

June 27, 2016

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Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

RE: 19 DE Reg. 1057/14 DE Admin. Code 616 [DOE Proposed Uniform Due Process Procedures for Alternative Placement Meetings and Expulsion Hearings Regulation (June 1, 2016)]

Dear Ms. Shockley:

The Governor’s Advisory Council for Exceptional Citizens (GACEC) has reviewed the Department of Education (DOE) proposal to create a new regulation defining uniform due process standards for disciplinary matters and placement in alternative disciplinary settings. The regulation was originally proposed in December 2015 but has been republished to incorporate changes made based on comments provided by Attorney General Matt Denn, the ACLU Foundation of Delaware, Representative Kimberly Williams, the Governor's Advisory Council for Exceptional Citizens, the State Council for Persons with Disabilities and various school district personnel. The letter submitted in December is attached for your reference. Council would like to share the following observations on the current proposal and reiterate some of our concerns from the earlier proposal.

1. 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 unclear. Does this mean that any single member of the team is able to invite a participant or would the entire team have to agree to invite a participant? The latter interpretation would be highly objectionable since it would mean that the Division of Services for Children, Youth and their Families (DSCY&F) could be barred from having more than one participant and that a parent would not be able to invite a participant (e.g. school psychologist; Wellness Center therapist).
2. In §2.0, definition of “Alternative Placement Team”, the student is not a member of the team. The student should be a member in order 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

3. In § 2.0, definition of “parent” includes “a student who has reached the age of majority”. While this corrects some problems where an adult student might not receive information that only goes to a parent, it creates odd language anywhere there is a reference to both the student and the parent. Moreover, it creates an ambiguity where something is to be communicated only to the “parent.” The way the definition is written, notice to a “parent” of an adult student could arguably be accomplished by contacting the adult student’s parent and not the adult student. This is unacceptable. The language may be corrected throughout the regulation by changing the definition of parent to “‘Parent’ is defined as the student, if the student has reached the age of majority. If the student has not reached the age of majority, ‘parent’ is defined as [biological parent, adopted parent, etc.]”
4. 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.
5. In §2.0, the definition of “Expulsion” contains an excess of substantive standards and ramifications of expulsion. Such substantive information does not belong in a definition. See Delaware Administrative Code Style Manual, §4.3.
6. In §2.0, the definition of “Grievance” envisions a complaint to a school administrator; however, there are no specific “due process” procedures for such grievances in the regulation. The regulation sets minimum procedures as “similar to the grievance guidelines as posted on the Department of Education website.” At present, there are no guidelines posted that can be easily located. As such, it is unclear whether this provides any significant due process protections.
7. 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.
8. In §2.0, definitions of “Suspension (Long-term Suspension)” and “Suspension, Short-term (Short-term Suspension), the DOE establishes different due process standards for suspensions up to 11 consecutive school days versus 11 or more school days. While such benchmarks may be appropriate general standards, they completely ignore the

alternate significant deprivation/change of placement standard - a pattern of short-term removals of less than 11 days. Consider the following:

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

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

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

B. The federal Department of Education Office for Civil Rights has adopted a similar approach for decades. See 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”. Thus, if a student has had a five day suspension and a district proposes to impose a second six-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.

9. 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).
10. Under §3.1.1.3, a principal’s preliminary investigation of offending student conduct requires the principal to make “reasonable efforts” to “*include* the allegedly offending

student” (emphasis added). Lack of interviewing a student to obtain the student’s version of events may manifestly undermine the validity and reliability of the investigation results. It may also lead to unjustified police referrals under §3.2.1. Thus, the language should be stronger. First, “include” should be changed to “interview.” To further strengthen the language, the regulation could read “the principal shall interview the allegedly offending student or state with specificity the reasons the student could not be interviewed.” This places an obligation on the principal but leaves an “out” in cases where it would not be possible to interview the student.

11. §§4.1 and 4.1.1 should be amended consistent with item 9 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).

12. §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.

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

14. §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. A similar New Jersey regulation, §6A:16-7.2(a)(5)1, reinstates academic instruction within five days of suspension. This is a more progressive approach which allows a student to keep up with coursework.

15. In §5.4 the notice should include the protocol for appeal, including the timetable and method to appeal pursuant to §5.4.1. As it currently reads, the regulation only requires the provision of “information regarding the districts/charters appeal or grievance process.” Information about the grievance process and the appeals process should be included. Additionally, there should be more specificity as to the information provided. For example, the time allowed to file an appeal should be included.

16. In §5.5, the decision to convene a conference in-person or by phone should be the choice

of the student/parent. See discussion in item #4 above. Furthermore, the following sentence is unclear: “The Principal may waive the conference requirement.” This could be interpreted in two 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 desires one. The former approach would be preferable.

17. §§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.
18. §7.2.1.5.1 could be improved by explicitly authorizing the Committee to include parent/student participation.
19. §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 the placement of a special education student. That is the responsibility of the IEP team.
20. §7.2.1.7.2 allows a conference to be held by phone or in person. Consistent with item #4 above, this section should be amended to clarify that the choice should be that of the parent/student.
21. §7.2.1.8 contemplates advance written notice but does not identify the time period (e.g. three business days).
22. §7.4.1.4 solely focuses on the responsibilities of the student to the exclusion of the responsibilities of the program, i.e., to fulfill services and supports identified in the required ISP. See 14 DE Admin Code 611.6.1. This is not balanced. Although the regulation refers to the ISP, it does not refer to the program’s obligations under the ISP.
23. §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 ISP. The Review is incomplete without the inclusion of such information. See discussion under item #7 above. The reference to “the student’s strengths and weaknesses in connection with their individualized goals and expectations” is not sufficient because it does not reference the extent to which the program provided the required services and supports.
24. §10.2.3.1 allows a conference to be held by phone or in person. Consistent with item #4 above, this section should be amended to clarify that the choice should be that of the parent/student.
25. §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 item #14 above. See also 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].

26. 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.
27. §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 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 hearings is limited to attorneys.
28. §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.
29. §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 two 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., 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”.
30. In the entire ten page regulation, the only section addressing additional protections for students with disabilities is §11.0 which consists of four extremely unclear 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 reluctant and weak 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 July 27, 2014 News Journal article. Disproportionate discipline of students with disabilities and other protected classes merits positive action by the Department to promote district and charter school conformity with federal and State civil rights protections.

Thank you in advance for your consideration of our comments. Please contact me or Wendy Strauss at the GACEC office if you have any questions on our observations and recommendations.

Sincerely,

Robert D. Overmiller
Chairperson

RDO:kpc

CC: The Honorable Matthew Denn, Delaware Attorney General
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
Terry Hickey, Esq.
Valerie Dunkle, Esq.
Kathleen McRae, ACLU

Enclosure