he could assume the role of both advisor and prosecutor. It should also be noted that this ruling was made by the District's Superintendent, not by the Board Chairman. There is no evidence that the counsel participated in the deliberations of the Board nor that he gave advice to the Board during the proceedings, however. The bias, if any, could only have come from his being with the Board prior to the hearing. Thus, although an appearance of impropriety might exist, there is no direct evidence of actual bias.

The better view in conducting hearings is for the Administration to present the case or for an additional attorney to assume the other role. Gonzalez v. McEuen, 435 F.Supp. 460 (D.C. Cal. 1977).

Finally with regard to the hearing, the Board failed to make any findings of fact or an conclusions of law, other than Appellant should be expelled. Any student being expelled has

the right to know the basis for the expulsion, what facts led the decision-maker to the conclusion that his behavior warranted that penalty, and what were the rules or law on which the expulsion was based. Had that evidence been presented to the Board, the task would have been easier. However, without the presentation of that evidence, no such findings of fact could reasonably have been made.

The [REDACTED] Board accordingly did not present either findings of fact or conclusions of law to the State Board. It did not present the laws, rules or regulations upon which the expulsion was based, or a copy of the minutes of the Board showing the action taken. Although the transcript was presented, along with some accompanying documents, it was not certified as required by State Board regulations.

Finally, the State Board has concerns over two other omissions made before the hearing took place: failure to evaluate as a special education student and placement on "indefinite" suspension.

First, the State Board very concerned that Appellant had been identified as possibly needing special education, but that he was never tested by the District. The District acknowledged at the hearing before the State Board, that one of his teachers had noted letter reversal still being used by this student in the seventh grade. This document was placed before the [REDACTED] Board during the course of its hearing. (T-18) Instead of being outraged by the words of the teacher and by their being brought to the attention of the Board

members, as occurred (T-19-20), the [REDACTED] Board should have been immediately on notice that it was dealing with a potentially handicapped student, about whom the District not only had failed to determine whether a handicap existed, but, if one did exist, had failed to determine, through the IEP process, whether the "violations" were the manifestation of or related to his handicapping condition, thus making the disciplinary hearing inappropriate under the Education of the Handicapped Act. 34 C.F.R. 300.552(2); Stuart v. Nappi, 443 F.Supp. 1235 (D. Conn. 1978); Administrative Manual: Programs for Exceptional Children (March 1987), I., I: Student Management and Discipline.

Second, a district's placement of a student on "indefinite" suspension, pending an expulsion hearing, is not only contrary to the EHA, but in the case of a student properly before a local board, tantamount to a finding of "guilt before conviction." The school district administration cannot find a student guilty; such a determination can only come from the local board. Generally, the courts have found suspensions for more than a reasonable time period to be the equivalent of expulsion, requiring formal procedures prior to the cessation of educational services. Goss v. Lopez, 419 U.S. 565 (1975); Dixon v. Alabama State Board of Education, 294 U.S. 150 (5th Cir.), cert. denied 368 U.S. 930 (1961). If the District is unable to provide those formal procedures through a hearing, a student is entitled to educational opportunities

from the school. Failure to do so implies guilt before that guilt has been found.

The State Board, in response to cases involving both regular and special education students, has determined that ten days is the time within which it believes such hearings should be held. Districts have been on notice of the State Board's position since the adoption of and dissemination of its Guidelines for the Development of District Policies on Student Rights and Responsibilities (October 1988), viz. P. 13, which was accompanied by a Resource Checklist for Due Process Procedures in Suspension and Expulsion, viz. pp. 2, 3.

In this matter, the Appellant was placed on indefinite suspension on December 7, 1991. This means his hearing should have taken place by December 21, 1991 to fall within the ten school day period. The District did not notify Appellant of the hearing until a letter dated December 20, 1990, which presumably arrived on December 21, 1990 or a later time well into the Christmas holiday, during which no one would be available to contact at the District office; the letter set the hearing for January 8, 1991. On January 3, 1991, just after the reopening of school, Appellant's counsel requested an extension of time to January 16, 1991, in order to allow counsel to review the request for representation. Throughout the time Appellant was out of school in January, a period of eleven days on top of the ten days Appellant was out of school in December, no educational services were provided for him.

The loss of this much time in the schooling of a seventh grader, can possibly be a detriment for the balance of his school career, and Appellant; at a minimum should have been provided with alternative educational opportunities in January.

CONCLUSION:

On appeal, the State Board must determine whether or not the the local school district in question acted rationally and without arbitrariness or capriciousness in the application of its disciplinary rules, whether the local board had substantial evidence before it to to make a ruling, and whether the local board's decision is correct as a matter of law.

The State Board finds that the [REDACTED] Board did not have substantial evidence before it to find that Appellant actually committed the offenses alleged by the District or that his behavior warranted expulsion; that the procedural errors committed by both the District and the [REDACTED] Board did not afford the student adequate due process; that both the District and the Board acted irrationally, and that the decision to expel was arbitrary and capricious.

Therefore, the State Board reverses the decision of the [REDACTED] Board to expel Appellant, and orders that he be reinstated in school and that no academic penalty be imposed for the time he missed from December 10, 1990 through his return as a result of the appeal to the State Board.

The State Board also orders that the student be tested for special education, and that the Superintendent notify the

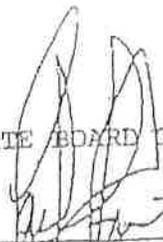
State Board by April 15, 1991 that such testing has taken place.

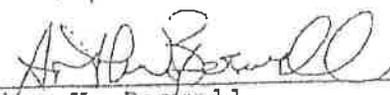
The State Board also recommends that the [REDACTED] Board seek technical assistance on improving its hearing practices and tightening up the District's disciplinary procedures with respect to substantive and procedural due process.

Finally, the State Board in no way wishes to condone the continuing misbehavior of Appellant. He must obey school rules and cooperate with school authorities. Both he and the school have an obligation to work together to improve his behavior.

DATE: March 21, 1991

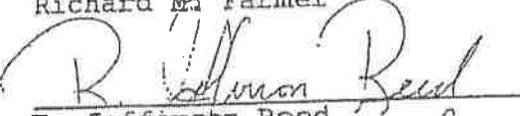
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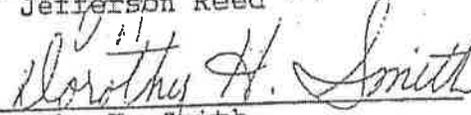

Paul R. Fine, President


Arthur W. Boswell

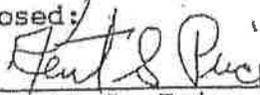

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Richard M. Farmer

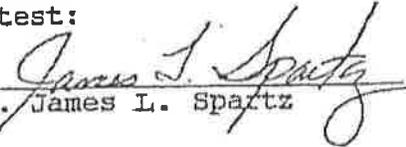

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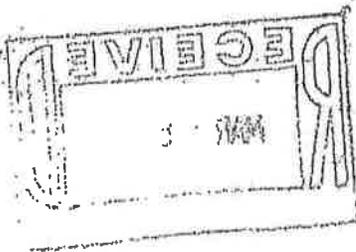

Dorothy H. Smith

Opposed:


Dr. Kent S. Price
Vice President

Attest:


Dr. James L. Spartz



Guidelines on Student Responsibilities & Rights

The goals of education are best served where there is a safe and pleasant environment which permits staff and students to concentrate on teaching and learning. Such an atmosphere can only be maintained through the cooperative efforts of all those involved in the education community--especially educators, students and parents. Educators have the responsibility to inform students of their rights and responsibilities. Students have the responsibility to know and abide by school rules and regulations. Parents have the responsibility to familiarize themselves with school rules to avoid misunderstanding and to join the school community's efforts to maintain a climate of respect, consideration and good citizenship.

Schools are recognized as having the authority to maintain order and discipline and to control student conduct, however schools must operate within established guidelines and constitutional limits. Under our constitutional system, state governments are empowered with the legal responsibility for establishing and maintaining a system of public education. Although the power of states over education is considerable, state legislatures do not actually operate schools; rather, they provide for the operation of schools. In Delaware, the authority for this operation is delegated to the State Board of Education and local boards of education. Such authority is outlined in Title 14 of the Delaware Code. It is the purpose of these guidelines to provide assistance to Delaware's local boards of education in developing policies for schools which will inform students of their rights and responsibilities.

I. GUIDELINES AS TO STUDENT RESPONSIBILITIES

The various rights of students set forth in the preceding sections reflect those guaranteed to all citizens in accord with the Constitution of the United States, federal laws, the laws of the State of Delaware, and the rules and regulations of the State Board of Education.

Our nation acquires its strength through citizen involvement. The educational process in the schools must become the vehicle by which the meaningful principles of democracy are both taught and practiced. To this end, school officials must assure that advice, counsel, and supervision are provided students.

The rights assumed by students must be accompanied by corresponding responsibilities as they exercise their rights. They must further accept the consequences of their actions, recognize the limits of their freedoms, and show concern and consideration for the rights of others.

Student rights thus involve equivalent responsibilities. Students thus have the following responsibilities:

1. To accept every person as an individual human being and to promote intercultural and group relations and understanding.

E. Student Conduct

The schools exist as educational and social institutions concerned with providing learning opportunities which lead to the development of responsible and intelligent citizens. School officials are, therefore, granted the authority to maintain an orderly and safe educational environment which considers student conduct and behavior as essential to the developmental aspect of the learning process.

1. Students should have the right to participate in the development, implementation and modification of rules and regulations establishing appropriate student conduct and behavior.
 - a. Such rules and regulations should be developed through a representative committee composed of administrators, teachers, and students. The committee may be expanded to include parents and lay citizens.
 - b. Such rules and regulations should emphasize the constitutional rights of students and respect for the school and school officials.
 - c. Such rules and regulations should be written in clear and precise language.
 - d. Such rules and regulations should not penalize the student for behavior not directly related to the educational responsibilities and functions of the school.
2. Students should have the right to be informed about violations of rules and regulations and to be granted a hearing regarding serious offenses.
 - a. Each student and/or his or her parent(s) or guardian(s) should receive a copy of the school's disciplinary code at the beginning of each school year or upon entry or re-entry to school
 - b. Minor infractions and misconduct may be handled through conferences with teachers and administrators.
 - c. Procedures for handling infractions may vary in formality in accordance with the seriousness of the action.
 - d. Procedures for disciplinary action shall be conducted in accordance with the judicial concept of innocent until proven guilty.

3. Students have the right to be treated fairly and equitably and to be granted due process before any disciplinary action which deprives them of education. Any such action which hampers their access to education should be reasonable and within the limits of the Constitution the laws of the State and the regulations of the State Board of Education.
 - a. Disciplinary action shall be fair, firm consistent, and appropriate to the infraction or offense.
 - b. Codes of conduct should be meaningful and applied without preference to any group or individuals.
4. Students should have the right to seek informal review or appeal of disciplinary decisions. Any disciplinary decision for which the sanction imposed is suspension for more than 10 days or expulsion, or which results in the right of appeal to the State Board of Education, requires formal due process procedures. Codes of conduct should clearly set out whether sanctions result in informal review or appeal. The appeals procedure should be in writing and be made well-known to the entire school community each year.
5. If a student is handicapped within the meaning of P.L. 94-142 (See Administrative Manual: Programs for Exceptional Students, A. I. 1.), a determination must be made prior to any disciplinary action of whether the misconduct prompting the disciplinary action was the result of the student's handicapping condition. If the misconduct is a manifestation of the student's handicap, any consequences should be through the IEP process, not through student disciplinary procedures.

F. Suspension and Expulsion

It is fundamental to the progress of a democratic nation that youth be provided with educational opportunities which are appropriate to their interests and their abilities. Equality of educational opportunity is both a right and a privilege established within the framework of a compulsory attendance law, which requires that students between the ages of 5 to 16 -- with certain exceptions -- be in school and be further permitted to continue in school if necessary until the age of 21.

Any administrative or disciplinary action which tends to restrict the above requirements should be conducted in accordance with acceptable standards of due process and should reflect, as broadly as possible, a learning experience which contributes toward the further educational development, responsibility, and maturity of the individual students, and corrects the situation producing the unacceptable behavior.

1. The use of suspension and/or expulsion as a consequence for misconduct should be limited to activities associated with the school.
2. Short-term suspensions for 10 days or less require that a student be afforded rudimentary due process. Goss v. Lopez, 419 U.S. 565 (1975). There are certain basic requirements which exist when rudimentary due process is extended. They are:
 - a. Conducting an individualized preliminary investigation to determine the facts associated with the infraction. Id.
 - b. Informing the student of the charges against him or her and permitting the student to discuss the matter. Id.
 - c. If the student denies the charges, giving him or her an explanation of the school's evidence and an opportunity to present his or her version of the facts. Id.
 - d. Notifying the student and his or her parent(s) or guardian(s) of the infraction and the proposed disciplinary action. French v. Cornwall, 276 N.W. 2d 216 (1979).
 - e. Conducting a conference with the student and his or her parent(s) or guardian(s) and informing them of the impending action, and permitting questioning of the complainant. Goss v. Lopez; Id.
 - f. Giving the student a written decision which clearly states:
 - i. The charges and the evidence;
 - ii. The sanction imposed;
 - iii. The rights of informal review or of appeal, including review by or appeal to the district superintendent, followed by the local board of education, or a panel composed of an equal number of faculty, student and lay representatives.
 - g. Providing the conditions under which the suspension will be terminated and recommending constructive means for improvement.
3. If the right of appeal granted by the district implicates review by the State Board of Education, the procedures for long-term suspension (more than 10 days) or expulsion should be followed. 14 Del. C., § 1058; Regulations for the Conduct of Hearings Before the State Board of Education Pursuant to 14 Del. C. § 1058, January 20, 1972.

4. Where suspension is not immediate, denial of appropriate educational opportunities during the period prior to the determination that suspension is warranted presupposes "guilt before conviction."
5. If the student's presence constitutes a clear and present danger to persons or property in the school, or an on-going threat of disruption of the academic process, the student may be suspended without rudimentary due process, but notice and an informal hearing, as detailed in paragraph 2 above, should be provided as soon as practicable. Goss v. Lopez, Id.
6. Multiple short-term suspensions should not be used to circumvent the due process requirements of long-term suspensions or expulsion.
7. Suspensions for more than 10 days or expulsions require more formal procedures. Such procedures should include the following:
 - a. All those procedures accorded students for short-term suspensions (paragraph 2 above);
 - b. Written notice to the student and his/her parent(s) or guardian(s) of:
 - i. The specific misconduct of which the student is accused, the factual basis of the charges, and the specific provisions of the student code allegedly violated; Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th Cir.), cert. den. 368 U.S. 930 (1961); Strickland v. Inlow, 519 F. 2d 744 (8th Cir. 1975).
 - ii. The right to have a formal hearing and the procedures to be followed; Goss; Dixon.

- iii. The date, time and place of the hearing, given so that the student has sufficient time to prepare a defense; Dixon; Smith v. Miller, 514 P. 2d 377 (Kan. 1973).
 - iv. The right to be represented by legal counsel or an adult advisor; Black Coalition v. Portland School District No. 1, 484 F. 2d 1040 (9th Cir. 1973).
 - v. The right to testify and present evidence. Goss v. Lopez, Id.
 - vi. The right to have witnesses and to cross-examine opposing witnesses. Id.; DeJesus v. Penberthy, 344 F. Supp. 70 (D. Conn. 1972).
 - vii. The right to either a public or a private hearing. 29 Del.C. §10004(b)(7).
- c. The district and the local board should ensure:
- i. That the student receives a fair and unbiased hearing which follows both substantive and the procedural due process requirements regarding student suspension and expulsion, Goss v. Lopez, Id.
 - ii. That the hearing is held by and the matter is decided by impartial decision-makers who have not participated in bringing or investigating the charges, Gonzalez v. McEuen, 435 F. Supp. 460 (D.C. Cal. 1977);
 - iii. That a verbatim record is made of the hearing, Regulations for Deciding Controversies Before Local Boards of Education, January 20, 1977, I(d) II(a);
 - iv. That the decision reached is supported by "substantial evidence." Regulations for the Conduct of Hearings Before the State Board of Education Pursuant to 14 Del. C. § 1058, January 20, 1977, III a.
- d. The local board should render a written decision setting forth:
- i. The findings of fact;
 - ii. The basis of the decision in law or the district student disciplinary code, and;
 - iii. The disciplinary action to be imposed, if any.

Regulations for Deciding Controversies Before Local Boards of Education, January 20, 1977, I (c).

- e. The written decision should be entered in full in the local board's minutes; Id. at II (b).
- f. A copy of the written decision should be sent to the student and his or her parent(s) or guardian(s), and should include or be accompanied by:
 - i. A notice of the student's rights of administrative or judicial review (e.g. by the State Board of Education). See: Dixon v. Alabama, Id.
 - ii. A statement of the conditions for readmission to school after the term of expulsion, with sufficient particularity to be able to determine whether the re-admittance of the student would either constitute a problem or disrupt the educational process.

G. Role of Police Authorities

While the education system is primarily responsible for the development of intellect and character and the police are responsible for welfare and safety, the two are interdependent. The successful functioning of law enforcement officials in the schools is dependent upon effective communication and cooperation between the two agencies. With this in mind, police, school and the various other agencies involved with the education, safety and welfare of Delaware's youth have been consulted, and a document entitled School/Police Relations Guidelines for School Administrators, dated January 28, 1988, was adopted by the State Board of Education.

These Guidelines address police/school relations in the following instances:

- a. Arrests on school premises;
- b. Questioning or interrogation by police on school premises;
- c. Search and seizure in connection with the police;
- d. Reporting crimes to the police;
- e. School disturbances requiring police assistance; and
- f. Police contact with "truants" out of school.

APPENDIX A

RESOURCE CHECKLIST FOR DUE PROCESS PROCEDURES
IN SUSPENSION AND EXPULSION

A. PRELIMINARY QUESTIONS:

1. Is the student to be disciplined a handicapped student under P.L. 94-142? (See Administrative Manual: Programs for Exceptional Children, A.I.1.)
 - a. If so, has there been a determination made and documented prior to any disciplinary action of whether the misconduct prompting the disciplinary action was the result of the student's handicapping condition?
 - b. If the student's misconduct is the result of his or her handicapping condition, any consequences should be through the IEP process, not disciplinary procedures.
2. Is the proposed disciplinary measure related to activities associated with the school? A student should not be disciplined (e.g. suspended or expelled) solely because charges are pending or a conviction has been obtained against him or her in court. See Leonard v. School Comm., 212 N.E. 2d 468 (Mass. 1965); Smith v. Little Rock School District, 582 F.Supp. 159 (E.D. Ark. 1984).
3. Has the student received some kind of advance notice of prohibited behavior and of consequent disciplinary action (e.g. a published student code which has been reviewed by the school at the beginning of the year and/or which has been sent to the student's parents)? Ingraham v. Wright, 498 F.2d 909 (5th Cir. 1976); Smith v. Little Rock School District, 582 F.Supp. 159 (E.D. Ark. 1984).
4. Is this an emergency situation where a student may be suspended from school without a hearing because his or her continued presence in school would be a clear and present danger to persons or property in school or an on-going threat of disruption of the academic process? See Goss v. Lopez, 419 U.S. 565 (1975).
 - a. If so, an informal hearing should be afforded the student as soon as practicable following the suspension. If a formal hearing is indicated from the student's misbehavior, that hearing should be held as soon as possible. Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992 (5th Cir. 1975); See Stricklin v. Regents of Univ. of Wisconsin, 297 F.2d 416 (W.D. Wis. 1969).

- b. _____ If not, the student should be afforded an informal hearing promptly following the misconduct or the discovery thereof.

SHORT-TERM SUSPENSIONS (10 DAYS OR LESS)

- _____ 5. Has the student received an "individualized" investigation of his or her case by a school administrator? Goss
- _____ 6. Has the student received oral or written notice of the specific misconduct of which he or she is accused and the proposed disciplinary measure? Goss
- _____ 7. If the student denies the charges, has he or she been given an explanation of the evidence the school authorities have and an opportunity to present his or her version of the facts? Goss
- _____ 8. Where the suspension is not immediate, has the student been afforded appropriate educational opportunities during the period prior to the determination that suspension is warranted? See No. 31
- _____ 9. Has there been an objective finding of the student's misconduct by an impartial decisionmaker? See Sullivan v. Houston Indep. School Dist., 475 F.2d 1071 (5th Cir. 1973), cert. den. 414 U.S. 1032 (1974).
- _____ 10. Has the student's parent(s) or guardian(s) been notified of the above? French v. Cornwall, 276 N.W. 2d 216 (1979).
- _____ 11. Has a written decision been rendered in the student's case?
- a. _____ Does it document all of the above steps?
- b. _____ Does it clearly state the sanction imposed?
- _____ 12. Has the student been informed of the right to informal review or to appeal the suspension? See No. 16b
- a. _____ Does the school disciplinary notice sent the student clearly set out the form the appeal is to take? If the right is only to informal review without any further right of appeal to the State Board of Education, that limitation should be set out. If the right of appeal implicates review by the State Board of Education, the guidelines for long-term suspensions or expulsions should be followed. 14 Del.C. sec. 1058; Regulations for the Conduct of Hearings Before the State Board of Education Pursuant to 14 Del.C. sec. 1058, January 20, 1977.

- b. _____ Does the notice clearly set out the student's rights on appeal? See No. 16, below.
- c. _____ Does the notice inform the student of whether the hearing must be requested (and the time period within which such a request must be made) or whether it will be scheduled automatically?
- _____ 13. If short-term suspension is merely a prelude to a suspension of more than 10 days or expulsion, has the student been given notice of his right to a formal hearing (appeal)? See No. 16, below.
- a. _____ Do the school disciplinary rules and the notice sent the student clearly set out the procedures to be followed for a formal hearing (appeal)?
- b. _____ Does the notice clearly set out the student's rights on appeal (formal hearing)?

LONG-TERM SUSPENSION (MORE THAN 10 DAYS) OR EXPULSION:

- _____ 14. Have all of the procedural steps set out above been followed? (If the steps taken above implicate review by the State Board of Education, the subsequent guidelines should be followed.)
- _____ 15. Does the student wish to relinquish, abandon or waive his right to a formal hearing? Sullivan v. Houston Indep. School Dist., 475 F.2d 1071 (5th Cir.), cert. denied, 414 U.S. 1032 (1973).
- a. _____ If so, is it adequately documented that the student clearly understood his or her right to the hearing and that his or her actions constituted a relinquishment, abandonment or waiver? Lopez v. Williams, 372 F.Supp. 1279 (D.C. Ohio), aff'd. sub nom. Goss v. Lopez, 419 U.S. 565 (1975).
- b. _____ If the student refused to or failed to participate in the hearing, have the school's efforts to inform the student of his or her rights and to seek the student's participation in the hearing been documented clearly? Scott v. Alabama State Bd. of Educ., 300 F.Supp. 763 (D.C. Ala. 1969). See Wright v. Southern Texas University, 277 F.Supp. 110 (S.D. Tex. 1967), aff'd., 392 F.2d 728 (5th Cir. 1968).

- ___ 16. Has the student received the following:
- a. ___ Written notice of the specific misconduct of which the student is accused, the factual basis of the charges and the specific provisions of the student disciplinary code allegedly violated? Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir.), cert. den., 368 U.S. 930 (1961); Strickland v. Inlow, 519 F.2d 744 (8th Cir. 1975).
 - b. ___ Written notice of the right to a hearing, the student's rights on appeal or at the hearing and the procedures to be followed? Goss; Dixon; Graham v. Knutzen, 351 F.Supp. 642 (D.Neb. 1972), aff'd on reh'g. 362 F.Supp. 881 (D.Neb. 1973).
 - c. ___ Written notice of the date, time and place of the hearing, given so that the student has sufficient time to enable him or her to prepare a defense? Dixon; Texarkana Indep. School Dist. v. Lewis, 470 S.W.2d 727 (Tex.Civ.App. 1971); Smith v. Miller, 514 P.2d 377 (Kan. 1973).
 - d. ___ Written notice of the student's right to be represented by legal counsel or an adult advisor? Black Coalition v. Portland School District No. 1, 484 F.2d 1040 (9th Cir. 1973); Diggles v. Corsicana Indep. Sch. Dist., 529 F.Supp. 169 (N.D.Tex. 1981); but see Linwood v. Bd. of Educ., 463 F.2d 763 (7th Cir.), cert. den. 409 U.S. 1027 (1972).
 - e. ___ A copy of the student disciplinary code and applicable procedures? See DeJesus v. Penberthy, 344 F.Supp. 70, 77 (D.Conn. 1972).
- ___ 17. Has the student been given the right to an open or closed hearing? 29 Del.C. sec 10004(b)(7).
- ___ 18. Has the student had access to the evidence before the hearing, including, where requested, a summary of the proposed testimony of witnesses? Dixon; Graham; Smith v. Miller, but see Linwood v. Board of Educ., 463 F.2d 763 (7th Cir. 1972).
- a. ___ If disclosure of requested evidence is prohibited by the Family Educational Rights and Privacy Act, or State law or State Board rule and regulation, has this been documented clearly and notice given the student? See Family Educational Rights and Privacy Act, 20 U.S.C. sec. 1232 g; See also Brown v. Knowlton, 370 F.Supp. 1119 (S.D.N.Y.), aff'd 505 F.2d 727 (2d Cir. 1974).

- b. _____ If disclosure of requested evidence would result in reprisals against witnesses, has this anticipated result been documented clearly and notice been given the accused student? See Graham v. Knutzen, Id.
- _____ 19. Has the student been afforded the right to present witnesses and to confront and cross-examine opposing witnesses? See No. 23k, below. Where the school can require attendance by a requested witness, have those witnesses been asked to attend the hearing? See Abbott, Due Process and Secondary School Dismissals, 20 Case W.Res. 378, 395 (1969); Rapp, 2 Education Law sec. 9.05 (3) (d) (v.1.) (1986); See DeJesus v. Penberthy, Id. but see Greene v. Moore, 373 F.Supp. 1194 (N.D.Tex. 1974).
- _____ 20. Has a verbatim record been made of the hearing? Regulations for Deciding Controversies Before Local Boards of Education, January 20, 1970 I(d), II(a).
- _____ 21. Has the hearing been held by an impartial decision-maker (tribunal)? See Gonzalez v. McEuen, 435 F.Supp.460 (D.C. Cal 1977).
- a. _____ Has the decision-maker testified in the hearing? See Warren v. National Ass'n of Secondary School Principals, 375 F.Supp. 1043, (N.D.Tex. 1974).
- b. _____ Has the decision-maker participated in bringing or in investigating the charges? Gonzalez; Sullivan v. Houston Indep. Sch. Dist., 475 F.2d 1071 (5th Cir.), cert. denied 414 U.S. 1032 (1973); but see Winnick v. Manning, 460 F.2d 545 (2d Cir. 1972).
- c. _____ Has the decision-maker other, outside, specific knowledge of the evidence so as to have impugned his fairness? Gonzalez.
- d. _____ Is the decision-maker otherwise impartial? Gonzalez.
- _____ 22. If the attorney for the school serves as both attorney for the decision-maker (tribunal) and prosecutor, can it be shown that the attorney performed both roles without prejudice or bias? (The better view is that the attorney should not serve in both roles. The administration should present the case or an additional attorney should fill one of the roles.) See Gonzalez; Appeal of Feldman, 346 A.2d 895, 896 (Pa.Comm.Pl. 1975); but see Alex v. Allen, 409 F.Supp. 379, 387 (W.D.Pa. 1976).

- ___ 23. When the hearing was conducted was the subsequent format followed?
- a. ___ The presiding officer should declare the hearing convened, and state the date, time and matter to be considered.
 - b. ___ If a board is hearing the matter, the presence of its members (by name) should be established and the existence of a quorum confirmed.
 - c. ___ All other persons participating in the hearing should be identified by name and their interest in the matter.
 - d. ___ It should be stated whether the student wishes the matter to be heard in open or closed session. 29 Del.C. sec. 10004(b)(7). If closed, all persons without proper interest in the matter should be excluded. Linwood. Witnesses may be excluded on request.
 - e. ___ The presiding officer should state the procedures to be followed in the hearing, and the parties should be allowed to make any objections to the time, date, place, or procedures of the hearing or the impartiality of any member of the tribunal or the decision-maker. See Board of Trustees v. Speigel, 549 P.2d 1161 (Wyo. 1976).
 - f. ___ The charges against the student should be read, and the student should be requested to confirm that he has received a copy of them. See No. 16.
 - g. ___ If any matters have been stipulated to or agreed upon, the parties should be requested to present them.
 - h. ___ Each party should be afforded a specific amount of time in which to make an opening statement.
 - i. ___ The district should then proceed to present its evidence, and thereafter the student should present his or her evidence. Each party should be allowed to present rebuttal, and if needed surrebuttal evidence.
 - j. ___ Although strict evidentiary rules need not be followed, the parties should be given the opportunity to present relevant, material and

reliable evidence, to make objections for the record and to have clear ruling made on those objections. See Boykins v. Bd. of Education, 492 F.2d 697 (5th Cir. 1974); Morale V. Grigel, 422 F.Supp. 988 (D.N.H. 1976); DeJesus v. Penberthy, 344 F.Supp. 70 (D.Conn. 1972).

k. _____ Each party should be given the opportunity to cross-examine the opposing witnesses. Black Coalition; DeJesus; Givens v. Poe, 346 F.Supp. 202, 209 (W.D.N.C. 1972), but see Dixon; Boykins.

l. _____ Where criminal penalties attach, the student may be given the right to remain silent. Caldwell v. Canady, 340 F.Supp. 835, 841 (N.D.Tex. 1972); but see Madera v. Board of Educ., 386 F.2d 788, 780 (2d Cir. 1967), cert. denied 390 U.S. 1028 (1968); Garrity v. New York, 385 U.S. 493 (1967).

m. _____ At the close of the evidence, each party should be afforded time to make a closing statement.

n. _____ The decision-maker (tribunal members) may be given the opportunity to ask questions at the close of the presentation. See State v. Milwaukee Bd. of School Directors, 111 N.W.2d 198 (1961).

o. _____ The hearing should be closed by the presiding officer with an explanation of when and how a decision will be rendered in the matter, and the decision-maker (tribunal) may go into closed session to consider the evidence.

_____ 24. Have only the members of the tribunal, or hearing officer, and their attorney(s) or advisor(s) attended the deliberations or participated in the decision? Gonzalez v. McEuen, Id.

a. _____ Should any of these participants been barred from the deliberations because of lack of impartiality? (See Nos. 21, 22, above).

_____ 25. If a board subject to the Freedom of Information Act is hearing the matter, has the board come back into open session to vote on its decision? 29 Del.C. sec. 10004(c).

_____ 26. Has the decision reached been supported by "substantial evidence"? Regulations for the Conduct of Hearings Before the State Board of Education Pursuant to 14 Del.C. sec. 1058, January 20, 1977, IIIa.

- ___ 27. Has the decision-maker rendered a written decision, setting forth findings of fact, the basis of the decision in law or the student disciplinary code, and the disciplinary action to be imposed, if any?
- a. ___ Has the full decision been entered in the local board's minutes. Regulations for Deciding Controversies Before Local Boards of Education (January 20, 1977), 11b.
- ___ 28. Has a copy of the written decision been sent to the student? See Dixon.
- ___ 29. Has the student been advised in writing of his rights of administrative and/or judicial review of the decision, if any?
- ___ 30. If the student has admitted misconduct but still maintains the penalty should not be imposed, has he or she been afforded the opportunity to have the above detailed hearing on the penalty? See Betts v. Board of Educ., 466 F.2d 629 (7th Cir. 1972).
- ___ 31. Has the student been afforded appropriate educational opportunities during the period prior to the formal hearing? Failure to provide educational alternatives presupposes "guilt before conviction."

GENERAL CONSIDERATIONS:

- ___ 32. If the student is handicapped, and a determination has been made that his or her misconduct was not the result of his or her handicapping condition, is the student's exclusion from school in accordance with federal and State law and rules and regulations? See Administrative Manual: Programs for Exceptional Children, A.I.1.
- ___ 33. If the student is a minor (under 18), has his or her parent(s) or guardian(s) been given the right to act on his or her behalf? If a student is handicapped, P.L. 94-142 gives parent(s) or guardian(s) the right to act on that student's behalf to age 21, with respect to rights guaranteed under the Act. 1 Del.C. sec. 701; 13 Del.C. sec. 701, et seq.; Administrative Manual: Programs for Exceptional Children,