

DEPARTMENT OF EDUCATION

OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(b) (14 Del.C. §122(b))
14 DE Admin. Code 225

PROPOSED

PUBLIC NOTICE

Education Impact Analysis Pursuant To 14 Del.C. §122(d)

225 Prohibition of Discrimination

A. TYPE OF REGULATORY ACTION REQUIRED

Amendment to Existing Regulation

B. SYNOPSIS OF SUBJECT MATTER OF THE REGULATION

The Secretary of Education intends to amend 14 DE Admin. Code 225 Prohibition of Discrimination. The regulation is being amended pursuant to a directive from Governor Carney to Secretary Bunting in a memo dated July 17, 2017. The Department was directed to provide guidance through regulation to school districts and charter schools to prohibit unlawful discrimination in educational programs and activities for students. The memo also required stakeholder input and that the new regulation be published for public comment by November 1st. The Department was also charged with producing a model policy that each district and charter school could adopt, or tailor and adopt, to suit the needs of the students in the district. The model policy is attached as Exhibit 1.

Information related to this regulation and model policy can be found at the Department website here <https://www.doe.k12.de.us/page/3531>.

Internally, the Department reviewed information from various sources including the Education Commission of the States and policies from other states and prepared a preliminary draft regulation and model policy. A Development Team was then established to review the preliminary draft regulation and model policy and to make recommendations for revisions. Also, some grammatical changes were made to comply with regulation drafting requirements. The Development Team consisted of seventeen individuals and included superintendents, a charter school head of school, students, local board members, school administrators and an advocate. Four Development meetings were held. The revised draft was made available for general public input.

The Department held four Community Conversations with one in each county and one in the City of Wilmington. An online survey was made available for public input. Many of the comments received were determined to be appropriate for inclusion in implementation guidance.

Persons wishing to present their views regarding this matter may do so in writing by the close of business on or before December 4, 2017 to Susan K Haberstroh, Department of Education, at 401 Federal Street, Suite 2, Dover, Delaware 19901. A copy of this regulation may be viewed online at the Registrar of Regulation's website, http://regulations.delaware.gov/services/current_issue.shtml, or obtained at the Department of Education, Finance Office located at the address listed above.

C. IMPACT CRITERIA

1. Will the amended regulation help improve student achievement as measured against state achievement standards? The amended regulation does not specifically address state achievement standards.

2. Will the amended regulation help ensure that all students receive an equitable education? The amended regulation is intended to continue to help ensure all students receive an equitable education.

3. Will the amended regulation help to ensure that all students' health and safety are adequately protected? The amendments are intended to help ensure that all students' health and safety are adequately protected.

4. Will the amended regulation help to ensure that all students' legal rights are respected? The amended regulation continues to help ensure that all students' legal rights are respected.

5. Will the amended regulation preserve the necessary authority and flexibility of decision making at the local board and school level? The amended regulation does not change the decision making at the local board and school level.

6. Will the amended regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels? The amended regulation does not place any unnecessary reporting or administrative requirements on decision makers.

7. Will the decision making authority and accountability for addressing the subject to be regulated be placed in the same entity? The decision making authority and accountability for addressing the subject to be regulated does not change

because of the amendment.

8. Will the amended regulation be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational policies addressing achievement in the core academic subjects of mathematics, science, language arts and social studies? The amendment is consistent with and not an impediment to the implementation of other state educational policies.

9. Is there a less burdensome method for addressing the purpose of the regulation? There is not a less burdensome method for addressing the purpose of the regulation.

10. What is the cost to the State and to the local school boards of compliance with the regulation? There is no expected cost to implementing this amended regulation.

225 Prohibition of Discrimination

4.0 Prohibition of Discrimination

~~No person in the State of Delaware shall on the basis of race, color, religion, national origin, sex, sexual orientation, genetic information, marital status, disability, age or Vietnam Era veteran's status be unlawfully excluded from participation in, denied the benefits of, or subjected to discrimination under any program or activity receiving approval or financial assistance from or through the Delaware Department of Education.~~

~~2 DE Reg. 1246 (01/01/99)~~

~~7 DE Reg. 1177 (03/01/04)~~

~~9 DE Reg. 1069 (01/01/06)~~

~~14 DE Reg. 554 (12/01/10)~~

1.0 Purpose

1.1 The purpose of this regulation is to provide guidance to School Districts and Charter Schools for the development of a policy prohibiting discriminatory treatment of students on the basis of a Protected Characteristic(s) in all Educational Programs and Activities and Extra-Curricular Activities. The intent of the policy is to foster school environments as welcoming, inclusive places where all students can flourish.

1.2 No person in the State of Delaware shall on the basis of race, ethnicity, color, religion, national origin, sex, gender, sexual orientation, genetic information, marital status, disability, age, gender identity or expression or other characteristic protected by state or federal law, known as "Protected Characteristics" under this regulation, be unlawfully excluded from participation in, denied the benefits of, or subjected to discrimination under any program or activity receiving approval or financial assistance from or through the State of Delaware.

1.3 This regulation requires each School District and Charter School to establish an anti-discrimination policy and procedures for reviewing the policy for compliance with the stated Purpose of the regulation. The established anti-discrimination policy shall, at a minimum, be consistent with this regulation and include any required language as such is noted in the approved Anti-Discrimination Model Policy.

2.0 Definitions

The following words and terms, when used in this regulation, shall have the following meaning unless the context clearly indicates otherwise:

"Anti-Discrimination Model Policy" means the policy, developed and approved by the Department, to be used by a School District or Charter School in the establishment of its anti-discrimination policy.

"Charter School" means a school established pursuant to Chapter 5 of Title 14 of the Delaware Code.

"Course of Study" or "Unit of Study" means academic based instruction within an Educational Program or Educational Activity.

"Department" means the Delaware Department of Education.

"Educational Program and Activity" mean an activity or program for providing education made available, sponsored or supervised by a Charter School or School District.

"Extra-Curricular Activity" means a student activity made available, sponsored or supervised by a School District or Charter School not falling within the scope of required Charter School or School District activities or relating to formally or informally approved and usually organized student activities connected with the Charter School or School District and not carrying academic credit.

"Protected Characteristic(s)" means race, ethnicity, color, religion, national origin, sex, gender, sexual orientation, genetic information, marital status, disability, age, gender identity or expression or other characteristic protected by state or federal law.

"School District" means a reorganized school district or vocational technical school district established pursuant to Title 14 of the Delaware Code.

3.0 Admission to Educational Programs and Activities

- 3.1 All Educational Programs and Activities offered by a public school shall be open and available to students regardless of Protected Characteristic(s), unless the Educational Program and Activity is legally constituted as single gender or is for the purpose of assisting students with a disability.
- 3.2 A School District or Charter School shall not schedule students into a Course of Study or Unit of Study on the basis of Protected Characteristic(s).
- 3.3 No student, on the basis of Protected Characteristic(s), shall be discriminated against in accessing a Course of Study or Unit of Study.
- 3.4 Nothing in this regulation shall be construed to prevent School Districts and Charter Schools from providing separately to each gender those segments of a program of instruction dealing exclusively with human sexuality. A student shall have the opportunity to participate in the program of instruction dealing exclusively with human sexuality that is consistent with the student's gender identity regardless of the student's assigned sex at birth.

4.0 Career and Educational Guidance

- 4.1 School counselors and other school personnel shall present to students a broad spectrum of educational and career opportunities. School counselors and other school personnel shall make reasonable effort to depict individuals with the various Protected Characteristic(s) as representatives in educational and career opportunities.
- 4.2 No materials, tests or procedures shall be employed for guidance purposes that discriminate or limit educational and career choices on the basis of Protected Characteristic(s).

5.0 Instructional Materials

- 5.1 No School District or Charter School shall use instructional materials in a manner that encourages discrimination of individuals based on a Protected Characteristic(s).
- 5.2 Each school with a physical education program shall provide equal opportunity for all students. Goals, objectives and skill development standards, where used, shall neither be designated on the basis of gender nor designed to have an adverse impact on members of any gender.

6.0 Extra-Curricular Activities

- 6.1 Advantages and privileges of Charter Schools and School Districts include all Extra-Curricular Activities made available to, sponsored by or supervised by any Charter School or School District. No Charter School or School District shall make available, sponsor or supervise any Extra-Curricular Activities that restrict student participation on the basis of Protected Characteristic(s). This regulation does not prohibit School Districts or Charter Schools from allowing use of school premises by independent groups with restrictive membership if such premises are generally made available to the public.
- 6.2 No student shall be denied the opportunity in any implied or explicit manner to participate in an Extra-Curricular Activity because of the student's Protected Characteristic(s) except as provided in subsection 6.4. Participation in Extra-Curricular Activities shall be encouraged by each Charter School and School District for all students regardless of their Protected Characteristic(s).
- 6.3 Each School District and Charter School shall provide equal athletic opportunity for male and female students to participate in intramural, club, and interscholastic sports.
 - 6.3.1 In order to provide equal athletic opportunity for male and female students, School Districts and Charter Schools that operate or sponsor intramural, club, or interscholastic sports teams shall:
 - 6.3.1.1 Effectively accommodate athletic interests and abilities of both male and female students; and
 - 6.3.1.2 Provide equivalent benefits and services, including in the provision of equipment and supplies; scheduling of games and practice times; travel and per diem allowance; opportunity to receive coaching and academic tutoring; assignment and compensation of coaches and tutors; provision of locker rooms and facilities for practice and competition; provision of medical and training facilities and services; provision of housing and dining facilities and services; and publicity.
- 6.4 A Charter School or School District may operate or sponsor separate teams for members of each gender where selection for such teams is based upon competitive skill or the activity involved is a contact sport, provided that the requirements of subsection 6.3.1.2 are satisfied. A student shall have the opportunity to

participate on the team that is consistent with the student's gender identity regardless of the student's assigned sex at birth.

6.4.1 For the purpose of subsection 6.4, a contact sport is a sport that involves bodily contact, including wrestling, football, basketball, lacrosse, soccer, field hockey, and ice hockey.

6.5 Teams comprised primarily or solely of students of one gender shall be granted equivalent instruction, training, coaching, access to all available facilities, equipment and opportunities to practice and compete as teams engaged in a similar activity comprised primarily or solely of students of the opposite gender.

7.0 Student Records

7.1 All students entering a School District or Charter School shall be enrolled in eSchoolPLUS and assigned a DELSIS Student ID. The DELSIS Student ID is the unique identifier used to track a student throughout the student's entire educational career in Delaware.

7.2 Any student who seeks to change the student's name and does so pursuant to 10 Del.C. §5901, shall have the name changed in eSchoolPLUS upon the school's receipt of the petition for change of name granted by the court. The legal name change shall be reflected only on the student's educational records from the effective date of the petition going forward; historical records shall not reflect the change.

7.3 Any student who seeks to change the student's name and does not do so pursuant to 10 Del.C. §5901, may select a "preferred name" based on a Protected Characteristic, which the school shall enter in to eSchoolPLUS; however, the student's legal name shall continue to be the name maintained in eSchoolPLUS and displayed on all educational records for the student.

7.3.1 A school may request permission from the parent or legal guardian of a minor student before a "preferred name" is accepted; provided, however, that prior to requesting the permission from a parent or legal guardian, the school should consult and work closely with the student to assess the degree to which, if any, the parent or legal guardian is aware of the Protected Characteristic and is supportive of the student, and the school shall take into consideration the safety, health and well-being of the student in deciding whether to request permission from the parent or legal guardian.

7.4 All students enrolled in a Delaware public school may self-identify gender or race which is maintained in eSchoolPLUS.

7.4.1 A school may request permission from the parent or legal guardian of a minor student before a self-identified gender or race is accepted; provided, however, that prior to requesting the permission from a parent or legal guardian, the school should consult and work closely with the student to assess the degree to which, if any, the parent or legal guardian is aware of the Protected Characteristic and is supportive of the student, and the school shall take into consideration the safety, health and well-being of the student in deciding whether to request permission from the parent or legal guardian.

7.5 A student's preferred name cannot be placed on the student's diploma unless it is the student's legal name.

7.5.1 A student may apply for a notarized letter of certification from the Department for a legally changed name after the issuance of the diploma. The Department does not issue duplicate or revised diplomas after the diploma has been issued.

8.0 Privacy

The school board of each School District and Charter School shall include a provision within its anti-discrimination policy that accommodates all students and addresses student access to locker rooms and bathrooms. School Districts and Charter Schools shall work with students and families on providing access to locker rooms and bathrooms that correspond to students' gender identity or expression.

9.0 Notification and Student Complaint Procedure

9.1 The superintendent of each School District and head of school for each Charter School shall be responsible for ensuring that all school handbooks and codes of conduct follow this regulation. In order to ensure that such obligations are fulfilled, all school handbooks or codes of conduct shall also contain the following:

9.1.1 The anti-discrimination policy that is consistent with this regulation and affirms the school's non-tolerance for discrimination, including that which is based upon Protected Characteristic(s);

9.1.2 The school's procedures for an informal process and a formal complaint process, which includes accepting, investigating and resolving students' complaints alleging discrimination in violation of the school's policy under subsection 9.1.1, which procedure shall, at a minimum, contain:

9.1.2.1 A description of the basic procedures;

- 9.1.2.2 An informal process for students such as identifying specific school staff member(s) a student may speak with if the student does not wish to initiate a formal complaint;
- 9.1.2.3 A formal student complaint provision that allows for the complaint to be brought by the student or parent or both which includes the following:
 - 9.1.2.3.1 The identification of the administrative position at the school that will address the formal student complaint at each level of the process and the identification of the final decision-maker at the school or School District levels;
 - 9.1.2.3.2 A provision that the formal student complaint be in writing at each step of the process and that the formal student complaint specifies the basis for the complaint, and that it shall be filed.
 - 9.1.2.3.3 A provision that the submitted formal student complaint be addressed during a conference with the student and parent, if requested by the student, by the school within five (5) school days of its receipt and a written determination shall be issued within five (5) school days after the conference;
 - 9.1.2.3.4 The disciplinary or intervention measures that the school may impose if it determines that discrimination has occurred.
- 9.1.2.4 The appeal process for both the student who filed the formal student complaint or for the individual determined to have engaged in discrimination if either wishes to appeal the disciplinary or intervention measure decision.

(Non-regulatory note - please refer to 14 DE Admin. Code 605 for requirements related to student rights and responsibilities.)

10.0 Implementation

- 10.1 The school board of each School District and Charter School shall establish an anti-discrimination policy, which shall be, at a minimum, consistent with this regulation and shall include any required language as such is noted on the approved Anti-Discrimination Model Policy.
- 10.2 The school board of each School District and Charter School shall periodically review its anti-discrimination policy and procedures for compliance with the stated purpose under Section 1.0 of this regulation, and assurance that all obstacles to equivalent access to Educational Programs and Activities and Extra-Curricular Activities for all students regardless of Protected Characteristic(s) are removed.
- 10.3 All School Districts and Charter Schools shall strive to prevent discrimination based upon a student's Protected Characteristic(s), and all School Districts and Charter Schools shall respond promptly to such discrimination when they have knowledge of its occurrence.
- 10.4 The superintendent of each School District and head of school for each Charter School shall promote and direct effective procedures for the full implementation of this regulation and shall make recommendations to district or charter school school board for the necessary policies, program changes, and budget resource allocations needed to achieve adherence to this regulation.
- 10.5 Any contributions to a School District or Charter School for activities and monetary awards within or sponsored by the School District or Charter School or for scholarships administered by the School District or Charter School by any person, group or organization shall be free from any restrictions based upon Protected Characteristic(s). Schools may post or print information regarding private restricted scholarships as long as no preferential treatment is given to any particular scholarship offered and as long as the school does not endorse or recommend any such scholarship or advise or suggest to a particular student that he or she apply for such a scholarship; provided that a school may so advise or suggest such a restricted scholarship to a student if the school is aware that it is available to that student based on such student's self-identified Protected Characteristic(s).

11.0 Policy Reporting Requirements and Timelines

Each School District and Charter School shall establish its anti-discrimination policy for implementation for the beginning of the 2018-2019 school year. An electronic copy of the current anti-discrimination policy of each School District and Charter School shall be on file with the Department of Education.

12.0 Application

Nothing in this regulation shall alter a School District's or Charter School's rights and responsibilities under any applicable federal or state law including, for example, the First Amendment of the U.S. Constitution, Title IX of the Education Amendments of 1972, the Individuals with Disabilities Act, or Title VI of the Civil Rights Act of 1964.

MODEL ANTI-DISCRIMINATION POLICY FOR DISTRICTS AND CHARTER SCHOOLS

REQUIRED LANGUAGE is italicized

The _____ School District/Charter School (hereinafter referred to as "The District/Charter School") recognizes that all schools in Delaware should be welcoming, inclusive places where students are able to learn, achieve, and flourish without unlawful discrimination. It is the District/Charter School policy that no student shall be treated differently, separately, or have any action directly affecting him or her taken on the basis of race, ethnicity, color, religion, national origin, sex, gender, sexual orientation, genetic information, marital status, disability, age, gender identity or expression or any other characteristic protected by state or federal law in any educational program or education activity.

This policy reflects the provisions of 14 DE Admin. Code 225 Prohibition of Discrimination.

DEFINITIONS (Additional definitions may be added by School District or Charter School)

The below words and terms, when used in this policy, shall have the following meaning unless the context clearly indicates otherwise:

"Educational Program and Activity" *mean an activity or program for providing education made available, sponsored or supervised by a Charter School or School District.*

"Extra-Curricular Activity" *means a student activity made available, sponsored or supervised by a School District or Charter School not falling within the scope of required Charter School or School District activities or relating to formally or informally approved and usually organized student activities connected with the Charter School or School District and not carrying academic credit.*

"Protected Characteristic(s)" *means race, ethnicity, color, religion, national origin, sex, gender, sexual orientation, genetic information, marital status, disability, age, gender identity or expression or other characteristic protected by state or federal law.*

POLICY

The _____ School District/Charter School personnel and students are strictly prohibited from engaging in any form of discrimination or retaliation. Prohibited behaviors may include, but are not limited to [note - the policy must include any conduct specifically identified as discriminatory in 14 DE Admin. Code 225]:

- Discriminating against a student with regard to access to or scheduling into a course or unit of study on the basis of Protected Characteristic(s).*
- Utilizing Protected Characteristic(s) as limiting factors in career determination while providing career and educational guidance.*
- Utilizing instructional materials in a manner that encourages discrimination of individuals based on Protected Characteristic(s).*
- Prohibiting a student's access to locker rooms or bathrooms on the basis of the student's gender identity or expression.*
- Expressing slurs, jokes or remarks that are derogatory, demeaning, threatening or suggestive to a class of persons or a particular student or that promote stereotypes of persons with a Protected Characteristic(s).*
- Engaging in discrimination between persons of different races or ethnicities, or even between persons of the same race or ethnicity because of their skin color, complexion or tone.*
- Prohibiting a student from being excused from lunch or breakfast because their religion.*
- Treating students unfavorably or favorably because they are from a particular country or part of the world because of ethnicity or accent or because they appear to be of a certain ethnic background (even if they are not).*
- Treating students differently on the basis of ancestry or physical or cultural characteristics associated with a certain race, such as skin color, hair texture or styles, or certain facial features.*

Any persons found to have engaged in discriminatory behavior based on Protected Characteristic(s) of a student shall be subject to the appropriate disciplinary or intervention measure.

No person shall be subjected to retaliation for reporting, testifying, assisting or participating in any manner in an investigation, proceeding or hearing resulting from a complaint of discriminatory behavior. No person shall intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with that person's right to file a

complaint of discrimination.

This statement constitutes only the policy of the District/Charter School. A violation of this policy does not necessarily mean that the conduct violates state and/or federal laws.

PROCEDURE FOR ADDRESSING ALLEGATIONS OF DISCRIMINATION

The _____ School District/Charter School's procedure for addressing allegations of discrimination is as follows:

(NOTE - The School District or Charter School can utilize an existing procedure provided the procedure contains, at a minimum, the provisions in Section 9.0 of 14 DE Admin. Code 225)

A. Informal Process

A student may contact (identified specific school staff) to discuss a concern about discriminatory conduct if the student does not want to file a formal student complaint. The (identified specific school staff) shall respect any request for student confidentiality as long as there is no information that would adversely affect the health and safety of the student or others.

B. Formal Student Complaint Procedure

The student will submit the complaint of alleged discrimination in writing to (identified administrative person) on the Formal Student Complaint form.

(identified person) will schedule a conference with the student and parent(s) if requested by the student. This conference must be scheduled within five (5) school days of receipt of the Formal Student Complaint form. The conference may occur by phone or in person.

(Identified person) will issue a written determination on the complaint within five (5) school days after the conference.

If the complaint is not resolved to the satisfaction of the student or the individual determined to have engaged in discrimination, the determination may be appealed to (final decision maker) within five (5) school days. The appeal must be in writing and provide a basis for the appeal.

(Final decision maker) will schedule a conference with the appellant within three (3) school days. The conference may occur by phone or in person.

(Final decision maker) will issue a written final decision on the appeal within three (3) school days of the conference.

Possible Discipline or Intervention Measures:

A person who has engaged in discriminatory conduct that has resulted in a reportable bullying or harassment incident shall be subject to the _____ School District/Charter School's code of conduct for those behaviors.

A person who has engaged in discriminatory conduct that constitutes a crime will be reported to the appropriate authorities.

A person who has engaged in discriminatory conduct may be required to participate in educational or cultural sensitivity training.

2 DE Reg. 1246 (01/01/99)

7 DE Reg. 1177 (03/01/04)

9 DE Reg. 1069 (01/01/06)

14 DE Reg. 554 (12/01/10)

21 DE Reg. 364 (11/01/17) (Prop.)