DISABILITIES LAW PROGRAM

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MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Recent Regulatory Initiatives

Date: December 9, 2015

Consistent with the requests of the SCPD and GACEC, I am providing an analysis of ten (10) regulatory initiatives in anticipation of the December 10, 2015 SCPD P&L Committee meeting. Given time constraints, the analyses should be considered preliminary and non-exhaustive.

1. DOE Final License & Cert. Of Adult Prison Education Emp. Reg. [19 DE Reg. 487 (12/1/15)]

The SCPD and GACEC commented on the proposed version of this regulation in September, 2015. A copy of the September 29, 2015 SCPD letter is attached for facilitated reference. The Department of Education is now adopting a final regulation with multiple amendments prompted by the commentary.

First, the Councils identified an error in numbering. The DOE confirmed that this was due to a publishing error by the Register of Regulations which the Register staff agreed to correct.

Second, the Councils recommended substituting "public education employee" for "public school employee". The DOE agreed and effected the substitution in 3 sections.

Third, the Councils identified both numbering and content irregularities within Section 4. The DOE confirmed that the numbering discrepancy was due to a publishing error by the Register of Regulations which the Register staff agreed to correct. The DOE also agreed with the content concern and deleted a section in its entirety.

Fourth, the Councils recommended reconsideration of including a discretionary "disloyalty" reference in §12.2. The DOE decided to retain the term.

Since the regulation is final, and the DOE addressed each comment, no further action is warranted.

2. DOE Final DIAA Sportsmanship Regulation [19 DE Reg. 493 (12/1/15)]

The SCPD and GACEC commented on the proposed version of this regulation in August, 2015. A copy of the August 26, 2015 SCPD letter is attached for facilitated reference. The Department of Education has now adopted a final regulation incorporating multiple amendments based on the commentary.

First, the Councils identified an "overbroad" ban on use of "over-the-counter" drugs and legal use of tobacco and alcohol by athletes over 18 and 21 respectively. The DOE eliminated the ban and substituted the following standard for coaches: "Establish policies which discourage the unlawful use of drugs, medications, and non-prescription drugs."

Second, the Councils identified a grammatical error in §1.2.1.5.4.1. The DOE corrected the grammar.

Since the regulation is final, and the Division adopted amendments based on each identified concern, no further action is warranted.

3. DOE Final School Health Record Keeping Regulation [19 DE Reg. 490 (12/1/15)]

The SCPD and GACEC commented on the proposed version of this regulation in October, 2015. A copy of the October 15, 2015 GACEC letter is attached for facilitated reference. The Department of Education has now adopted a final regulation with multiple amendments prompted by the commentary.

First, the Councils identified ambiguity in a reference to "issued medication". The DOE amended the reference to "issued or prescribed medications.

Second, the Councils noted that a reference to records of "mandated" testing and screenings would not cover results of discretionary testing and screenings. The DOE deleted the word "mandatory".

Third, the Councils identified several contexts in which school athlete health records are compiled, including "return to play" authorizations. However, the regulation omitted such records as documents included in the Delaware School Health Record. The DOE added a Council-recommended reference verbatim, i.e., "student athlete health records compiled in compliance with DIAA regulations".

Fourth, the Councils suggested that the DOE consider adding an email address to the Emergency Nursing Treatment Card. The DOE declined to add the reference but noted that public schools could include an email address in their discretion.

Fifth, in §2.1.4, the Councils recommended amending a reference to include guardians and relative caregivers. The DOE agreed and adopted the suggested language verbatim.

Since the regulation is final, and the DOE addressed each comment submitted by the Councils, no further action is warranted.

4. DMMA Final Hippotherapy Regulation [19 DE Reg. 513 (12/1/15)]

The SCPD and GACEC commented on the proposed version of this regulation in September, 2015. A copy of the September 29, 2015 SCPD letter is attached for facilitated reference. In a nutshell, the Councils endorsed the proposed regulation subject to consideration of two amendments. The Division of Medicaid & Medical Assistance is now adopting a final regulation with one amendment prompted by the commentary.

First, the Councils documented that only 1 therapist in the entire State met the qualifications to provide Hippotherapy under the eligibility standards. The Councils recommended provisional eligibility of American Hippotherapy Certification Board "member therapists" until December 31, 2016. The Division disagreed based on the lesser demonstrated skill sets of member therapists in contrast to "certified Hippotherapy Professional Clinical Specialists".

Second, the Councils strongly objected to a recital that OT is only covered if expected to result in improvement of function. The Councils noted that the recital was at odds with federal and State regulations which authorize OT for "restoration of function" or prevention of "worsening" of function. The Division deleted the policy statement from the regulation.

Since the regulation is final, and the Division responded to each comment, no further action is warranted.

5. DMMA Final Private Duty Nursing (PDN) Regulation [19 DE Reg. 507 (12/1/15)]

The SCPD and GACEC commented on the proposed version of this regulation in October, 2015. A copy of the October 28 SCPD letter (minus appendix) is attached for facilitated reference. One of the Medicaid MCOs, Highmark Health Options, also submitted comments generally objecting to many provisions as "expanding coverage". DMMA disagreed and effected no amendments based on Highmark's comments. At 509-511.

The Councils noted that the Division of Medicaid & Medical Assistance had previously adopted revisions to a pre-publication draft based on DLP commentary. The Councils endorsed the published proposed regulation subject to nine (9) considerations.

First, the Councils characterized a recital that costs of PDN not exceed institutional costs as inconsistent with the ADA and CMS guidance. DMMA did not amend the reference but did clarify that a variety of factors should be considered, including cost, ..."with an emphasis on the importance of preventing or delaying institutionalization".

Second, the Councils questioned a reference to "certified registered nurse practitioner". DMMA consulted the Board of Nursing and revised the reference to "advance practice registered nurse (APRN)".

Third, the Councils recommended substituting "prescribing practitioner" for "attending practitioner" in §3.1.1.2. DMMA agreed and effected the substitution.

Fourth, the Councils recommended expanding a prior authorization reference to cover not only a DMMA nurse, but an MCO nurse as well. DMMA adopted no amendment.

Fifth, the Councils recommended substituting "DMAP" for "DMMA" in §5.2.2. DMMA agreed and effected the substitution.

Sixth, the Councils observed that a reference to "face to face" nursing assessment was being deleted inferentially based on the availability of telemedicine. DMMA thanked the Councils for the comment without embellishing intent.

Seventh, the Councils recommended reconsideration of a requirement of a consumer-provided caregiver during non-authorized PDN hours. DMMA declined to amend the requirement.

Eighth, the Councils prompted reconsideration of a recital that parental consent to an IEP which includes PDN equates to parental consent to use of Medicaid to fund PDN. The Councils submitted contrary federal guidance. DMMA amended the reference to authorize PDN "with parental consent".

Ninth, the Councils noted that DMMA was adopting an incorrect legal standard by requiring a school to demonstrate an inability to meet the medical needs of school age children as a prerequisite to Medicaid coverage of PDN. DMMA deleted the reference

Since the regulation is final, and the Division adopted several revisions based on the Councils' commentary, a "thank-you" communication should be considered.

6. DOE Proposed Instructional Program Requirements Regulation [19 DE Reg. 455 (12/1/15)]

The Department of Education is proposing to adopt some discrete changes to its instructional program standards. Most of the revisions are non-substantive. There are a few exceptions.

First, § 5.4 allows any "licensed medical provider" to authorize an exemption from physical education. This would include an OT, PT, ST or licensed practical nurse. The analogous "homebound" regulation (14 DE Admin Code 930.2.2.) is somewhat more restrictive , referring to physicians, advanced practice nurses, physician assistants, and psychologists. I have no preference in approach. On the one hand, authorizing a speech/language therapist to exempt a student from PE could be perceived as "overbroad". On the other hand, there are many mental health practitioners apart from psychologists who would have the background to authorize an exemption based on psycho-social reasons. See Title 24 Del.C. Ch. 39 (licensed clinical social worker); Title 24 Del.C. Ch. 30 (professional counselor of mental health; family therapist).

Second, the availability of career and technical education programs of study is expanded in §7.0. For example, §7.2 recites as follows:

7.2. All public school students in grades 9 through 12 in local school districts, and charter schools when consistent with the charter school's approved program, shall be provided with the opportunity to enroll in and complete a career and technical education program of study.

This merits endorsement.

The Councils may wish to endorse the regulation while sharing the above observations.

7. DOE Prop. High School Interscholastic Athletics Reg. [19 DE Reg. 462 (12/1/15]

The SCPD and GACEC commented on an earlier version of this proposed regulation in August. A copy of the August 26, 2015 SCPD letter (minus appendix) is attached for facilitated reference. The Department of Education is now publishing a revised proposed regulation which attempts to address some of the concerns raised by the Councils.

I have the following observations.

First, one section which remains unchanged is §2.1.1. I therefore recommend reiteration of the following italicized comment:

> *Second, §2.1.1 is difficult to interpret. It recites that a student turning 19 on or after June 15 immediately preceding the student's year of participation shall be eligible for all sports provided all other eligibility requirements are met. There is no definition of "student's year of participation". Moreover, there is no comparable guidance for a student who becomes age 20 or 21 on or after June 15. Students are generally eligible to attend school at least through age 20. See 14 Del.C. §202(a). An IDEA-classified student is often eligible for education past his/her 21st birthday. See 14 Del.C. §3101(1). The implication of §2.1.1 is that 19 year olds can play all sports but 20 year olds are barred from all sports. If this is accurate, it reflects a rather "brittle" approach to eligibility which deters participation in athletics.*

Second, the Councils noted in their August commentary that an attempt to create an age waiver protocol for students with disabilities was well intentioned but problematic in several respects. The age waiver protocol (former proposed §2.1.1.2) has been stricken from the revised proposed regulation to allow further analysis. The DOE provided the following rationale:

> There were also comments regarding the age waiver protocol for students with disabilities being limited to students with an IEP and not covering students with 504 Plans, and the involvement of the IEP team. After considering these public comments, the DIAA Board voted to remove this proposed change for further consideration and analysis at this time. Due to the fact that this is a substantive change, the regulation is being republished for comment.

At 463. The Councils may wish to offer technical assistance to the DOE in this context.

Third, in the August commentary the Councils noted that use of a definition of "student with a disability" which covered only IDEA-identified students to the exclusion of §504-identified students was ill-conceived. The DOE has attempted to address this observation by adopting the following revised definition of "student with a disability" in §1.1:

> "Student with a Disability" means a "child with a disability" as that term is defined in 14 DE Admin Code 922 or Section 504 of the Rehabilitation Act of 1973.

There are two problems with the new definition:

A. Section 2.3.3.1 contains a definition of "Student with a Disability" which is limited to IDEA-identified students. Since the definition in §1.1 cover the entire regulation, the inconsistent definition in §2.3.3.1 should be stricken.

B. Section 504 of the Rehabilitation Act does not define "student with a disability". Consider the following revision:

> "Student with a Disability" means a "child with a disability" as defined in 14 DE Admin Code 922 or a qualified person with a disability under Section 504 of the Rehabilitation Act.

Compare 14 DE Admin Code 930.1.3.

Fourth, §2.3.3.2.1 remains unchanged from the August version of the regulation. I therefore recommend reiteration of the following italicized comment:

> *Fifth, §2.3.3.2 provides as follows:*
>
> *2.3.3.2. A student with a disability who is placed in a special school or program shall be eligible to participate in interscholastic athletics as follows:*
>
> > *2.3.3.2.1. If the special school or program sponsors the interscholastic sport in question, the student shall be eligible to participate only at the school or program.*
>
> *This violates federal and State law since it categorically bars a student with a disability from any opportunity to participate in a non-segregated team. It rigidly limits a student with a disability to participate in a team exclusively comprised of students with disabilities of the special school (e.g. Sterck). The DOE has an affirmative obligation to promote opportunities for participation in integrated extracurricular activities. See 14 DE Admin Code 923.17.0; 34 C.F.R. §§104.34(b) and 104.37(c)(2); and 34 C.F.R. §300.117.*

The following italicized sentences could be added to the commentary:

> *For example, 14 DE Admin Code 923.17.0 recites as follows:*

In providing or arranging for the provision of nonacademic and extracurricular services and activities, ...each public agency shall ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child".

[emphasis supplied]

The sponsors of the "unified sports" bill (H.B. No. 175) recently stressed that public policy and federal law support integrated athletics:

> *The General Assembly recognizes that unified sports offer benefits to all students and serve as a potential tool for schools that are required to meet Section 504 of the federal Rehabilitation Act of 1973, 29 U.S.C. §794, regarding providing extracurricular activities, and 14 Del. Admin. C. §923-7.1 and 7.2.*

Fifth, §2.6.1.1 remains unchanged from the August version of the regulation. I therefore recommend reiteration of the following italicized variation of the earlier comment:

Section 2.6.1.1 authorizes an accommodation for a student with a disability with an IEP but not a student with a disability with a Section 504 Plan. The section should be modified to also cover students with a Section 504 Plan. Consistent with the attached 2013 federal guidance, footnote 8, Section 504-identified students are entitled to similar protections and accommodations. The DOE has provided assurances that it does not discriminate based on "disability", not simply IDEA-identified disability. See 14 DE Admin Code 225.1.0.

Sixth, §2.7 remains substantively unchanged from the August version of the regulation. I therefore recommend reiteration of the following italicized comment:

Seventh, §2.7 bars a student from participating in athletics after 4 consecutive years from the date of the student's first entrance into the 9th grade. It also bars a student who had more than 4 "opportunities" to participate in sports. The regulation authorizes the DIAA to issue a "hardship" waiver. The standards place the "burden of proof" on the student and the DIAA considers disability-related factors such as extended illness, debilitating injury, and emotional stress. For a student with a disability, the decision of whether a student should participate in extracurricular activities such as athletics is the province of the IEP or Section 504 team. Such decision-making does not involve a "burden of proof". The team would decide if such participation is appropriate as part of a FAPE.

Seventh, based on the Councils' August "Special Olympics" commentary, the DOE added the following section:

> 6.6.2.6 Nothing in this regulation shall be construed as prohibiting schools from providing transportation or school supplied assistive technology and equipment to or for non-school activities for students with disabilities.

While written in the negative, this does represent an improvement from the August version.

Eighth, the new regulation is rife with a common grammatical error which did not appear in the August version. The DOE has substituted a plural pronoun ("their" or "they") with a singular antecedent ("student") throughout the regulation. The following sections are illustrative: §§2.2.1; 2.2.1.1; 2.2.1.2; 2.2.1.3; 2.2.1.7; 2.3.1; 2.3.2; 2.6.1.1; 2.6.2.2; 2.7.1.2; and 2.7.1.2.3. To correct the error, the DOE could substitute "student" or "student's" as done in §§2.2.1. and 2.2.1.8. Alternatively, consistent with the Delaware Administrative Code Style Manual, §7.2 and Title 1 Del.C. §304, the masculine version of the pronoun could be used.

The Councils may wish to consider sharing the above observations with the Department and SBE.

8. DOE Prop. Jr. H.S. & Middle School Intersch. Athletics Reg. [19 DE Reg. 461 (12/1/15)]

The SCPD and GACEC commented on an earlier version of this proposed regulation in August. A copy of the August 26, 2015 SCPD letter (minus appendix) is attached for facilitated reference. The Department of Education is now publishing a revised proposed regulation which attempts to address some of the concerns raised by the Councils.

I have the following observations.

First, the Councils noted in their August commentary that an attempt to create an age waiver protocol for students with disabilities was well intentioned but problematic in several respects. The age waiver protocol (former proposed §2.1.3) has been stricken from the revised proposed regulation to allow further analysis. The DOE provided the following rationale:

> There was also a comment regarding the age waiver protocol for students with disabilities being limited to an IEP and not expanded to cover 504 Plans, and the involvement of the IEP team. After considering public comment, the DIAA Board voted to remove this proposed change for further consideration and analysis at this time. Due to the fact that this is a substantive change, the regulation is being republished for comment at this time.

At 461. The Councils may wish to offer technical assistance to the DOE in this context.

Second, in the August commentary the Councils noted that use of a definition of "student with a disability" which covered only IDEA-identified students to the exclusion of §504-identified students was ill-conceived. The DOE has attempted to address this observation by adopting the following revised definition of "student with a disability" in §1.1:

> "Student with a Disability" means a "child with a disability" as that term is defined in 14 DE Admin Code 922 or Section 504 of the Rehabilitation Act of 1973.

There one problem with the new definition, i.e., Section 504 of the Rehabilitation Act does not define "student with a disability". Consider the following revision:

"Student with a Disability" means a "child with a disability" as defined in 14 DE Admin Code 922 or a qualified person with a disability under Section 504 of the Rehabilitation Act.

Compare 14 DE Admin Code 930.1.3.

Third, §2.3.2.2.1 remains unchanged from the August version of the regulation. I therefore recommend reiteration of the following italicized comment:

Fifth, §2..3.2.2 provides as follows:

2.3.2.2. A student with a disability who is placed in a special school or program shall be eligible to participate in interscholastic athletics as follows:

2.3.2.2.1. If the special school or program sponsors the interscholastic sport in question, the student shall be eligible to participate only at the school or program.

This violates federal and State law since it categorically bars a student with a disability from any opportunity to participate in a non-segregated team. It rigidly limits a student with a disability to participate in a team exclusively comprised of students with disabilities of the special school (e.g. Sterck). The DOE has an affirmative obligation to promote opportunities for participation in integrated extracurricular activities. See 14 DE Admin Code 923.17.0; 34 C.F.R. §§104.34(b) and 104.37(c)(2); and 34 C.F.R. §300.117.

The following italicized sentences could be added to the commentary:

For example, 14 DE Admin Code 923.17.0 recites as follows:

In providing or arranging for the provision of nonacademic and extracurricular services and activities, ...each public agency shall ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child".

[emphasis supplied]

The sponsors of the "unified sports" bill (H.B. No. 175) recently stressed that public policy and federal law support integrated athletics:

The General Assembly recognizes that unified sports offer benefits to all students and serve as a potential tool for schools that are required to meet Section 504 of the federal Rehabilitation Act of 1973, 29 U.S.C. §794, regarding providing extracurricular activities, and 14 Del. Admin. C. §923-7.1 and 7.2.

Fourth, §2.6.1.1 remains unchanged from the August version of the regulation. I therefore recommend reiteration of the following italicized variation of the earlier comment:

Section 2.6.1.1 authorizes an accommodation for a student with a disability with an IEP but not a student with a disability with a Section 504 Plan. The section should be modified to also cover students with a Section 504 Plan. Consistent with the attached 2013 federal guidance, footnote 8, Section 504-identified students are entitled to similar protections and accommodations. The DOE has provided assurances that it does not discriminate based on "disability", not simply IDEA-identified disability. See 14 DE Admin Code 225.1.0.

Fifth, §2.7 remains substantively unchanged from the August version of the regulation. I therefore recommend reiteration of the following italicized comment:

Sixth, §2.7 bars a student from participating in athletics after 4 consecutive semesters from the date of the student's first entrance into the 7th grade. It also bars a student who has had more than 2 "opportunities" to participate in sports. The regulation authorizes the DIAA to issue a "hardship" waiver. The standards place the "burden of proof" on the student and the DIAA considers disability-related factors such as illness, injury, and accidents. For a student with a disability, the decision of whether a student should participate in extracurricular activities such as athletics is the province of the IEP or Section 504 team. Such decision-making does not involve a "burden of proof". The team would decide if such participation is appropriate as part of a FAPE. In addition, SCPD understands that some covered schools have three (3) years of enrollment (e.g. grades 6th, 7th, and 8th) and the regulation does not appear to address this situation.

Sixth, based on the Councils' August "Special Olympics" commentary, the DOE added the following section:

> 6.6.2.6 Nothing in this regulation shall be construed as prohibiting schools from providing transportation or school supplied assistive technology and equipment to or for non-school activities for students with disabilities.

While written in the negative, this does represent an improvement from the August version.

Seventh, the new regulation is rife with a common grammatical error which did not appear in the August version. The DOE has substituted a plural pronoun ("their";"they"; "them") with a singular antecedent ("student"; "child") throughout the regulation. The following sections are illustrative: §§2.2.1; 2.2.1.1; 2.2.1.2; 2.2.1.3; 2.2.1.7; 2.3.1; 2.3.3; 2.3.4; 2.2.7; 2.4.2; 2.4.2.3.1; 2.5.1; 2.5.1.5; 2.5.1.7; 2.5.2; 2.5.3; 2.6.1.1; 2.6.2.2; 2.6.2.3; 2.6.3; 2.6.5; 2.7.1.; 2.7.1.2; 2.7.1.2.2; 2.7.1.2.3; 2.7.1.2.3; and 2.7.2. To correct the error, the DOE could substitute "student" or "student's". Alternatively, consistent with the Delaware Administrative Code Style Manual, §7.2 and Title 1 Del.C. §304, the masculine version of the pronoun could be used.

The Councils may wish to consider sharing the above observations with the Department and SBE.

9. DOE Prop. Alt.Placement Mtgs. & Exp. Hearing Due Process Reg [19 DE Reg. 458 (12/1/15)]

The Department of Education proposes to create a new regulation defining uniform due process standards for disciplinary matters and placement in alternative disciplinary settings.

I have 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 1 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. No. 1 for H.B. No. 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 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.

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, I recommend 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. Morreover, 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).

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. No. 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 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.

The Councils may wish to share the above observations with the ACLU, McAndrews, DOE, SBE, New County Councilman Jea Street, the Attorney General, and other policymakers.

10. DSCYF Proposed Juvenile Mental Health Screeners Regulation [19 DE Reg. 473 (12/1/15)]

Marissa Band, a DLP staff attorney, participated in the drafting of this regulation and provided the gist of the following analysis.

The Division of Prevention and Behavioral Health Services of the Department of Services of Children Youth and Their Families proposes to adopt a regulation controlling the following aspects of juvenile mental health screeners: 1) who can become a screener; 2) the application process; 3) training process; 4) performance oversight; 5) suspensions/revocation of screener status; 6) appeals; and 7) related issues, as authorized by HB 346 of the 147th Delaware General Assembly.

The rationale for the adoption is as follows: "The purpose of this notice is to advise the public that the Delaware Department of Services for Children, Youth and Their Families/Division of Prevention and Behavioral Health Services (DSCYF/DPBHS) proposes to promulgate regulations for the Juvenile Mental Health Screeners."

The Department is seeking to expand the pool of individuals who can currently screen and detain juveniles. Presently only psychiatrists, board certified emergency physicians, and physicians can screen and detain individuals under the age of 18. This creates problems for youths with mental health disabilities, as they often must add a stop to the emergency room, to be screened by a qualified screener, in order to be admitted to a psychiatric hospital.

With this regulation, the Department is expanding the scope of Juvenile Mental Health Screeners to a include some discrete classes of professionals: certain licensed non-physician mental health professionals who have completed DPBHS's juvenile mental health screener training or DSAHM's mental health screener training who have a current employment or contract relationship with DSCYF operated facility, DPBHS crisis services, or a Delaware licensed mental health hospital under contract with the Department.

DPBHS will monitor the use of detainment of youths via multiple provisions of the regulation:

•6.2.2: DPBHS will collect and monitor all DPBHS Emergency Detainment Request Forms for detainments paid in whole or in part by DPBHS.

•6.2.3: For youth who are not presently involved with DPBHS, DPBHS will collect aggregate data from the psychiatric facilities in a monthly report. DPBHS can request a redacted copy of the Emergency Detainment Request form for specific juveniles, or in aggregate.

•6.3: Record keeping compliance monitoring will occur.

•6.3.1 :DPBHS aggregate data of juvenile mental health screener detentions will be available to the public.

•6.3.2: Review for anomalies in detainment rates will occur.

•7.1.5 and 7.1.6: Suspension of juvenile mental health screener status is authorized due to concerns with performance, including overuse of emergency detainments, or concerns identified in a complaint or appeal submitted to DPBHS's Quality Assurance Department.

•7.1.6: DPBHS's psychiatrist will review any complaints or appeals having to do with a juvenile mental health screener.

I identified one context for improvement. For enhanced clarity, the first sentence of 3.2.3.2. could be revised as follows: "Current employment or contract relationship required with one of the following: DSCYF operated facility, DSCYF crisis services, or a Delaware licensed mental health hospital under contract with DSCYF."

The Councils may wish to share the above observations with the Department. Otherwise, since the proposal should remove an impediment to quickly accessing emergency mental health services, and creates mechanisms for DPBHS to monitor the use of detainments of juveniles, the Councils may wish to consider an endorsement.

Attachments
E:legis/1215bils
F:pub/bjh/legis/2015p&l/1215bils

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September 29, 2015

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

RE: 19 DE Reg. 163 [DOE Proposed License & Certification of DOE, Adult & Prison Education Employees Regulation]

Dear Ms. Shockley:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposal to revise its standards applicable to public education employees in the Department, in Adult Education, and in Prison Education Programs whose work responsibilities are directly related to curriculum and instruction. The standards are authorized by Title 14 Del.C.§121(c). The proposed regulation was published as 19 DE Reg. 163 in the September 1, 2015 issue of the Register of Regulations. SCPD has the following observations.

First, the numbering of §10.0 should be corrected. It appears as "710.0".

Second, the DOE should consider some clarifying revisions to address DOE employees. For example, in §1.0, there is a definition of "public education employee" which includes DOE employees. However, the term "public school employees" is used in other sections. See §1.0, definitions of "Instructional Paraeducator", "Service Paraeducator", and "Title 1 Paraeducator". The term "public school" is generally applied to district and charter schools but not the DOE. SCPD assumes that the DOE would at least employ instructional paraeducators in the prison program consistent with §9.1. At a minimum, the definition of "Instructional Paraeducator" could be amended by substituting "public education employee" for "public school employee".

Third, the numbering in Section 4.0 merits revision. There is no Section 4.4. Moreover, there appears to be a "disconnect" between Section 4.6 and the following sections (4.6.1 through 4.7.1). The former deals with license renewal while the balance appears to be an excerpt from license suspension standards.

Fourth, the reference to "disloyalty" in Section 12.2 should be reconsidered. The Secretary is authorized by 14 Del C. Section 1218(a)6) to consider "disloyalty". However, that statutory authorization is discretionary and dates back to at least 1955. In 2015, it makes little sense to take adverse state action on a license based on an investigation of "disloyalty".

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

Sincerely,

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

cc: The Honorable Mark Murphy, 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

19reg163 doe-license-certification adult-prison ed employees 9-28-15

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August 26, 2015

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

RE: 19 DE Reg. 105 [DIAA Proposed Sportsmanship Regulation]

Dear Ms. Shockley:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposal to adopt some amendments to its "sportsmanship" standards applicable to DIAA-regulated athletics. The proposed regulation was published as 19 DE Reg. 105 in the August, 2015 issue of the Register of Regulations. SCPD has the following observations.

First, §1.2.1.5.2.8 requires coaches to "forbid the use of tobacco, alcohol, and non-prescribed drugs...". This is "overbroad" in multiple contexts.

A. Students who have reached the age of 18 can legally use tobacco and students who have reached age 21 can consume alcohol. There is no legal basis for a coach to forbid adult athletes from using tobacco or alcohol when not involved in school functions. Compare 14 DE Admin Code 877. Section 1.2.1.5.2.8 is not limited to school functions and sites.

B. An across-the-board ban on use of "non-prescribed drugs" would penalize an athlete from using even benign over-the-counter drugs (e.g. Neosporin for a cut; Aspirin or Advil for a headache or inflammation reduction). Trainers at athletic contests would be barred from even suggesting use of benign over-the-counter drugs (e.g. Neosporin).

Second, the grammar in §1.2.1.5.4.1 should be corrected. In the second sentence, delete "shall".

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

Sincerely,

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

cc: The Honorable Mark Murphy, Secretary of Education
Mr. Kevin Charles, DIAA
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

19reg105 DIAA sportsmanship 8-26-15

STATE OF DELAWARE

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GEORGE V. MASSEY STATION
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October 15, 2015

Tina Shockley
Education Associate – Policy Advisor
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

RE: 19 DE Reg. 234/14 DE Admin. Code 811 [DOE Proposed School Health Record Keeping Regulation (October 1, 2015)]

Dear Ms. Shockley:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Department of Education (DOE) proposal to adopt revisions to its standards covering school health records. Council would like to share the following observations.

First, in §1.0, definition of "Delaware School Health Record", the reference to "issued medications" is unclear. Does this refer only to medications administered or provided to the student by a school nurse? Alternatively, does it refer to "prescribed" and "non-prescribed" medications? It would make sense to at least include a list of prescribed medications in the record regardless of whether the nurse is "issuing" the medication. For example, a student may present with side-effects of a drug or the nurse might otherwise consider giving the student a medication (e.g. Advil; Aspirin) which may be "contraindicated" in conjunction with a prescribed drug.

Second, in §1.0, definition of "Delaware School Health Record", the term "mandated testing and screenings" apparently covers those encompassed by 14 DE Admin Code 815. However, it is limiting since it would exclude testing and screenings which are not "mandatory". For example, if a nurse conducted an "extra" vision screening in a non-mandated grade [14 DE Admin Code 815.3.1], it would make sense to include such results in the health record. Council suggests the DOE consider the following alternative language: "results of mandated and discretionary testing and screenings" or "results of required and discretionary testing and screenings".

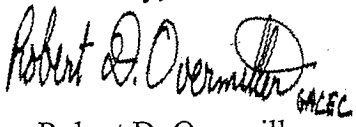
Third, the Delaware Interscholastic Athletic Association (DIAA) concussion regulations include an authorization for "school nurse" screening/clearance of a student to return to play. See 14 DE Admin Code 1008.3.1.6.2 and 14 DE Admin Code 1009.3.1.6.2. School nurses are authorized to perform "sidelines" duties. See 14 DE Admin Code 1008.3.3.1 and 14 DE Admin Code 1009.3.3.1. The DIAA regulations also contemplate submission of return-to-play authorizations to a school by other health providers. See, e.g., DIAA return-to-play form which envisions school nurse supervision of implementation of a Return to Play Plan. Other DIAA regulations require school acquisition of medical records on student athletes. See 14 DE Admin Code 1008.3.1 and 14 DE Admin Code 1009.3.1. It would be wise to specifically include a reference to such medical documents in the definition of "Delaware School Health Record". For example, the definition could at least include the following reference: "student athlete health records required by DIAA regulation" or "student athlete health records compiled in implementation of DIAA regulation".

Fourth, in §1.0, definition of "Emergency/Nursing Treatment Card", the DOE may wish to consider adding an email address for identified classes of individuals.

Fifth, in §2.1.4, the DOE may wish to refer to "parent, guardian, or Relative Caregiver" for consistency with other regulatory sections (§1.0, definitions of "Emergency/Nursing Treatment Card" and "Student Health History Update"; §2.1.2; §4.1.1).

Please contact me or Wendy Strauss at the GACEC office if you have any questions on our observations. Thank you for your consideration.

Sincerely,



Robert D. Overmiller
Chairperson

RDO:kpc

CC: The Honorable Dr. Steven H. Godowsky, Secretary of Education
Dr. Teri Quinn Gray, State Board of Education
Mr. Chris Kenton, Professional Standards Board
Mary Ann Mieczkowski, Department of Education
Matthew Korobkin, Department of Education
Kathleen Geiszler, Esq.
Terry Hickey, Esq.
Ilona Kirshon, Esq.

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MEMORANDUM

DATE: September 29, 2015

TO: Ms. Sharon L. Summers, DMMA
Planning & Policy Development Unit

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

RE: 19 DE Reg. 164 (DMMA Proposed Hippotherapy Regulation)

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Medicaid and Medical Assistance's (DMMAs) proposal to adopt a Medicaid State Plan amendment to add therapeutic horseback-riding (hippotherapy) as a form of approved physical, occupational, or speech therapy. The proposed regulation was published as 19 DE Reg. 164 in the September 1, 2015 issue of the Register of Regulations. Background on hippotherapy is contained in the attached Wikipedia article. More information is available through the website of the American Hippotherapy Association, Inc.: http://www.americanhippotherapyassociation.org/. SCPD endorses this initiative subject to consideration of a few amendments.

First, §1.1.6 requires therapists to have a "HCPS" certification:

> 1.1.6. Therapists that provide Hippotherapy must be certified by the American Hippotherapy Certification Board as a Hippotherapy Professional Clinical Specialist (HCPS).

The Board's website indicates that there is only one therapist in Delaware with the certification, a single upstate OT. See http://www.americanhippotherapyassociation.org/find-a-therapist-2/. The Board also maintains a list of approval "member therapists" who have completed at least some coursework. There is one ST in Delaware who has "member therapist" status. Id. Given that there is only 1 therapist in the entire State with the required certification, the Division may wish to consider expanding the scope of therapists eligible to provide Hippotherapy under the Medicaid program on a provisional basis. For example, DMMA could adopt a transitional standard in which "member therapists" could also provide Hippotherapy under the Medicaid program with a defined expiration date. This would provide some time to achieve full HCPS certification. Consider the following amendment:

> 1.1.6. Therapists that provide Hippotherapy must be certified by the American Hippotherapy

Certification Board as a Hippotherapy Professional Clinical Specialist (HCPS). **[Given the low number of Delaware therapists with HCPS certification, a therapist enrolled as an American Hippotherapy Association "member therapist" may bill the DMAP for Hippotherapy provided through December 31, 2016.]**

Second, the Medicaid Plan excerpt included in the proposed regulation contains the following provision which is not earmarked for revision:

> 3.3 Services Not Covered
>
> 3.3.1 Occupational therapy services that are not covered include but are not limited to OT services which are not intended to improve functions. is not covered by DMAP.

At 169.

Apart from the obvious grammatical problems with this subsection, its substance is inconsistent with federal regulation and the DMMA medical necessity regulation. It literally limits OT to "medical improvement". In contrast, 42 C.F.R. 440.110(b) (reproduced on p. 165) authorizes OT for both "medical improvement" AND restoration of function. The DMMA "medical necessity" regulation does not require services to result in medical improvement, i.e. services can "restore" or "prevent worsening" of function. See attached regulatory definition [2 DE Reg. 1249 (1/1/99)]. See also attached correspondence from Delaware Medicaid Director disapproving an MCO denial notice based on a "chronic" condition which would "not significantly improve ... with occupational therapy". Section 3.3.1 literally bars coverage of OT which would restore or prevent the worsening of effects of a condition. The entire subsection could be deleted since it is grammatically infirm, substantively incorrect, and superfluous (other sections define the scope of covered OT). The Division is authorized to informally correct this section pursuant to Title 29 Del.C. §10113(b)(4)(5).

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

cc: Mr. Stephen Groff
Mr. Brian Hartman, Esq.
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

19reg164 dmma-hippotherapy 9-28-15

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MEMORANDUM

DATE: October 28, 2015

TO: Ms. Sharon L. Summers, DMMA
Planning & Policy Development Unit

DMP/ARR

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

RE: 19 DE Reg. 245 (DMMA Proposed Private Duty Nursing Services Regulation)

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Medicaid and Medical Assistance's (DMMAs) proposal to amend the State Medicaid Plan and relevant policy manual by revising the private duty nursing (PDN) standards. The proposed regulation was published as 19 DE Reg. 245 in the October 1, 2015 issue of the Register of Regulations.

As background, SCPD and Disabilities Law Program (DLP) representatives met with DHSS Administration in August, 2009 to review concerns with PDN standards. An agreement was reached to revise the standards. In 2010, DMMA shared draft revisions which resulted in submission of September 16, 2011 DLP-authored comments from the SCPD. In 2015, this initiative was revived. DMMA prepared a new set of proposed revisions resulting in DLP commentary and an agreement to incorporate additional changes. See attached August 26, 2015 DMMA letter. DMMA is now formally publishing revised PDN standards for comment. The proposed standards represent a major improvement in several contexts and generally merit endorsement subject to a few considerations. The proposed regulations represent a major improvement in several contexts and SCPD appreciates consideration of past comments. Council still has the following observations and concerns.

First, §1.1.4 contains the following recital: "Generally, the total cost of PDN services shall not exceed the cost of care provided in an institutional setting." The DLP's concern with this recital and DMMA's response are included in Section 2 of the attached August 26, 2015 letter. Literally, it suggests that individual costs may "trump" other considerations, including the ADA's mandate to prioritize non-institutional services. CMS has historically instructed that ADA principles should be reflected and embedded in state Medicaid program standards. See attachments. See also attached NASDDDS, "The ADA, Olmstead, and Medicaid: Implications for People with Intellectual and Developmental Disabilities (2013). The "not exceed the cost" recital provides a regulatory basis for MCOs to justify institutional placement for individuals with higher PDN needs. Moreover, the notion of "cost-effectiveness" is contained in the attached regulatory definition of "medical necessity" so its deletion in the PDN standards does not result in ignoring cost considerations. The recital should be deleted.

Second, §2.1.1 refers to a "certified registered nurse practitioner (CRNP) who has a professional license from the State to provide nursing services." The Delaware nurse licensing law refers to "advanced practice nurses" and "advanced practice registered nurses" [24 Del.C. §1902(a)(b)]. There is no definition of a "certified registered

nurse practitioner. DMMA may wish to review this reference.

Third, §3.1.1.2 refers to "attending practitioner". SCPD recommends substituting either "prescribing practitioner" or, for consistency with §5.3.2, "primary care physician". See analysis in attached August 26, 2015 letter, Section 10. The term "attending physician" is based on institutional care environments while PDN is limited to non-institutional settings. See §1.1.4.

Fourth, §§5.1.1 and 5.2.1 merit review. They only refer to prior authorization by DMAP through a DMMA nurse. SCPD assumes it should also refer to an MCO nurse since the standards cover both DMMA-authorized PDN and MCO-authorized PDN. See §§5.1.2 , 5.2.7 and §1.0.

Fifth, SCPD assumes that references to "DMAP" (e.g. §§5.2.4, 5.2.6) are generic and are intended to cover both DMMA and MCO decision-making. However, the reference to "DMMA" in §5.2.2 is "underinclusive" since it would not cover an MCO. The reference could be amended to refer to "DMAP" or "DMMA or an MCO".

Sixth, the requirement in §5.2.1 that an initial nursing assessment be "face to face" is being deleted. Perhaps this change is in recognition of the expanded authorization for telemedicine. Otherwise, we suspect a face to face" assessment may be "best practice" and generally more valid than a "paper" review.

Seventh, §5.2.3 merits reconsideration based on concerns reflected in the attached August 26, 2015 letter, Section 5. Consider the following:

A. The section categorically presumes that everyone qualifying for PDN will need a caregiver during non-authorized PDN hours. Some individuals may be capable of self-care during such periods and not require a caregiver.

B. The section omits the concept or expectation that an MCO or provider will include a backup component in the plan of care akin to the PAS Service Specifications.

C. The section is "at odds" with §5.3.5 which contemplates home health personnel covering non-PDN hours as juxtaposed to exclusive reliance on a caregiver.

Eighth, §5.2.6 indicates that a parent's consent to an IEP which includes PDN equates to parental consent to use of Medicaid to fund PDN . There are two problems with this approach.

A. Some students qualifying for Medicaid-funded PDN may not yet have an IEP. They may have an IFSP (Title 16 Del.C. §§214-215) or be awaiting IEP development. For example, a student incurring a sports injury or involved in an auto accident may qualify for PDN but be in the evaluation phase of IDEA special education eligibility or, having been determined eligible, be awaiting development of an IEP.

B. Parental consent to an IEP does not equate to consent to "tap" a child's Medicaid or private insurance benefits. Indeed, IEPs do not typically include sources of payment for services. Moreover, there is no requirement that a parent "consent" to an IEP.

Explicit parental consent to "tap" Medicaid should be required. See attached federal guidance referring to a "consent form" and requirement that "parental consent" must be obtained "each time that access to public benefits or insurance is sought". Characterizing consent to an annual IEP as consent to accessing Medicaid for PDN does not conform to this federal guidance. Even on a practical level, PDN can change

more frequently than an annual IEP (§5.2.2).

Ninth, §5.2.6 contains an incorrect legal standard for eligibility to use Medicaid to fund school-based services. The standard refers to a determination that " a school is unable to meet the medical needs of school age children who are technology dependent or for whom DMAP has determined these services to be otherwise medically necessary". [emphasis supplied] There are two problems with the underlined provision.

A. A child could qualify for PDN for reasons apart from technological dependency.

B. Medicaid is expected to routinely fund qualifying services in schools. A school is not required to demonstrate that it cannot meet a child's needs without resorting to Medicaid funding. See attached In re A..G., DCIS No. 5000703852 (DHSS June 22, 2000); U.S. DOE Memorandum, OSEP 00-7 (January 13, 2000), at 5 ["The law clearly states that the State Medicaid agency, as well as other public insurers of children with disabilities, shall precede the financial responsibility of the local educational agency (or State agency)"].

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

cc: Mr. Stephen Groff
Mr. Brian Hartman, Esq.
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council
19reg245 dmma-private duty nursing services 10-28-15

STATE OF DELAWARE
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August 26, 2015

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

RE: 19 DE Reg. 111 [DOE Proposed High School Interscholastic Athletics Regulation]

Dear Ms. Shockley:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposal to adopt revisions to the Delaware Interscholastic Athletic Association (DIAA) regulation covering school-sponsored sport and athletic activities at the high school level. The proposed regulation was published as 19 DE Reg. 111 in the August, 2015 issue of the Register of Regulations. SCPD has the following observations.

First, §§7.1.2.2 and 7.2.1.2 are amended to require certified and emergency coaches to complete an approved concussion course. This furthers the concussion and return-to-play initiatives of the SCPD and AI duPont. It also implements 14 Del.C. §303(d) adopted in 2011.

Second, §2.1.1 is difficult to interpret. It recites that a student turning 19 on or after June 15 immediately preceding the student's year of participation shall be eligible for all sports provided all other eligibility requirements are met. There is no definition of "student's year of participation". Moreover, there is no comparable guidance for a student who becomes age 20 or 21 on or after June 15. Students are generally eligible to attend school at least through age 20. See 14 Del.C. §202(a). An IDEA-classified student is often eligible for education past his/her 21st birthday. See 14 Del.C. §3101(1). The implication of §2.1.1 is that 19 year olds can play all sports but 20 year olds are barred from all sports. If this is accurate, it reflects a rather "brittle" approach to eligibility which deters participation in athletics.

Third, §2.1.1.2 is an attempt to create an age waiver protocol for students with disabilities. While well-intentioned, it merits reconsideration in several contexts.

A. Section 2.1.1.2.2.3 limits the waiver to IDEA-classified students with an IEP. At a minimum, §504-identified students with disabilities are eligible for policy modifications and accommodations under federal law. See attached U.S. Department of Education guidance documents. See also the discussion under "Fourth" below.

B. An IDEA-identified student is entitled to have extracurricular and nonacademic activities (including athletics) included in the student's IEP. See attached 2011 guidance at p. 10 and 34 C.F.R. §§300.107 and §300.320(a)(4). Cf. 19 DE Reg. 107, §1.2.1.5.4.3 ["Remember the field, court, pool or mat is a

classroom."] The athletic activity is therefore subject to IEP team jurisdiction. The IEP team would determine whether an accommodation or policy modification is appropriate to enable a student to participate in a DIAA-sponsored activity. The proposed DIAA regulation incorporates standards which would be considered "foreign" to IEP team deliberation, including placing the burden of proof to qualify for an accommodation on the student and reciting that DOE staff and representatives have no duty to produce or collect information (§2.1.1.2.1) .

C. Section 2.1.1.2.1 categorically bars an age waiver "for any season or sport in any subsequent school year". This rigid approach is "at odds" with individualized decision-making required by the IDEA and Section 504. It is reminiscent of a past attempt to limit IDEA-student driver education eligibility to the standard 1-time enrollment. Title 14 Del.C. §4125 was amended in 2012 to permit subsequent enrollment in deference to federal law. If an IEP team determines that a student should participate in an athletic activity for 2 years in a row, the team's decision-making cannot be hamstrung by a no-exceptions DOE regulation.

D. Section 2.1.1.2.2.1 limits the disability determination to a "treating physician or psychiatrist." This is unduly narrow. Compare §3.1.1, §3.1.6.2, and 14 DE Admin Code 930.2.2.

E. The combination of §2.1.1.2.2.2 and §2.1.1.2.2.4 indicates that an age waiver would only be granted if a student with a disability has weak or depressed skills. Query why having weak skills is material? If a student with autism or Downs Syndrome is a fast runner, why should his/her speed be a factor in denying a waiver? The DIAA "Sportsmanship" regulation stresses that developing character is the focus of interscholastic sports, not "winning". See 19 DE Reg 106, §1.2.1.5.2.2.

Fourth, several sections (e.g. §§2.1.1.2, 2.3.3.2) use the term "student with a disability" which is limited to IDEA-classified students to the exclusion of students identified under Section 504. See §2.3.3.1, definition of "student with a disability". Consistent with the attached 2013 federal guidance, footnote 8, Section 504-identified students are entitled to similar protections and accommodations. The DOE has provided assurances that it does not discriminate based on "disability", not simply IDEA-identified disability. See 14 DE Admin Code 225.1.0.

Fifth, §2.3.3.2 provides as follows:

> 2.3.3.2. A student with a disability who is placed in a special school or program shall be eligible to participate in interscholastic athletics as follows:
>
> > 2.3.3.2.1. If the special school or program sponsors the interscholastic sport in question, the student shall be eligible to participate only at the school or program.

This violates federal and State law since it categorically bars a student with a disability from any opportunity to participate in a non-segregated team. It rigidly limits a student with a disability to participate in a team exclusively comprised of students with disabilities of the special school (e.g. Sterck). The DOE has an affirmative obligation to promote opportunities for participation in integrated extracurricular activities. See 14 DE Admin Code 923.17.0; 34 C.F.R. §§104.34(b) and 104.37(c)(2); and 34 C.F.R. §300.117.

Sixth, §2.6.1.1 authorizes an accommodation for a student with a disability with an IEP but not a student with a disability with a Section 504 Plan. The section should be modified to also cover students with a Section 504 Plan. See discussion in "Fourth" above.

Seventh, §2.7 bars a student from participating in athletics after 4 consecutive years from the date of the student's first entrance into the 9th grade. It also bars a student who had more than 4 "opportunities" to participate in sports. The regulation authorizes the DIAA to issue a "hardship" waiver. The standards place the "burden of proof" on the student and the DIAA considers disability-related factors such as extended illness, debilitating injury, and emotional stress. For a student with a disability, the decision of whether a student should participate in extracurricular activities such as athletics is the province of the IEP or Section 504 team. Such decision-making does not involve a "burden of proof". The team would decide if such participation is appropriate as part of a FAPE.

Eighth, §6.6 discourages participation of students with disabilities in programs such as Special Olympics. The regulation bans a school (e.g. Ennis; Leach) from transporting students to Special Olympics, bans PTAs and support groups from providing or paying for transportation to Special Olympics, and limits school-supplied assistive technology/equipment to that used to prevent physical injury. Thus, if a student has a school-supplied AAC device for communication in the community, the student cannot use it to communicate at a Special Olympics event. These limits are "overbroad" and ill-conceived since the DOE should be encouraging, not discouraging, participation in such extracurricular activities.

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

Sincerely,

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

cc: The Honorable Mark Murphy, Secretary of Education
The Honorable Melanie Smith
The Honorable Michael Ramone
The Honorable Margaret Rose Henry
The Honorable Gregory Lavelle
The Honorable Bryan Townsend
Ms. Ann Grunert, Special Olympics
Ms. Terri Hodges, State PTA
Mr. Tony Glenn, DFRC
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

19reg111 doe-high school interscholastic athletics 8-26-15

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August 26, 2015

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

RE: 19 DE Reg. 110 [DOE Proposed Junior High School & Middle School Interscholastic Athletics Regulation]

Dear Ms. Shockley:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposal to adopt revisions to the Delaware Interscholastic Athletic Association (DIAA) regulation covering school-sponsored sport and athletic activities at the junior high school and middle school level. The proposed regulation was published as 19 DE Reg. 110 in the August, 2015 issue of the Register of Regulations. SCPD has the following observations.

First, §§7.1.2.2 and 7.2.2.2 are amended to require certified and emergency coaches to complete an approved concussion course. This furthers the concussion and return-to-play initiatives of the SCPD and AI duPont. It also implements 14 Del.C. §303(d) adopted in 2011.

Second, §2.1.1.2 is an attempt to create an age waiver protocol for students with disabilities. While well-intentioned, it merits reconsideration in several contexts.

A. Section 2.1.3.2.3 limits the waiver to IDEA-classified students with an IEP. At a minimum, §504-identified students with disabilities are eligible for policy accommodations under federal law. See attached U.S. Department of Education guidance documents. See also the discussion under "Third" below.

B. An IDEA-identified student is entitled to have extracurricular and nonacademic activities (including athletics) included in the student's IEP. See attached 2011 guidance at p. 10 and 34 C.F.R. §§300.107 and §300.320(a)(4). Cf. 19 DE Reg. 107, §1.2.1.5.4.3 ["Remember the field, court, pool or mat is a classroom."] The athletic activity is therefore subject to IEP team jurisdiction. The IEP team would determine whether an accommodation or policy modification is appropriate to enable a student to participate in a DIAA-sponsored activity. The proposed DIAA regulation incorporates standards which would be considered "foreign" to IEP team deliberation, including placing the burden of proof to qualify for an accommodation on the student and reciting that DOE staff and representatives have no duty to produce or collect information (§2.1.3.1).

C. Section 2.1.3.1 categorically bars an age waiver "for any season or sport in any subsequent school

year". This rigid approach is "at odds" with individualized decision-making required by the IDEA and Section 504. It is reminiscent of a past attempt to limit IDEA-student driver education eligibility to the standard 1-time enrollment. Title 14 Del.C. §4125 was amended in 2012 to permit subsequent enrollment in deference to federal law. If an IEP team determines that a student should participate in an athletic activity for 2 years in a row, the team's decision-making cannot be hamstrung by a no-exceptions DOE regulation.

D. Section 2.1.3.2.1 limits the disability determination to a "treating physician or psychiatrist." This is unduly narrow. Compare §3.1.1, §3.1.6.2, and 14 DE Admin Code 930.2.2..

E. The combination of §2.1.3.2.2 and §2.1.3.2.4 indicates that an age waiver would only be granted if a student with a disability has weak or depressed skills. Query why having weak skills is material? If a student with autism or Downs Syndrome is a fast runner, why should his/her speed be a factor in denying a waiver? The DIAA "Sportsmanship" regulation stresses that developing character is the focus of interscholastic sports, not "winning". See 19 DE Reg 106, §1.2.1.5.2.2.

Third, several sections (e.g. §§2.1.3, 2.3.2.2) use the term "student with a disability" which is limited to IDEA-classified students to the exclusion of students identified under Section 504. See §2.3.2.1, definition of "student with a disability". Consistent with the attached 2013 federal guidance, footnote 8, Section 504-identified students are entitled to similar protections and accommodations. The DOE has provided assurances that it does not discriminate based on "disability", not simply IDEA-identified disability. See 14 DE Admin Code 225.1.0.

Fourth, §2.3.2.2 provides as follows:

> 2.3.2.2. A student with a disability who is placed in a special school or program administered by a school district or charter school which sponsors junior high or middle school interscholastic athletics shall be eligible to participate in interscholastic athletics as follows:
>
> > 2.3.2.2.1. If the special school or program sponsors the interscholastic sport in question, the student shall be eligible to participate only at the school or program.

This violates federal and State law since it categorically bars a student with a disability from any opportunity to participate in a non-segregated team. It rigidly limits a student with a disability to participate in a team exclusively comprised of students with disabilities of the special school (e.g. Sterck). The DOE has an affirmative obligation to promote opportunities for participation in integrated extracurricular activities. See 14 DE Admin Code 923.17.0; 34 C.F.R. §§104.34(b) and 104.37(c)(2); and 34 C.F.R. §300.117.

Fifth, §2.6.1.1 authorizes an accommodation for a student with a disability with an IEP but not a student with a disability with a Section 504 Plan. The section should be modified to also cover students with a Section 504 Plan. See discussion in "Third" above.

Sixth, §2.7 bars a student from participating in athletics after 4 consecutive semesters from the date of the student's first entrance into the 7th grade. It also bars a student who has had more than 2 "opportunities" to participate in sports. The regulation authorizes the DIAA to issue a "hardship" waiver. The standards place the "burden of proof" on the student and the DIAA considers disability-related factors such as illness, injury, and accidents. For a student with a disability, the decision of whether a student should participate in extracurricular activities such as athletics is the province of the IEP or Section 504 team. Such decision-making does not involve a "burden of proof". The team would decide if such participation

is appropriate as part of a FAPE. In addition, SCPD understands that some covered schools have three (3) years of enrollment (e.g. grades 6th, 7th and 8th) and the regulation does not appear to address this situation.

Seventh, §6.6 discourages participation of students with disabilities in programs such as Special Olympics. The regulation bans a school (e.g. Ennis; Leach) from transporting students to Special Olympics, bans PTAs and support groups from providing or paying for transportation to Special Olympics, and limits school-supplied assistive technology/equipment to that used to prevent physical injury. Thus, if a student has a school-supplied AAC device for communication in the community, the student cannot use it to communicate at a Special Olympics event. These limits are "overbroad" and ill-conceived since the DOE should be encouraging, not discouraging, participation in such extracurricular activities.

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

Sincerely,

Daniese McMullin-Powell

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

cc: The Honorable Mark Murphy, Secretary of Education
The Honorable Melanie Smith
The Honorable Michael Ramone
The Honorable Margaret Rose Henry
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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

19regl10 doe- jr high school and middle school interscholastic athletics 8-26-15

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.

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[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.

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[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-1 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-1. 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.

NJ DISCIPLINE REGULATION

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], District Superintendent, and [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.

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]

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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 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

ate 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

STATE BOARD OF EDUCATION

Paul R. Fine, President

Arthur W. Boswell

Harold E. Cosgrove

Richard M. Farmer

R. Jefferson Reed

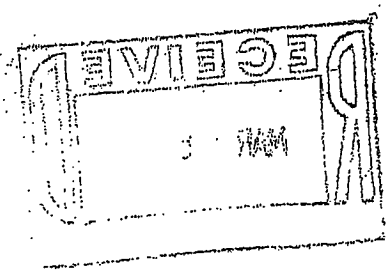
Dorothy H. Smith

Opposed:

Dr. Kent S. Price
Vice President

Attest:

Dr. James L. Spartz



EXCERPT

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 compulsoryattendance 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. 163 (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 preapre 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.Fupp. 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), IIb.

___ 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,

Home
Bill Tracking
Senate
- Agenda
- Ready List
- Meeting Notices
- Journal
- Nominations
- Roll Call

House
- Agenda
- Ready List
- Meeting Notices
- Journal
- Roll Call

All Legislation
Current Day's Action
Recent Legislation
Signed Legislation
Calendar
Reports:
- By Sponsor
- By Status
- By Date Introduced
- By Date Signed
- Activity Report
- Agenda Report

Archives
Contact Info
House
Joint Committees
Legislative Divisions

Back

144th General Assembly
House Bill # 326

Primary Sponsor:	Johnson
CoSponsors:	Reps. Blakey, Brady, Ewing, Hall-Long, Hudson, Kowalko, Longhurst, Manolakos, Mulrooney, Plant, Schooley, B. Short, Spence, Walls, Williams; Sens. Henry, McBride
Introduced on :	03/13/2008
Long Title:	AN ACT TO AMEND TITLE 14 OF THE DELAWARE CODE RELATING TO SCHOOL **DISCIPLINE**.
Synopsis:	This act establishes a presumption that students sixteen and younger who are expelled or suspended pending expulsion by a local school district or charter school are appropriate for placement in an alternative education program
Current Status:	Signed **On** 07/21/2008
Volume Chapter	76:407 **Fiscal Note:** Not Required
Date Governor acted:	07/21/2008
Full text of Legislation: (in HTML format)	**Legis.html** Email this Bill to a friend
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Committee Reports:	House Committee Report 03/20/08 F=1 M=8 U=0---->
Voting Reports:	House vote: () Passed 7/1/08 2:39:39 AM------->

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Meeting
Schedules
Online
Publications
Press Releases
Regulations
Schedule
Senate
Virtual Tour
Who's my
Legislator

Bill Search:

Session
Bill Type No.

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Full Text Search Go

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Actions History:

Jul 21, 2008 - Signed by Governor
Jul 01, 2008 - Passed by Senate. Votes: Passed 17 YES 1 NO 0 NOT VOTING 3 ABSENT 0 VACANT
Jul 01, 2008 - Necessary rules are suspended in Senate
Jul 01, 2008 - Passed by House of Representatives. Votes: Passed 41 YES 0 NO 0 NOT VOTING 0 ABSENT 0 VACANT
Mar 20, 2008 - Reported Out of Committee (EDUCATION) in House with 1 Favorable, 8 On Its Merits
Mar 13, 2008 - Introduced and Assigned to Education Committee in House

SPONSOR: Rep. Johnson
Reps. Blakey, Brady, Ewing, Hall-Long, Hudson, Kowalko, Longhurst, Manolakos, Mulrooney, Plant, Schooley, B. Short, Spence, Walls, Williams; Sens. Henry, McBride

HOUSE OF REPRESENTATIVES
144th GENERAL ASSEMBLY

HOUSE BILL NO. 326

AN ACT TO AMEND TITLE 14 OF THE DELAWARE CODE RELATING TO SCHOOL DISCIPLINE.

WHEREAS, the intent of the General Assembly, as evidenced by Delaware's compulsory attendance laws, is that all children between the ages of five and sixteen attend and have access to full-time public education; and

WHEREAS, recognizing that some students exhibiting behavior or discipline problems may not be appropriate for placement in a regular classroom setting, the State of Delaware has enacted statutes and regulations providing for the education of such students in Consortium Discipline Alternative Programs; and

WHEREAS, the intent of Delaware's compulsory attendance statutes is not met when students who are eligible for placement in a Consortium Discipline Alternative Program are simply expelled by a local school district or charter school and not placed in such a program.

NOW, THEREFORE:

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend §1604, Title 14 of the Delaware Code by adding a new subsection "(8)" thereto as follows:

"(8) A student sixteen years of age or less who is expelled or suspended pending expulsion by a local school 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."

Section 2. The Department of Education shall promulgate regulations establishing the criteria, which may include age, availability of funding, availability of space, and such other considerations the Department deems relevant, to be applied to determine whether a student is inappropriate for placement in a Consortium Discipline Alternative Program.

HD : JDN : KKA
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Released: 03/11/2008 05:13 PM

SYNOPSIS

This act establishes a presumption that students sixteen and younger who are expelled or suspended pending expulsion by a local school district or charter school are appropriate for placement in an alternative education program

Released: 03/11/2008 05:13 PM

A better way than excessive school suspensions

Marie-Anne Aghazadian *1:43 p.m. EDT July 27, 2014*

When Mrs. P called the Parent Information Center of Delaware, she was in a panic. A parent of a child with a disability, she struggled to navigate, not only the special education system, but also the new expectations for general education.

And now, her child was facing a long-term suspension that would make it difficult for him to stay on track for graduation. Sadly, Mrs. P's situation is not unique.

During the 2012-2013 school year, more than 18,000 students lost 105,338 school days because of suspensions or expulsions.

How severe is the impact of repeated school discipline measures? According to data reported to the U.S. Department of Education, nearly 23 percent of Delaware students suspended or expelled during the 2011-12 school year (the latest report) were students with disabilities. Of those 76 percent were males and 68 percent were students of color.

The Civil Rights Project at the University of California in Los Angeles came to similar conclusions. It reported that one in five secondary school students with disabilities was suspended nearly three times as often as students without disabilities.

The project also cites the greatest rates of suspension when tabulating the combination of race, disability and gender. For example, 36 percent of all black middle school males with disabilities were suspended one or more times.

What compounds this problem is the disparate number of students of color and students with disabilities who face frequent school discipline. Moreover, these same students experience the greatest achievement gap and dropout rate both in Delaware and nationally.

Common sense tells us that students who lose significant classroom time lose ground academically. Therefore, reducing excessive suspensions or expulsions can only help improve academic outcomes, thus also decreasing future incarceration of juveniles and adults.

Ensuring that schools are safe and orderly while keeping students in the classroom requires a cultural shift and a new approach to discipline. Addressing this challenge demands the commitment of the larger community, schools, parents and students. This will not be easy, and it will take work.

For that very reason, PIC joined the Coalition for Fairness and Equity in Schools, a consortium of organizations that brings professional expertise and essential community connections to create systems that support families and keep all students in the classroom.

Unfortunately, the highest academic standards, the smartest assessments, and the most comprehensive teacher training cannot remedy the achievement gap, if students are not in school.

If we believe the pathway to a fulfilling life begins with education, then each of us – parents, community organizations, educators, and all others engaged in helping children and families – must work together to make sure each public school student in our state attends school, meets high standards and graduates.

Last year, 150 parents reached out to PIC for assistance with school discipline issues. If your child with special education needs is being pushed out of school, we may be able to help you as well. Contact us at 302-999-7394 or at picofdel.org.

Marie-Anne Aghazadian is the executive director of The Parent Information Center of Delaware, a statewide nonprofit organization with a mission to advance effective parent engagement in education. For over 30 years, PIC has helped families and professionals to better understand their respective responsibilities in ensuring that students with special education needs have to access to and benefit from a free and appropriate public education.

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