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State Superintendent of Schools

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TO: Members of the State Board of Education
FROM: Nancy S. Grasmick *Nancy*
DATE: May 27-28, 2009
RE: COMAR 13A.09.09 (AMEND)
Educational Programs in Nonpublic Schools

PERMISSION TO PUBLISH

PURPOSE:

The purpose of this item is to request permission to publish amendments to COMAR 13A.09.09 Educational Programs in Nonpublic Schools (Attachment I). Amendments are being proposed to clarify due process procedures that have been implemented through policy and to add specific due process 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 pertaining to the approval of Montessori Educational Programs.

BACKGROUND/HISTORICAL PERSPECTIVE:

Over the past two years, two significant events have occurred to prompt the review by staff of regulatory requirements for nonpublic schools approved under COMAR 13A.09.09: (1) the codification of Education Article §2-206.1; and (2) the consolidation of early childhood education program licensure.

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.09.09 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 violation of Education Article §2-206.1

and also places existing due process procedures 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.

Secondly, on March 27, 2007, the Maryland State Board of Education (MSBE) voted to adopt amended regulations that removed all regulatory language pertaining to Nursery School (age 3 and 4) from COMAR 13A.09.09 and introduced new regulatory language regarding the approval of nonpublic nursery schools (COMAR 13A.16.16). This action transferred all regulatory responsibilities (i.e., licensure of child care programs, approval of nonpublic nursery-school programs, and the accreditation of early childhood programs) to the Division of Early Childhood Development. During regulatory development and discussions with stakeholder groups, it was determined that the new regulations should not differentiate among Montessori and other educational programs; thus, the nursery school regulations do not include specific regulatory requirements for Montessori educational programs. At the same time, no substantive changes were made to Nonpublic School Approval regulations in the interest of maintaining transparency and clarity; stakeholder groups acknowledged the need for future adjustment to align Montessori requirements, but these were held in abeyance to provide for implementation of licensure consolidation.

This course of action caused a temporary discrepancy between the regulatory requirements for Montessori Programs approved under COMAR 13A.09.09 (grades 5-12) and those approved under COMAR 13A.16.16 (early childhood). COMAR 13A.09.09 specifies requirements for the operation of a Montessori Educational program (i.e., teacher credentials, curriculum and instructional materials), while COMAR 13A.16.16 is silent with regard to Montessori programs. Discussion with the original stakeholder group led to the conclusion that alignment – by eliminating Montessori references in the Nonpublic School Approval regulations – was desirable.

On April 29, 2008 the MSBE voted to publish the above-referenced changes to COMAR 13A.09.09. Through the regulatory process, the Montessori community expressed significant concern with the removal of Montessori-specific regulatory requirements during the open comment period. Subsequently, MSDE staff met with members of the Montessori community on July 10, 2008, August 13, 2008, and September 16, 2008 to discuss concerns. As a result of these meetings, and based on a recommendation from the State Superintendent of Schools, the MSBE acted to withdraw the revisions to COMAR 13A.09.09 at its October 28, 2008 meeting.

On December 19, 2008 and March 11, 2009 MSDE staff continued discussions with the Montessori community to identify ways to maintain regulatory assurance to the public regarding nonpublic Montessori educational programs in a more meaningful way than is currently available under existing regulation. It was determined that there are overarching standards that are consistent in all Montessori programs; however, there are slightly different philosophies for the implementation of these standards. Furthermore, the group acknowledged that there are established Montessori organizations serving as experts in the field of Montessori education and that these organizations could become recognized by the MSDE to validate Montessori educational programs in Maryland. Finally, on March 13, 2009 and March 20, 2009, MSDE staff conducted conference calls with representatives from the American Montessori Society (AMS) and Association Montessori International (AMI) to discuss proposed regulatory changes

and the concept of program validation by external organizations. Input from all stakeholders has been considered and is included in the proposed regulatory amendment as appropriate.

EXECUTIVE SUMMARY:

COMAR 13A.09.09 requires revision due to the enactment of Education Article 2-206.1 and the July 1, 2007 transfer of approved nursery school programs to the Division of Early Childhood Development.

Proposed amendments:

1. establish appeal procedures that are congruent with the mandate of Education Article §2-206.1;
2. incorporate existing policy and due process procedures for serious noncompliance with regulatory requirements;
3. maintain regulatory assurance to the public regarding nonpublic Montessori Programs in a more meaningful way than is currently available under existing regulation; and
4. provide clarification of the meaning of existing regulation.

The proposed amendments to COMAR 13A.09.09 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 permission to publish the proposed amendments to COMAR 13A.09.09 with the following TENTATIVE timeline:

Maryland Register Issue Date: July 17, 2009
30-Day Open Comment Period Ends: August 17, 2009
Adoption: September 21-22, 2009

NSG: jes/sds

Attachment #1: COMAR 13A.09.09 Educational Programs in Nonpublic Schools

Attachment #2: August 24, 2006 Office of the Attorney General Advice of Counsel Memorandum

Title 13A STATE BOARD OF EDUCATION

Subtitle 09 NONPUBLIC SCHOOLS

Chapter 09 Educational Programs in Nonpublic Schools

Authority: Education Article, §§2-206, 2-206.1, 2-304, 7-301, 7-302, and 7-405;

Family Law Article, §§5-561 and 5-704; Annotated Code of Maryland

.01 Purpose and Scope

A. – E. (text unchanged)

.02 Definitions.

A. In this chapter, the following terms have the meanings indicated.

B. Terms Defined.

(1) — (10) (text unchanged)

(11) "Montessori" means an educational program based on the educational philosophy of Dr. Maria Montessori [as reflected in the qualifications of the teachers, written curriculum, instructional methods, and materials and equipment used to implement the instructional program.] that is validated by a Department-recognized Montessori validating organization.

[(12) "Montessori teacher credential" means the document that is evidence of successful completion of all academic course work, student internship, and all other requirements established by a Montessori teacher training program.]

[(13)] (12) — [(18)] (17) (text unchanged)

.03 Certificate of Approval for the Educational Program.

A. — B. (text unchanged)

C. A Certificate of Approval shall be limited to the following specifications recorded on it:

(1) — (3) (text unchanged)

(4) Classification of the educational program to include one or a consecutive sequence of the following:

(a) – (c) (text unchanged)

(d) Montessori.

(i) Effective September 1, 2009, any new Montessori educational program shall submit a validating document from a Department-recognized Montessori validating organization; or

(ii) Any Montessori educational program holding a Certificate of Approval issued prior to September 1, 2009 shall submit a validating document from a Department-recognized validating organization by July 1, 2015 in order to maintain the Montessori program recognition.

D. — M. (text unchanged)

.04 Compliance.

A. — J. (text unchanged)

.05 Statement of Purposes.

A. — B. (text unchanged)

.06 Personnel Requirements.

A. Administrative Head.

(1) — (4) (text unchanged)

B. Teachers.

(1) (text unchanged)

(2) A teacher, regardless of whether the employment status of the teacher is full-time, part-time, paid, volunteer, or substitute, shall meet the [following qualifications:] requirements of this regulation.

[(a)] (3) A teacher who provides instruction in English language arts, mathematics, science, social studies, courses for which secondary school credit is granted[, and Montessori areas of instruction] shall hold, at a minimum, one of the following credentials:

(i) — (ii) (text unchanged)

(iii) A bachelor's degree equivalent as determined by an independent agency authorized to evaluate foreign credentials that is designated by the Department[;] .

[(b) In addition to the requirement of §B(2)(a) of this regulation, a teacher in a Montessori school shall hold a Montessori teacher credential appropriate for the level of assignment.]

[(3)] (4) (text unchanged)

C. Written Statement of Teacher Qualifications.

(1) — (2) (text unchanged)

.07 Educational Program.

A. Program.

(1) (text unchanged)

(2) Based on the classification specified on the Certificate of Approval of a school, a school shall maintain at the school a written curriculum of its educational program for the following areas of instruction:

(a) English, language arts, mathematics, science, and social studies for kindergarten and each grade; and

(b) Secondary school courses for which credit is issued[; and] .

[(c) Montessori areas of instruction.]

(3) (text unchanged)

B. Instructional Materials and Equipment.

(1) — (2) (text unchanged)

C. Library Media Collection.

(1) — (2) (text unchanged)

D. Ratio of Students to Teachers or Average Class Size.

(1) — (2) (text unchanged)

.08 Student Records for Kindergarten and Elementary Schools.

A. – B. (text unchanged)

.09 Requirements for Secondary Schools.

A. – E. (text unchanged)

.10 Administrative Practices.

A. Schedule of the School Day.

(1) — (2) (text unchanged)

B. Calendar of the School Year.

(1) — (4) (text unchanged)

C. Admissions.

(1) — (3) (text unchanged)

(a) [By the 2006—2007 school year and thereafter, a] A child shall be 5 years old on or before September 1 of a school year to be age-eligible for admission during that school year to a kindergarten program approved under this chapter.

[(b) A school may develop a plan to meet the September 1, 2006 kindergarten age-of-eligibility date requirement.]

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

D. Public Relations Information. The public relations information of a school, by whatever means provided, shall be accurate and may not be erroneous or misleading, either by actual statement, omission, or reasonable inference.

.11 Health, Fire Safety, and Zoning.

A. – B. (text unchanged)

.12 Procedures and Sanctions for Noncompliance.

[A. If the Department believes that a school does not meet the conditions or standards on which the Certificate of Approval of the school was based, the Department shall implement procedures and sanctions for noncompliance approved by the State Board.

B. If the State Board believes that a school does not meet the conditions or standards on which the Certificate of Approval was based, the State Board shall give the legal authority of the school written notice of the deficiencies and direct the school to correct the deficiencies within a period of not less than 30 days.

C. The legal authority of a school may request a hearing if a written request is filed with the State Board within 20 days of receipt of the notice of deficiencies from the State Board.

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

E. If the legal authority of a school requests a hearing and after that hearing the State Board finds that the conditions or standards on which the Certificate of Approval was based are not met, the State Board shall issue an order to the legal authority of the school 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 was based, the Department may place the school on intensive monitoring, which 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. Following placement on intensive monitoring, if a school continues to fail to meet the conditions or standards on which its Certificate of 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.

(1) 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.

(a) 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.

(b) 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 .12D of this chapter.

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

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

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

(2) 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.

(3) If the legal authority requests a hearing before the State Board, the legal authority shall include the reason(s) for the request and any evidence that supports it.

(a) 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.

(b) 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 .12D of this chapter.

D. 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 et seq., Annotated Code of Maryland, and with COMAR 28.02.

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

(2) 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.

(3) 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.

(4) 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.

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

[F.] E. (text unchanged)

.13 Schools Serving Students with Special Education Needs.

(text unchanged)

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TO: Sarah Spross
Interim Chief, Nonpublic Schools Approval Branch

FROM: Demetria Titus *DT*
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

