

TO: Department of Elementary & Secondary Education
FROM: Education Law Task Force
DATE: February 24, 2014
RE: "Public Comment" on Chapter 222 Proposed Regulations

The Education Law Task Force (ELTF) submits the following "Public Comment" on the Chapter 222 Proposed Regulations. The ELTF is comprised of parents, students, educators and advocates who seek to reduce the number of disciplinary school exclusions. For that reason, ELTF members worked with lawmakers to secure enactment of the legislation which became Chapter 222 of the Acts of 2012. The ELTF appreciates that DESE supported the legislation and that, as demonstrated by the Proposed Regulations, DESE is committed to its implementation. We believe that revision of the Proposed Regulations is needed with regard to the following areas:

- **Alternatives to Suspension;**
- **Parental Participation;**
- **Emergency Removal;**
- **In-School Suspension;**
- **Education Services and Academic Progress; and**
- **Public Reporting of Disaggregated School Discipline Data.**

Our suggested revisions in each area, as set forth below, are essential to the implementation of Chapter 222 and will improve the prospects of decreasing students' time out of school.

ALTERNATIVES TO SUSPENSION

We suggest revisions in two areas:

1. Alternatives to suspension are key to the paradigm change prescribed by Chapter 222: that *exclusion only be used as a last resort*. Rather than the specific alternatives listed in Proposed Regulation § 53.05, we believe it would be highly appropriate, without being prescriptive, to make reference to the six core elements of school operations contained in the Behavioral Health and Public Schools Framework as a comprehensive organizational structure, and then to reference model interventions such as the Massachusetts Tiered System of Support (MTSS) and Restorative Justice practices. These approaches would include the present list and much more.
2. §§ 53.08 and 53.09 do not incorporate alternatives in the disciplinary process. Chapter 222 is remedial legislation. Implementation of legislative intent to reduce the incidence of school exclusion and increase reliance on alternatives, will require clear direction and documentation requirements. The essential elements that are relevant to the disciplinary process and should be incorporated into hearing requirements are: a review of prior efforts to avoid exclusion; mutual consideration by disciplinarians and parents of other efforts short of exclusion that might be successful; documentation of both levels of analysis in decisions issuing after the principal's hearing and superintendent's appeal, including the alternatives considered and why they were rejected, prior to

imposition of exclusion; and, finally, a clear instruction that exclusion may not be employed unless these steps are faithfully taken. Each of these elements is missing from the disciplinary hearing provisions of the DESE proposal.

PARENTAL PARTICIPATION

Chapter 222 requires the issuance of regulations to address the role of parents in disciplinary cases. This subject needs additional procedures in order to maximize the prospects of parental participation. The ELTF understands that former Rep. Alice Wolf will be submitting “Public Comment” on this important subject.

EMERGENCY REMOVAL

Proposed Regulation § 53.07 states that a student “charged with a disciplinary offense” may be subjected to “emergency removal” from school before procedures designed to insure against arbitrariness are provided. In other words, a student later deemed “not guilty” of the typically non-serious rule violations covered by Chapter 222 will have been punished nonetheless.¹ The provision violates the plain language of the statute, which unambiguously requires that procedural protections occur “prior to” the imposition of sanctions.² As drafted, it will frustrate legislative intent to ensure disciplinary fairness and, perhaps even more importantly, that the disciplinary process include consideration of alternatives to exclusion so that denials of access to the educational mainstream occur only when truly a last resort.³

The proposed regulation virtually assures that the exception will swallow the rule. It permits punishment before process whenever a disciplinarian concludes that a student’s continued presence will “materially disrupt” school order (compare the standard governing “emergency” suspension in the Boston Public Schools, which is considerably more rigorous⁴). The unexacting standard proposed, particularly as it is likely to be applied by administrators ingrained in the practice of punishing immediately, will result in pre-process exclusion in circumstances that are not emergencies. And remedial action will not happen soon under DESE’s proposed regulation, which permits delay in due process for five school days. A hearing in the Boston Public Schools must occur no later than the next day after an emergency suspension.⁵

Chapter 222’s drafters understood that process is pointless once a student is sanctioned. Notwithstanding very occasional circumstances that call for prompt removal of students from the school building (e.g., a serious brawl), “emergency” removal must not become the rule. Compliance with Chapter 222 in even the majority of cases would require a major cultural shift that will not happen if regulations permit disciplinarians to conduct business as usual. Any justification for carving such a broad

¹ Under C. 222 of the acts of 2012 (“c. 222”), codified at G.L. c. 71, § 37H ¾ (a), mandated procedural protections do not apply to violations governed by G.L. c. 71, §§ 37H (drugs and weapons possession or trafficking; assaults on school staff) and 37H ½ (felony charge or conviction creating “substantial detriment” to school safety). *Id.* at § 3(a).

² *Id.* at § 3(c).

³ *Id.* at § 3 (b).

⁴ See Boston Public Schools Code of Conduct at § 8 (emergency suspension only permitted when there is “no alternative” to suspension and providing prior process is “impossible;” the “exact reason for exclusion and the alternative measures taken” must be documented).

⁵ *Id.*

exemption is undermined by the fact that the due process provisions of Chapter 222 *do not even apply* to the most serious school offenses.⁶

The broad exception is also bad policy. It will undo the pedagogical value of the disciplinary process, teaching students that authority may proceed as it may wish even in the face of legally mandated checks. Recent research indicates that safe schools are firm in discipline but also fair.⁷ Where procedures designed to insure fairness are circumvented, it is impossible for students to have this perception.

Any exception prior to due process must be genuinely calculated to pertain only to emergencies. Given the need to change current practice, this would require:

1. Stringent standards governing “emergency removal”, similar to the Boston Public Schools disciplinary code;
2. Delay in the provision of due process of no longer than one school day, again, consistent with the Boston code, unless further delay is requested by the student, parent, or a representative;
3. Internal controls on the use of Emergency Removals, such as prior notice to and required permission of the district superintendent, in the same manner as prior notice of suspensions of younger children, as required by Chapter 222 and the proposed regulations;
4. Incorporating emergency exceptions into school district reporting to DESE and data posting in two ways:
 - a. Same day notice of emergency exceptions in the manner of restraint reporting to DESE;
 - b. Annual reporting and posting in the same fashion as exclusion reporting generally so that overuse can be identified and addressed.

Unless checks such as these are in place, procedural fairness will be sacrificed and legislative intent violated across the board due to rare cases that present genuine emergency circumstances. Additionally, the exception, unless strictly limited, will likely spawn wasteful and unnecessary litigation by students and parents of students disciplined prior to procedures designed to prevent unfairness and access to education before it happens.

In-School Suspension

Chapter 222 requires that the “department shall promulgate rules and regulations that address a principal’s duties under this subsection and procedures for including parents in student exclusion meetings, hearings or interviews under this subsection.” (SECTION 3) Proposed Regulation § 53.10 would require principals to notify parents if an in-school suspension has been imposed, but should also require principals to invite parents to attend the meeting when the principal decides whether to impose an in-school suspension.

⁶ See note 1.

⁷ See e.g. Gary Gottfredson et al., *School Climate Predictors of School Disorder: Results from a National Study of Delinquency Prevention in Schools*, 42 *Journal of Research in Crime and Delinquency* 412, 433 (2005) (students rate their schools higher on scales of student delinquency and victimization when they report unfair implementation of arbitrary rules).

Education Services and Academic Progress

Chapter 222 requires that “Principals and headmasters shall ensure that students who are suspended from school for 10 or fewer consecutive days, whether in or out of school, shall have an opportunity to make academic progress during the period of suspension, to make up assignments and earn credits missed including, but not limited to, homework, quizzes, exams, papers and projects missed.” (Section 9) Proposed Regulation § 53.13 omits and should include the words “earn credits missed including but not limited to, homework...”

Public Reporting of Disaggregated School Discipline Data

Chapter 222 requires the issuance of *regulations* to address discipline data reporting to DESE, including the “manner and form” of district reporting of “specific reasons” for exclusion actions and the “student status and categories,” as well as publication of collected data in “disaggregated” fashion. The proposed regulations at § 53.14,, however, do not include the required specifics. Further, and most importantly, the regulations flatly violate the disaggregation requirement, which is necessary to determine discrimination in discipline. This section needs to be revised to assure that DESE publicly reports disaggregated data in addition to aggregated data; that DESE posts the annual data the following fall rather than its current practice of posting the following spring; and that DESE reports on the assistance it provides to the schools and districts that significantly exclude students for disciplinary reasons. Please see the ELTF letter to Commissioner Chester, dated 2/17/14, for further discussion of this issue.

Thank you for your consideration of the ELTF Public Comment. We look forward to continuing to work collaboratively with DESE.