

May 17, 2017

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

RE: 20 DE Reg. 867/14 DE Admin. Code 613 [DOE Proposed Processing of Attorney General's Report Regulation (May 1, 2017)]

Dear Ms. Shockley:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Department of Education (DOE) proposal to adopt a new regulation establishing uniform procedures for processing Attorney General's reports as authorized by Title 14 Del.C. §122(b)(26). The reports address "1) an enrolled student's alleged criminal conduct, regardless of jurisdiction, which shows disregard for the health, safety, or welfare of others, including, but not limited to, acts of violence, weapons offenses, and drug offenses; 2) wanted persons enrolled in a school and 3) missing persons enrolled in a school." See §2.0, definition of "Attorney General's Report". Council would like to share the following observations.

1. Section 1.0 applies the regulation to both public school districts and charter schools. The section 2.0, definition of "district", then recites that a "district" includes a "charter school". This is counterintuitive and contrary to the commonly understood concept of a district. The Delaware Administrative Code & Style Manual, §7.2, offers the following guidance:

In general, keep the language in the text as clear and simple as possible. When drafting, remember that documents should be written so that the general public can understand them....Consistency of expression, ...and adherence to accepted usage aid readability. ...Avoid using the same word or term in more than one sense. Conversely, avoid using different words to denote the same idea.

To add to this confusing approach, there are several references to charter schools as distinct from districts. See, e.g., §2.0, definition of "administration"; §2.0, definition of "board of education"; §2.0, definition of "consortium discipline alternative program"; §2.0, definition of "principal"; §2.0, definition of "school property"; and §2.0, definition of "superintendent". In other cases, the regulation uses the term "school district/charter". See, e.g., §2.0, definition of "alternative program"; §2.0, definition of "assignment to an alternative program"; and §5.1.

2. The regulation contains several references to "crimes" and "criminal conduct". In general, minors

who commit certain offenses are characterized as “delinquent” but not “criminal”. See, e.g., Title 10 Del.C. §901(7), 1002 and 1009(c)(h). At a minimum, the DOE could consider incorporating a definition. See, e.g., 14 DE Admin Code 614.2.0, definition of “crime”; and 14 Del.C. §4112.

3. In §2.0, the definition of “appropriate educational services” establishes an “anemic” level of entitlement which is, particularly for special education students, inconsistent with law. See Title 14 Del.C. §3101(5). See also Endrew F. v. Douglas County School District, No. 15-827 (March 22, 2017).

4. In §2.0, many of the definitions (“disciplinary action”; expulsion; suspension long term; suspension short-term) are problematic since a) they contain many substantive standards; and b) are unnecessarily brittle. The Delaware Administrative Code & Style Manual, §4.3, provides the following admonition:

Regulatory information should not be included in the definition.

Example of a Definition that is Too Substantive:

“Lockup facility” means a secure adult detention facility used to confine prisoners waiting to appear in court and sentenced prisoners for not more than 90 days. In addition to the cell, a lockup facility must include space for moderate exercise and activity, such as weight lifting, ping-pong, table games, reading, television, and cards.

This definition should end at “90 days”. [emphasis supplied]

Even on a practical level, there is no need for detailed information about the ramifications of suspension, expulsion, etc. since the standards are designed to solely focus on processing of Attorney General’s Reports. There are other regulations (e.g. Parts 611-616) which contain specifics on suspension, expulsion, due process, etc. Finally, public schools have discretion to relax some of the normal consequences of a suspension. For example, if the school is the polling place for a student, the school could make an exception to allow a suspended student to be on school property to vote or obtain health services at a wellness center.

5. In §2.0, the definition of “parent” omits persons appointed by a power of attorney, DOE grant of authority form or appointed by an IEP team. See 14 DE Admin Code 926.20 and 14 Del.C. §§3101(7) and 3132.

6. In §2.0, the definition of “regular school program” consists of a single 71-word sentence with many clauses. It is convoluted and difficult to understand.

7. If the DOE opts to retain substantive standards in the definition of “suspension, long term”, the definition merits correction since it does not include federal guidance holding that a pattern or practice of short-term removals aggregating 11 days in a school year may constitute a long-term suspension. See codification of caselaw at 34 C.F.R. 300.536.

8. Section 3.1.4 contemplates retention of the report during the time for initiating a dispute resolution application under the Individuals with Disabilities Education Act (IDEA). The DOE may wish to consider adopting a conforming standard for Section 504-identified students since they are also entitled to a manifestation determination meeting. See, e.g., OCR Senior Staff Memo, 16 IDELR 491, 493 (November 13, 1989).

9. Section 4.1.2 apparently authorizes disciplinary action based on off-campus conduct which does not present a risk to school students and employees. Delaware caselaw authorizes schools to consider off-

campus activities if they present a risk to school students and employees. Cf. Howard v. Colonial School District, 621 A.2d 362 (Del. Super 1992), aff'd 615 A.2d 531. Thus, an otherwise exemplary student who faces a single charge of driving under the influence of alcohol who rides the school bus to school should not be the subject of school discipline. There is simply no nexus to a risk of harm to the school body. The recitation that “all off-campus, non-school activity conduct which shows disregard for the health, safety and welfare of others... may subject a student to Disciplinary Action” is “overbroad”.

10. The regulation adopts a model which authorizes discipline for off-campus activities even if the student has only been charged with delinquency with no adjudication of guilt. This approach is inconsistent with the presumption of innocence inherent in American jurisprudence. This approach also undermines Family Court due process since the student has the Constitutional right to remain silent when questioned about an incident but may feel compelled to waive this right to present a defense to disciplinary action.

11. Section 6.0 contains the following standard: “If any portion of this regulation is in conflict with any Memorandum of Understanding or Agreement in existence, the Memorandum of Understanding or Agreement shall control.” This is an unusual recitation. It is also difficult to interpret. First, Council queries if this is a “grandfather” provision which allows an agreement currently “in existence” to “trump” the regulation while a prospectively revised agreement would not “trump” the regulation. Second, query if a district or charter school could avoid the entire regulation by simply adopting a memorandum of agreement with any entity? There is some “tension” between the enabling statute [14 Del.C. §122(b)(26)] promoting uniform processing regulations and authorizing non-uniformity based on undefined agreements which supersede the uniform regulatory standards.

Thank you for the opportunity to share our observations with you. Please contact me or Wendy Strauss at the GACEC office if you have any questions on our comments.

Sincerely,

Dafne A. Carnright
Chairperson

DAC: kpc

CC: The Honorable Susan Bunting, Secretary of Education
Dr. Teri Quinn Gray, State Board of Education
Mary Ann Mieczkowski, Department of Education
Mr. Chris Kenton, Professional Standards Board
Matthew Korobkin, Department of Education
Terry Hickey, Esq.
Valerie Dunkle, Esq.
Kathleen MacRae, ACLU of Delaware