



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.09.09 (AMEND)
Educational Programs in Nonpublic Schools
WITHDRAWAL

PURPOSE:

The purpose of this item is to seek withdrawal of proposed amendments to COMAR 13A.09.09, Educational Programs in Nonpublic Schools (Attachment I). These regulations govern the requirements of and approval process for Maryland non-public schools.

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, it 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 Maryland State Department of Education (MSDE) 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 were developed to 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 implemented through policy into regulation.

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 in COMAR 13A.14.13. This action transferred all regulatory responsibilities for these schools (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 the period of regulatory development and discussions with stakeholder groups leading to this action, it was determined that the new regulations should not differentiate among Montessori and other educational programs; as such, COMAR 13A.14.13 does 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 and those approved under COMAR 13A.14.13. COMAR 13A.09.09 specifies requirements for the operation of a Montessori Educational program relating to teacher credentials, curriculum, and instructional materials; however, COMAR 13A.14.13 is silent with regard to Montessori program requirements. This discrepancy has generated concern among nonpublic Montessori schools that operate programs approved under both sets of regulations and those wishing to begin operating a nonpublic Montessori educational program.

On March 27, 2008 and April 7, 2008, representatives from the Maryland Association of Nonpublic Special Education Facilities (MANSEF), Council of American Private Education (CAPE), Association of Maryland Independent School (AIMS), and The Montessori School met with MSDE staff to review these proposed changes and provide input; all input was considered and was included in the proposed regulatory amendment as appropriate. You acted to publish the proposed regulatory changes at your meeting on April 29, 2008.

Subsequent to the publication of these proposed changes several members of the Maryland Montessori Community expressed concern about the removal of the specific regulatory elements recognizing Montessori as a classification on the Certificate of Approval. As a result, MSDE has participated in a series of discussions with the Montessori community and has recognized the strong interest in ensuring that Maryland maintains regulatory assurance to the public with regard to the viability of Montessori programs in Nonpublic Schools.

Based on expanded knowledge and newly identified interest from the Montessori community, MSDE staff has recommended withdrawal of the proposed regulatory amendments that were published on June 20, 2008. It will serve the best interests of students and parents to revisit the way in which Montessori programs are addressed in this regulation, and we will work to develop a revised proposal for your consideration in the coming months. This represents an opportunity to build on the vitality of the Maryland Montessori community to address standards and program quality in a meaningful way.

Regulatory language pertaining to due process procedures for nonpublic schools whose Certificate of Approval may be revoked as a result of Education Article §2-206.1 will be included as originally proposed.

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. Previously proposed and published 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; and eliminate specific Montessori program elements and designation to align these regulations with more recently adopted COMAR 13A.14.13.

Due to discussions with the Montessori community, MSDE staff has been alerted to strong interest in ensuring that Maryland maintains regulatory assurance to the public with regard to the viability of Montessori programs in nonpublic schools. Therefore, withdrawal of proposed regulatory change is appropriate to provide an opportunity for further consideration and refinement of a regulatory approach to Montessori programs that ensures adherence to standards and educational quality. MSDE staff plans to explore with members of the Montessori community and others ways in which this might be achieved in a more meaningful way than is currently available under existing regulation.

ACTION:

I am requesting withdrawal of proposed amendments to COMAR 13A.09.09.

NSG: jes/ss

Attachment #1: Proposed Changes to COMAR 13A.09.09 Educational Programs in Nonpublic Schools (*Maryland Register*, June 20, 2008)

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

Subtitle 09 NONPUBLIC SCHOOLS

13A.09.09 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

Notice of Proposed Action

108-172-P1

The Maryland State Board of Education proposes to amend Regulations .02, .03, .06, .07, .10, and .12 under COMAR 13A.09.09 Educational Programs in Nonpublic Schools. 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) Eliminate specific Montessori program elements and designation to align these regulations with more recently adopted COMAR 13A.14.13;
- (4) Provide clarification of the meaning of existing regulations; and
- (5) 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 West 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)—(5) (text unchanged)

(6) "Educational program" means an organized program of instruction in English, language arts, mathematics, science, social studies, and, as applicable, courses for which secondary school credit is granted [, and Montessori areas of instruction,] provided by teachers to students enrolled in any consecutive sequence of kindergarten, or grades 1—12, or all of these.

(7)—(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.]

(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)] [(11)]—[(18)] [(16)] (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) (text unchanged)

(b) Elementary school with the grade or grades specified; *and*

(c) Secondary school with the grade or grades specified [; and].

[(d) Montessori.]

D.—M. (text unchanged)

.06 Personnel Requirements.

A. (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, *and* courses for which secondary school credit is granted[, and Montessori areas of instruction] shall hold, at a minimum, one of the following credentials:

[(i)] (a)—[(ii)] (b) (text unchanged)

[(iii)] (c) 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) An individual who provides assistance to a teacher in a class is not required to meet the [requirement] *requirements* of §B(2) *and* (3) of this regulation.

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.—D. (text unchanged)

.10 Administrative Practices.

A.—B. (text unchanged)

C. Admissions.

(1)—(2) (text unchanged)

(3) Kindergarten.

(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) (text unchanged)

D. (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. 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 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 .12D of this chapter.

(5) 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.

(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.

(1) 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.

(2) Before revoking a school's Certificate of 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 Regulation .12D of this chapter.

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. The final decision shall be in writing and contain findings of fact and conclusions of law.

[F.] E. (text unchanged)

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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