STATE OF DELAWARE

GOVERNOR'S ADVISORY COUNCIL FOR EXCEPTIONAL CITIZENS

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December 17, 2015

Tina Shockley
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Department of Education
401 Federal Street, Suite 2
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RE: 19 DE Reg. 458/14 DE Admin. Code 616 [DOE Proposed Uniform Due Process Procedures for Alternative Placement Meetings and Expulsion Hearings Regulation (December 1, 2015)]

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. Council would like to share the following observations.

First, in §2.0, definition of "Alternative Placement Team", Council requests the Department 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 very vague. 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 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 allowed to 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 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 FY16 budget epilog, House Substitute No. 1 for House Bill No. 225,

§329.

Fourth, throughout the regulation, there is no differentiation between students who are adults versus students who are still 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 will be 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 an overabundance 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 inconsistent 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 required "Individual Service Plan (ISP)" has been implemented for the student. 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 Individuals with Disabilities Education Act (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 Office of the Attorney General, 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 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.

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, the preliminary investigation by the principal 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, 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).

Seventeenth, §5.1.1 allows a principal to impose a short term suspension on a student for violating the school Code of Conduct. Council considers this to be too broad as it may allow short term suspension for innocuous offenses, such as tardiness.

Eighteen, §5.1.2 allows a Superintendent to temporarily extend a short-term (up to 10 days) suspension with no time limit. Council also notes that there is no definition for 'temporarily'. Consider the following 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 comparable New Jersey regulation, §6A:16-7.2(a)(5)1 (attached), reinstates academic instruction within five days of suspension. This is a more progressive approach which allows a student to "keep up" with coursework.

Nineteenth, §5.4 states that "…verbal notification to the Parent shall be attempted…". Council objects to the use of the word, 'attempted' and would request a stronger standard. Council would also suggest a change to the wording that written notification will be given or sent to the Parent "as soon as practical". This is very vague. The DOE might consider listing a specific timeframe for the written notice. The notice should also include the protocol for appeal, including the timetable and method to appeal pursuant to §5.4.1.

Twentieth, 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. Furthermore, 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.

Twenty-first, §§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. Furthermore, as discussed in "Fourth" above, the regulation does not differentiate between students who are minors versus students who are adults.

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

Twenty-fourth, §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 province of the IEP team.

Twenty-fifth, §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-sixth, §7.2.1.7.3 allows the principal to have someone take notes of the proceedings. Council feels strongly that the conference should be taped to allow for greater reliability.

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

Twenty-eighth, §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-ninth, §7.4.1.4 focuses solely 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 Individual Service Plan (ISP). See 14 DE Admin Code 611.6.1. This is not balanced. A reference to ISP services should be included.

Thirtieth, §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 "Ninth" above.

Thirty-first, §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.

Thirty-second, §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 "Eighteenth" 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-third, §10.3.2 contemplates notice only to the "parent" even if a student is an adult.

Thirty-fourth, 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-fifth, §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-sixth, §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-seventh, §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., 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-eighth, §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-ninth, §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.

Fortieth, in the entire nine-page regulation, the only section addressing additional protections for students with disabilities is §11.0 which consists of four highly vague 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 attached July 27, 2014 News Journal article. Disproportionate discipline of students with disabilities and other protected classes merits affirmative action by the Department to promote district and charter school conformity with federal and State civil rights protections.

Thank you 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 GACEC

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
Jea Street, New Castle County Council
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Enclosures