



Nancy S. Grasmick
State Superintendent of Schools

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TO: Members of the State Board of Education
FROM: Nancy S. Grasmick *Nancy*
DATE: October 28, 2008
RE: COMAR 13A.09.10 (AMEND)
Educational Programs in Nonpublic Schools and Child Care and Treatment Facilities
ADOPTION

PURPOSE:

The purpose of this item is to request adoption of amendments to COMAR 13A.09.10 Educational Programs in Nonpublic Schools and Child Care and Treatment Facilities (Attachment I). Amendments are being proposed to clarify due process procedures that have been implemented through policy and to add specific due process procedures for revocation of a school's Certificate of Approval as a result of violating Education Article §2-206.1. Additional changes are being proposed to clarify current regulatory elements.

BACKGROUND/HISTORICAL PERSPECTIVE:

On May 2, 2006, the General Assembly and the Governor enacted Senate Bill 111 (SB 111), which prohibits a nonpublic school from knowingly hiring or retaining employees who have been convicted of certain crimes. SB 111 has been codified in Education Article §2-206.1.

With an effective date of July 1, 2006, this statute applies to each nonpublic school approved under COMAR 13A.09.10 and affects all employees regardless of hire date. Subsequently, the Office of the Attorney General issued an advice of counsel memorandum (Attachment II) indicating that the current appeal procedures set forth in statute and regulation governing nonpublic schools are not congruent with the mandate of Education Article §2-206.1. As such, the Department was advised to promulgate regulations providing adequate due process for a nonpublic school for which a Certificate of Approval may be revoked under this statute.

The proposed amendments establish the due process procedures for nonpublic schools whose Certificate of Approval may be revoked as a result of Education Article §2-206.1 and also places existing due process procedures that are currently implemented through policy into regulation. Additionally, proposed amendments provide language clarifying the meaning of existing regulations and, in some instances, establishing more meaningful minimum standards.

On March 27, 2008, representatives from the Maryland Association of Nonpublic Special Education Facilities (MANSEF), Council of American Private Education (CAPE), and Association of Maryland Independent School (AIMS) met with MSDE staff to review these proposed changes and provide input; all input has been considered carefully and is incorporated in the proposed regulatory amendment as appropriate.

On April 29, 2008, the Maryland State Board of Education (State Board) acted to publish amended regulations that clarify due process procedures for the revocation of a school's Certificate of Approval as a result of violating Education Article §2-206.1 and also clarify current regulatory elements. Subsequently, the proposed regulatory amendment was published in the *Maryland Register* on June 20, 2008.

EXECUTIVE SUMMARY:

COMAR 13A.09.10 requires revision due to the enactment of Education Article 2-206.1. Proposed amendments establish appeal procedures which are congruent with the mandate of Education Article §2-206.1; incorporate existing policy and due process procedures for serious noncompliance with regulatory requirements; provide clarification of the meaning of existing regulation; and establish, in some cases, more meaningful minimum standards.

Through publication in the *Maryland Register*, interested parties were invited to provide comments on these proposed changes. No comments were received by the July 21, 2008 deadline. The proposed amendments to COMAR 13A.09.10 do not have any economic impact, nor is there any impact on individuals with disabilities. There is no corresponding federal standard for these proposed actions.

ACTION:

I am requesting the adoption of proposed regulatory changes to COMAR 13A.09.10.

NSG: jes/ss

- Attachment #1: Proposed Changes to COMAR 13A.09.10 Educational Programs in Nonpublic Schools and Child Care and Treatment Facilities (*Maryland Register*, June 20, 2008)
- Attachment #2: August 24, 2006 Office of the Attorney General Advice of Counsel Memorandum

Subtitle 09 NONPUBLIC SCHOOLS

13A.09.10 Educational Programs in Nonpublic Schools and Child Care and Treatment Facilities

Authority: Education Article, §§2-205, 2-206, 2-206.1, 2-304, 7-301, 7-403, and 8-406; Family Law Article, Title 5, Subtitles 5 and 7; Annotated Code of Maryland

Notice of Proposed Action

[08-171-P]

The Maryland State Board of Education proposes to amend Regulations .02, .05, .06, .09, .10, .12—, .17, .19, and .20 under COMAR 13A.09.10 Educational Programs in Nonpublic Schools and Child Care and Treatment Facilities. This action was considered at the Maryland State Board of Education meeting on April 29 and 30, 2008.

Statement of Purpose

The purpose of this action is to:

- (1) Establish appeal procedures that are congruent with the mandate of Education Article, §2-206.1, Annotated Code of Maryland;
- (2) Incorporate existing policy and due process procedures for serious noncompliance with regulatory requirements;
- (3) Provide clarification of the meaning of existing regulations; and
- (4) Establish, in some cases, more meaningful minimum standards.

Comparison to Federal Standards

There is no corresponding federal standard to this proposed action.

Estimate of Economic Impact

The proposed action has no economic impact.

Economic Impact on Small Businesses

The proposed action has minimal or no economic impact on small businesses.

Impact on Individuals with Disabilities

The proposed action has no impact on individuals with disabilities.

Opportunity for Public Comment

Comments may be sent to Sarah Spross, Chief, Nonpublic School Approval Branch, Maryland State Department of Education, 200 W. Baltimore Street, Baltimore, MD 21201, or call 410-767-0407, or email to

sspross@msde.state.md.us, or fax to 410-333-8963. Comments will be accepted through July 21, 2008. A public hearing has not been scheduled.

Open Meeting

Final action on the proposal will be considered by the Maryland State Board of Education during a public meeting to be held on August 26 and 27, 2008, at 200 W. Baltimore Street, Baltimore, MD 21201.

.02 Definitions.

A. (text unchanged)

B. Terms Defined.

(1)—(9) (text unchanged)

(10) *Educational Program.*

(a) "Educational program" means any one or combination of two or more of the following:

[(a)] (i)—[(g)] (vii) (text unchanged)

[(h)] (viii) An organized program of special education that is provided by a teacher and related services providers to students based on the individualized education program of each student; *or*

[(i)] (ix) (text unchanged)

(b) "*Educational program*" does not mean an organized program of instruction in a trade that requires licensure of its practitioners.

(11)—(13) (text unchanged)

(14) "Individualized education program (IEP)" means a written description *of the educational program* for a student with a disability that is developed, reviewed, and revised in accordance with COMAR 13A.05.01.

(15)—(22) (text unchanged)

(23) "Nongraded educational program" means a program of special education and related services that is provided by a teacher to students for whom the instruction [is based on ability or achievement, or both] *requires extensive and substantial modification.*

(24)—(36) (text unchanged)

(37) [Special Education.

(a) "Special education" [means specially designed instruction, at no cost to the parent, to meet the unique needs of a student with a disability, including instruction conducted in the classroom, hospitals, institutions, and other settings] *has the meaning stated in COMAR 13A.05.01.*

[(b) "Special education" includes:

(i) Speech-language pathology services, travel training, career and technology education, and instruction in physical education if the service consists of specially designed instruction; and

(ii) The adaptation of content, methodology, or delivery of instruction that addresses the unique needs of a student with a disability to ensure access to the general curriculum, so that the student can meet the educational standards that apply to each student within the jurisdiction of the public agency as specified in COMAR 13A.05.01.]

(38)—(39) (text unchanged)

(40) “Student with a disability” [means a student, 3 years old through the end of the school year in which the student reaches 21 years old, who has been identified by a local school system as having a disability or disabilities as identified in COMAR 13A.05.01.] *has the meaning stated in COMAR 13A.05.01.*

(41)—(42) (text unchanged)

.05 Procedures and Sanctions for Noncompliance.

[A. If the Department believes that a school does not meet the conditions or standards on which the approval document of the school was issued, the Department shall implement the procedures under §B of this regulation applicable to a school that does not demonstrate compliance with this chapter.

B. The procedures referenced in §A of this regulation shall include the following:

(1) Department identification of a school that fails to comply with approval requirements;

(2) Contents of Department notice to a legal authority regarding placement on intensive monitoring;

(3) Simultaneous with the Department notice specified in §B(2) of this regulation, referral for cessation of the State share of nonpublic tuition assistance under Education Article, §8-406, Annotated Code of Maryland, as applicable;

(4) Intensive monitoring of a school by the Department; and

(5) Department referral of a school to the State Board.

C. If the State Board believes that a school does not meet the conditions or standards on which its approval document was issued, the State Board shall give the legal authority written notice of the deficiencies and direct the legal authority to correct the deficiencies of the school within a period of not less than 30 calendar days.

D. A legal authority may request a hearing if the legal authority files a written request with the State Board within 20 calendar days of receipt of the notice of deficiencies from the State Board.

E. If a legal authority fails to correct the specified deficiencies of the school within the period set by the State Board and a hearing is not requested, the State Board shall issue an order to the legal authority to cease operating the educational program.

F. If a hearing is requested and after that hearing the State Board finds that the conditions or standards on which the approval document was issued are not met, the State Board shall issue an order to the legal authority to cease operating the educational program.]

A. If a school has serious areas of noncompliance or demonstrates a pattern of noncompliance with the conditions or standards on which the Certificate of Approval or Letter of Tentative Approval was based, the Department may place the school on intensive monitoring, which shall include referral to the Department's Division of Special

Education /Early Intervention Services for cessation of the State share of nonpublic tuition assistance under Education Article, §8-406, Annotated Code of Maryland, if appropriate, and may include:

- (1) Announced and unannounced site visits;*
- (2) Monitoring at the Department; or*
- (3) Requests for documentation pertaining to requirements under this chapter.*

B. Procedures on Finding of Deficiencies.

(1) Following placement on intensive monitoring, if a school continues to fail to meet the conditions or standards on which its Certificate of Approval or Letter of Tentative Approval was based, the State Board shall give the legal authority written notice of the deficiencies and order the legal authority to correct the deficiencies of the school within a period of not less than 30 calendar days.

(2) A legal authority may request a hearing to challenge the notice of deficiencies if the legal authority files a written request with the State Board within 20 calendar days of receipt of the notice.

(3) If a legal authority requests a hearing, the legal authority and the Department shall have an opportunity for oral argument before the State Board before a final decision is rendered. Oral argument before the State Board shall be limited to 15 minutes per side.

(4) If the State Board reviews an appeal request, or hears oral argument, and finds that a genuine dispute of material fact exists, the State Board shall promptly refer the case to the Office of Administrative Hearings for proceedings in accordance with Regulation .05E of this chapter.

(5) Following a hearing, if the State Board finds that the conditions or standards on which the Certificate of Approval or Letter of Tentative Approval was based are not met, the State Board may issue an order to the legal authority to cease operating the educational program.

(6) If a legal authority does not request a hearing and fails to correct the specified deficiencies of the school within the period set by the State Board, the State Board may issue an order to the legal authority to cease operating the educational program.

C. Revocation of Certificate of Approval or Letter of Tentative Approval.

(1) The State Board shall revoke the Certificate of Approval or Letter of Tentative Approval of a nonpublic school that knowingly hires or retains an individual in violation of Education Article, §2-206.1, Annotated Code of Maryland.

(2) Before revoking a school's Certificate of Approval or Letter of Tentative Approval, the State Board shall notify the legal authority of the charges and advise the legal authority of the right to request a hearing within 20 calendar days following receipt of the charges.

(3) If the legal authority does not request a hearing, the State Board shall issue an order to the legal authority to cease operating the educational program.

(4) If the legal authority requests a hearing before the State Board, the legal authority shall include the reasons for the request and any evidence that supports them.

(5) The legal authority and the Department shall have an opportunity for oral argument before the State Board before a final decision is rendered. Oral argument before the State Board shall be limited to 15 minutes per side.

(6) If the State Board reviews an appeal request, or hears oral argument, and finds that a genuine dispute of material fact exists, the State Board shall promptly refer the case to the Office of Administrative Hearings for proceedings in accordance with §D of this regulation.

D. Hearing Procedures.

(1) The hearing procedures for appeals referred by the State Board to the Office of Administrative Hearings are in accordance with the Administrative Procedure Act, State Government Article, §§10-201—10-226, Annotated Code of Maryland, and with COMAR 28.02.

(2) The Office of Administrative Hearings shall prepare an official case record as provided in COMAR 28.02.01.23.

(3) The administrative law judge shall submit in writing to the State Board a proposed decision containing findings of fact, conclusions of law, and recommendations, and distribute a copy of the written proposed decision to the parties.

(4) A party objecting to the administrative law judge's proposed decision may file exceptions with the State Board within 10 calendar days of receipt of the findings. A party may respond to the exceptions within 10 calendar days of receipt of the exceptions.

(5) If exceptions are filed, all parties shall have an opportunity for oral argument before the State Board before a final decision is rendered. Oral argument before the State Board shall be limited to 15 minutes per side.

(6) The State Board shall make the final decision in all cases dealing with the revocation of a Certificate of Approval or Letter of Tentative Approval. The final decision shall be in writing and contain findings of fact and conclusions of law.

[G.] E. (text unchanged)

.06 Certifications of Compliance.

A. The legal authority of a school shall certify that the school is in compliance with the requirements for:

(1) A criminal background check as specified in Family Law Article, Title 5, Subtitle 5, and Education Article, §2-206.1, Annotated Code of Maryland;

(2) Reporting suspected child abuse and neglect as specified in Family Law Article, Title 5, Subtitle 7, Annotated Code of Maryland; and

(3) Nondiscrimination based on race, color, or national origin as specified in Education Article, §2-206(e)(3), Annotated Code of Maryland; and]

[(4) Scoliosis screening as specified in Education Article, §2-206(k)(1) and (2), Annotated Code of Maryland.]

B. The legal authority shall certify compliance with §A(1)—[(4)] (3) of this regulation on forms provided by the Department.

.09 Type I Educational Program—General Requirements.

A.—B. (text unchanged)

C. [Teacher to Student] *Student-to-Teacher Ratio*.

(1) (text unchanged)

(2) With the exception of a full-day special education or residential special education program, a school may not assign more than [one teacher to ten students] *ten students to one full-time certified teacher* unless the Department approves a written justification that provides an educationally sound basis for the increased number.

(3) (text unchanged)

D. Admissions Criteria.

(1) (text unchanged)

(2) Kindergarten.

[(a) Until the 2006—2007 school year, a nonpublic school shall follow the established phase-in plan utilized by local school systems to determine the age of eligibility for enrollment in kindergarten. The Department shall provide this phase-in plan.]

[(b)] (a) [*In the 2006—2007 school year and each school year after that, a] A child who will be 5 years old or older on September 1 is age eligible for enrollment in a kindergarten program.*

(b) *A school may adopt policies and procedures permitting a 4-year-old child to be admitted to kindergarten, upon the request of the parent or guardian, if the school determines that the child demonstrates capabilities warranting early admission.*

(3) Admission of Students with an IEP in a General Education Program. A school shall maintain and implement [legally sufficient] policies and procedures for the admission of a student with special education needs into a general education program, *as outlined in the Department's "Policies and Procedures for Educating a Student with an Individualized Education Program (IEP) in a Type I or Type III Nonpublic General Education Program Approved under COMAR 13A.09.10".*

(4) On an annual basis, a school shall distribute its written statement of the criteria for admission to the school to the placement unit of each agency placing a student in the educational program.

.10 Type I Educational Program—Student Records and PEP.

A. Student Records.

(1)—(3) (text unchanged)

(4) A school shall maintain student record information [in] *on a standard [format] form* for each student, which includes all of the following:

(a)—(f) (text unchanged)

(g) Month, day, and year student initially entered; *and*

(h) Month, day, and year student withdrew [;].

(5) A school shall maintain student record information in a standard format for each student, which includes all of the following:

[(i)] (a)—[(m)] (e) (text unchanged)

[(5)] (6) A school shall give a copy of the complete student record of each student as specified in §A(4) and (5) of this regulation to the representative of the placing agency of each student upon discharge from the school.

B. (text unchanged)

.12 Type I Educational Program—Privacy Rights.

A. (text unchanged)

B. Protecting Right of Privacy of Students.

(1) (text unchanged)

(2) The written policies and procedures under §B(1) of this regulation shall include the following:

(a)—(c) (text unchanged)

(d) Procedures by which the school shall maintain a written record of requests for, and disclosure of, personally identifiable information from a student's record that includes *the first, middle, and last name of the student*, the name of the reviewer, the month, day, and year of the review, and the purpose of the review; and

(e) (text unchanged)

C. (text unchanged)

.13 Type I Educational Program—Instructional Materials and Equipment/Library Media Collection.

A. Instructional Materials and Equipment.

(1)—(3) (text unchanged)

(4) A school shall maintain a written inventory of instructional materials and equipment owned by the school [that is organized by subject for each age, grade, or instructional program with reading level or levels indicated, or a combination of these, based on the classification of] *to implement* the educational program specified on the approval document of the school.

(5) (text unchanged)

B. Library Media Collection.

(1)—(5) (text unchanged)

(6) A school shall maintain a written inventory of the items in the library media collection owned by the school [that is organized by subject for each age, grade, or instructional program, or a combination of these, based on the classification of] *to support and supplement* the educational program specified on the approval document of the school.

(7) (text unchanged)

.14 Type I Educational Program—Daily Schedule and Yearly Calendar.

A. Schedule of the School Day.

(1) (text unchanged)

(2) A school shall distribute annually its written schedule for the school day to the [parents of students enrolled and] representatives of agencies placing students in the school *and to the parents of students enrolled, as applicable.*

(3)—(5) (text unchanged)

B. Calendar of the School Year.

(1) A school shall develop a written calendar for each year that includes the *name, address, and telephone number of the school*, month, day, and year for the opening and closing of school, the specific and total number of days of instruction, the total number of hours a school is open for student attendance, holidays, vacations, and other pertinent events or activities in the schedule for the year.

(2) A school shall distribute its written calendar annually to the [parents of students enrolled and] representatives of agencies placing students in the school *and to the parents of students enrolled, as applicable.*

(3)—(5) (text unchanged)

.15 Type I Educational Program—Requirements for General Education Programs.

A. Nursery School, Kindergarten, Elementary School, and Secondary School Program. A school providing one or a combination of these educational programs shall implement [a written curriculum in English language arts, mathematics, science, social studies, and any other appropriate curricular areas for each subject at each grade.] *the Maryland Voluntary State Curriculum, the general education curriculum of a local school system, or both, as applicable, for each subject or area of instruction at each grade level, as specified on its approval document.*

B.—E. (text unchanged)

.16 Type I Educational Program—Requirements for a Secondary School Program.

A. (text unchanged)

B. Unit of Credit.

(1)—(4) (text unchanged)

(5) College Credit. If a student earns credit for [an approved] a course taken at an [accredited college or university] *IHE*, a school may grant a unit of credit, *with the approval of the local school system.*

C. Transcript.

(1) A secondary school shall be prepared to present as a separate document a current and cumulative transcript of the secondary school record of each student for each year of enrollment, which includes the following:

(a)—(i) (text unchanged)

(j) Month, day, and year the student initially entered *the school's secondary school program*;

(k) Month, day, and year the student withdrew or graduated; [and]

(l) Total days of attendance during each school year in the school [.];

(m) *Summary of State test requirements, including test dates and scores, as applicable; and*

(n) *Summary of service learning hours completed.*

(2)—(3) (text unchanged)

.17 Type I Educational Program—Requirements for a Special Education Program.

A.—C. (text unchanged)

D. Curriculum Guides.

[(1)] A school that provides nursery school, kindergarten, grades 1—12, or any combination of these[,] shall implement the Maryland Voluntary State Curriculum, [and] the general education curriculum of a local school system, *or both, as applicable*, for each subject [or area of instruction] at each grade *or age* level as specified on its approval document.

[(2)] A school that provides an educational program to students who will participate in the ALT-MSA shall implement a written curriculum that includes the following components:

(a) Regular or extended Maryland reading and mathematics content standards; and

(b) A fundamental life skills curriculum of a local school system that includes instruction in the following areas:

(i) Functional academics to include English language arts, social studies, and science;

(ii) Personal management;

(iii) Community skills;

(iv) Recreation and leisure skills;

(v) Career and vocational skills;

(vi) Communication and decision making skills; and

(vii) Interpersonal skills.]

E. [Staff to] *Student-to-Teacher* Ratio.

(1)—(2) (text unchanged)

(3) Residential Special Education. A school providing residential special education services as specified on the approval document of the school shall meet the following [staff-to-student] *student-to-teacher* ratio for its entire special education program:

(a) The average ratio of students to qualified staff may not exceed an average of four students with disabilities per full-time certified teacher [or] *and*, if applicable, full-time certified or licensed related services provider; or

(b) If an aide is present in every class, the average ratio of students to qualified staff may not exceed seven students with disabilities per full-time certified teacher [or] *and*, if applicable, full-time certified or licensed related services provider.

F. (text unchanged)

G. Individualized Education Program (IEP).

(1)—(3) (text unchanged)

(4) Documentation of Student Progress Toward IEP Goals.

(a) A school shall document student progress in the achievement of IEP goals [and objectives] as often as the progress of students without disabilities is documented.

(b) (text unchanged)

(5)—(6) (text unchanged)

H.—I. (text unchanged)

.19 Type II Educational Programs.

A.—C. (text unchanged)

D. Personnel.

(1) (text unchanged)

(2) The Department may approve a written justification that provides an educationally sound basis for a less than full-time [educational] *education* director.

E. [Teacher-to-] Student-*to-Teacher* Ratio.

(1) The [teacher-to-student] *student-to-teacher* ratio in a nursery school, kindergarten, elementary school, or secondary school educational program may not exceed [a full-time teacher to] ten students *to a full-time certified teacher* unless the Department approves a written justification for more students.

(2) The [staff to student] *student-to-teacher* ratio in a special education program shall be as specified in Regulation .17E of this chapter, as appropriate.

F. Educational Program.

(1)—(6) (text unchanged)

(7) A PEP shall be developed for each student enrolled in [an] *a general* educational program specified in §B of this regulation. The PEP shall include all of the following:

(a)—(n) (text unchanged)

(8)—(11) (text unchanged)

(12) Student Records.

(a) [A student record shall be maintained for each student that includes all of the following:] *A school shall maintain student record information on a standard form for each student, which includes all of the following:*

(i)—(vi) (text unchanged)

(vii) Month, day, and year the student initially entered; *and*

(viii) Month, day, and year the student withdrew or graduated [;].

(b) *A school shall maintain student record information in a standard format for each student, which includes all of the following:*

[(ix)] (i)—[(xiii)] (v) (text unchanged)

[(b)] (c) (text unchanged)

(13)—(15) (text unchanged)

(16) Schedule of the School Day.

(a) The [length] *hours* of the school day shall be the same as that of the public school.

(b)—(c) (text unchanged)

(17) Calendar of the School Year.

(a) [The length of the school year shall be the same as that of the local school system.] *A school shall develop a written calendar of the school year that includes the same days in the school year that the local school system is open and may include additional days.*

[(b)] A school shall develop a written calendar of the school year.

[(c)] (b) (text unchanged)

(18)—(19) (text unchanged)

.20 Type III Educational Programs.

A. In a Type III educational program, the school shall provide a transitional instructional program *to the residents of the licensed facility*, not to exceed an average of 60 school days, in a facility licensed by a unit of State government.

B.—C. (text unchanged)

D. Admission of students with an IEP in a Type III Educational Program. A school shall maintain and implement policies and procedures for the admission of a student with an IEP or suspected disability into a general education

program, as outlined in the Department's "Policies and Procedures for Educating a Student with an Individualized Education Program (IEP) in a Type I or Type III Nonpublic General Education Program Approved under COMAR 13A.09.10."

[D.] E.—[H.] I. (text unchanged)

[I.] J. [Teacher-to-] Student-to-Teacher Ratio. The [teacher-to-student] *student-to-teacher* ratio may not exceed [one teacher to] ten students *to one full-time certified teacher* unless the Department approves a written justification for the increased number that is educationally sound.

[J.] K. Schedule of the School Day. A school shall:

(1) (text unchanged)

(2) [A school shall distribute] *Distribute* the schedule of its school day to the [parents of each student enrolled and] representatives of agencies placing students in the school *or to the parents of students enrolled, as applicable;*

(3)—(4) (text unchanged)

[K.] L. Calendar of the School Year. A school shall:


(1)—(2) (text unchanged)

(3) Distribute the written calendar to the [parent of each student enrolled and] representatives of agencies placing students in the school *or to the parents of students enrolled, as applicable.*

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TO: Sarah Spross
Interim Chief, Nonpublic Schools Approval Branch

FROM: Demetria Titus 
Assistant Attorney General

DATE: August 24, 2006

SUBJECT: Revisions to June 30, 2006 NSAB Memo to Nonpublic Schools re: SB111

As I have explained recently, Liz and I have discussed the June 30, 2006 memorandum and attachments from Virginia Cieslicki to the nonpublic schools regarding SB 111. We discovered an error that I did not catch when I met to discuss these materials with you and Virginia. Consequently, my advice is for the branch to send a correction in a revised memo.

The issue concerns this sentence near the bottom of page 1: "You will note that a school may not appeal the Department's revocation of the Certificate of Approval pursuant to a violation of SB 111." It is my understanding that it was Virginia's intent to not provide any appeal rights for nonpublic schools that violate SB 111. As a legal matter, however, appeal rights can arise, whether or not they are specifically granted in statute.

As you know, a non-public school may not operate in this State without a Certificate of Approval. Md. Code Ann., Educ. Art. § 2-206(e). Once a non-public school is granted a Certificate of Approval, it has a property interest¹ in the certificate. The United States Constitution prohibits a State from depriving a person or entity of a property interest unless it provides the person or entity with basic due process rights. *Coleman v. Anne Arundel County Police Dept.*, 369 Md. 108, 142 (2002). Basic due process rights are the right to notice and the opportunity to be heard. *New Bd. Of School Comm'n v. PSASA*, 142 Md.App. 61, 71 (2002).

¹ The U.S. Supreme Court has opined that "protected interests in property are normally not created by the Constitution. Rather, they are created and their dimensions are defined by an independent source such as state statutes or rules entitling the citizen to certain benefits." *Goss v. Lopez*, 419 U.S. 565, 572-72 (1975). Here, a school's property interest in the Certificate of Approval is conferred by Education Article §2-206.

The formality of the notice and opportunity to be heard depends on the severity of the deprivation. If the deprivation is significant - - such as losing one's right to operate a business - - the Constitution calls for a formal evidentiary hearing. *Mathews v. Eldridge*, 424 U.S. 319 (1976). Maryland's Administration Procedure Act codifies that requirement by requiring a "contested case" hearing whenever the Constitution requires that a hearing be held before a license can be revoked. Md. Code Ann., State Gov't Art. § 10-202(d)(ii).

The bottom line is that before MSDE can take away a Certificate of Approval from a non-public school for hiring a criminal, it must provide the school with the opportunity for an evidentiary hearing.

The question arose in my discussion with Liz whether there currently exists in State law or regulation notice to the public of the appeal procedure that MSDE will follow in these types of revocation cases. I note here that SB 111 states that "The Department shall revoke the Certificate of Approval or Letter of Tentative Approval of a non-public school that violates this section." I have looked at the various appeal procedures set forth in the statute and regulations governing non-public schools. Each one requires that a notice of deficiency be provided to the school and that the school be given a certain amount of time to correct the deficiency. If the non-public school requests a hearing, MSDE must stay the order to correct deficiencies. Educ. Art. § 2-206(g). After a full hearing, the State Board may order the school to cease operations. *Id.* § 2-206(h); COMAR 13A.09.10.05.

I have concluded that those appeal procedures are not congruent with the mandate of SB 111; that statute provides no opportunity to "correct the deficiency." It states, essentially, that if a non-public school knowingly hires a criminal, its certificate shall be revoked - - no second chances; no opportunity to fix it. Under current appeal procedures, however, there is an opportunity to fix the problem. If they were cited as the appeal procedures MSDE would use when it sought to revoke a certificate under SB 111, the non-public school would have a right to expect that it could correct its "deficiency" by firing the employee at issue. It is my view that because SB 111 requires that a certificate be revoked if the non-public school knowingly hired a criminal, firing the employee cannot cure the illegal action.

You may wonder why MSDE must provide any hearing if there is no "second chance"? At the hearing, the fact of the hiring and whether it was done knowingly will be the contested issue; one that MSDE may win or lose. It is my view, however, if MSDE prevails at the hearing by proving that the non-public school knowingly hired a criminal, the school's certificate must be revoked, even if the school "corrected the deficiency" by firing the culpable person.

Therefore, it is my advice that MSDE promulgate a regulation providing adequate due

process for a non-public school whose certificate of approval will be revoked under SB 111. I am working on the proposed regulatory language, which I will send to you shortly.

In the meantime, I recommend that a corrective memorandum be sent to the non-public schools notifying them that some due process will be provided for a SB 111 violation.

**ADVICE OF COUNSEL
NOT AN OPINION OF THE ATTORNEY GENERAL**

cc: John Smeallie, Assistant Superintendent for Certification and Accreditation
Elizabeth Kameen, Principal Counsel