

OFFICE OF THE SECRETARY

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

PUBLIC NOTICE

Education Impact Analysis Pursuant To 14

**Del.C. §122(d) 225 Prohibition of
Discrimination**

A. TYPE OF REGULATORY ACTION REQUIRED

New Regulation

Amendment to Existing Regulation

Reauthorization of 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. Through this directive, the Department was required 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 1, 2017 and required 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/charter school. The original proposed regulation (November 2017) received comments that resulted in substantive changes, reflected in this version of the new regulation.

Information related to this regulation can be found at the Department website [here](https://www.doe.k12.de.us/page/3531)
<https://www.doe.k12.de.us/page/3531>.

Through this process, 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. 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 Team meetings were held. The revised draft was made available for general public input. Prior to the November 2017 publication, 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.

During the comment period that ended December 4, 2017, the Department received over 11,000 comments. The Department held a final meeting with the Development Team on January 31, 2018 and approximately 300 members of the public attended. Comments from that meeting as well as from the public comment period have been taken into consideration in the preparation of this current proposed amended regulation.

Persons wishing to present their views regarding this matter may do so in writing by the close of business on or before July 6, 2018 to Department of Education, Office of the Secretary, Attn: Regulation Review, 401 Federal Street, Suite 2, Dover, Delaware 19901 or email to DOERegulations.comment@doe.k12.de.us. 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, 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 will preserve the necessary authority and flexibility of 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 additional expected costs to implementing this amended regulation.

225 Prohibition of Discrimination

1.0 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.~~

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. All School Districts and Charter Schools may use the document entitled "Guidance to assist School Districts and Charter Schools in creating an anti-discrimination policy" as developed and attached to this regulation as Exhibit 1 – which may be amended by the Department of Education – to assist with creating a policy to meet their community's needs.

2.0 Definitions

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

"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 and Activity.

"Department" means the Delaware Department of Education.

"Educational Program and Activity" means 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 Parental Notification

A school shall request permission from the parent or legal guardian before accommodating a request by a minor student that the school take action to recognize a change in any Protected Characteristic. Prior to requesting such permission, to safeguard the health, safety and well-being of the student, the school shall discuss with the student the permission process and, based on its discussions with the student, assess the degree to which the parent or legal guardian is aware of the change to the Protected Characteristic. If the student does not permit the school to request permission from the parent or legal guardian, then the request to take action shall not be accepted.

4.0 Admission to Educational Programs and Activities

- 4.1 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.
- 4.2 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).
- 4.3 No student, on the basis of Protected Characteristic(s), shall be discriminated against in accessing a Course of Study or Unit of Study.
- 4.4 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.

5.0 Career and Educational Guidance

- 5.1 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.
- 5.2 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).

6.0 Instructional Materials

- 6.1 No School District or Charter School shall use instructional materials in a manner that encourages unlawful discrimination against individuals based on a Protected Characteristic(s).
- 6.2 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.

7.0 Extra-Curricular Activities

- 7.1 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.
- 7.2 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 7.3. Participation in Extra-Curricular Activities shall be encouraged by each Charter School and School District for all students regardless of their Protected Characteristic(s).
- 7.3 School Districts and Charter Schools shall comply with Delaware Interscholastic Athletic Association regulations and policies regarding equal athletic opportunities for all students.

8.0 Student Records

- 8.1 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.
- 8.2 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 proof that the petition for change of name has been 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.
- 8.3 Any student who seeks to change the student's name on the basis of a Protected Characteristic and does not do so pursuant to 10 Del.C. §5901 may select a "preferred name", which the school shall enter into eSchoolPLUS. The student's legal name shall also be maintained in eSchoolPLUS and shall be displayed on all educational records for the student.
- 8.4 A student's preferred name cannot be placed on the student's diploma unless it is the student's legal name.
- 8.4.1 A student may request 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.

9.0 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.

10.0 Notification and Student Complaint Procedure

- 10.1 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 adhere to this regulation. In order to ensure that such obligations are fulfilled, all school handbooks or codes of conduct shall also contain the following:
- 10.1.1 The anti-discrimination policy required by Section 11.1;
- 10.1.2 The school's procedures for an informal discussion 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 10.1.1, which procedure shall, at a minimum, contain:
- 10.1.2.1 A description of the basic procedures;
- 10.1.2.2 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;

10.1.2.3 A formal student complaint provision that allows for the complaint to be brought by the student or parent or both, and which includes the following;

10.1.2.3.1 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;

10.1.2.3.2 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;

10.1.2.3.3 A provision that the submitted formal student complaint shall be addressed by the school, or if requested by the student that a conference with the student and parent be held within five (5) school days of its receipt and, if a conference is held, that a written determination shall be issued within five (5) school days after the conference;

10.1.2.3.4 The disciplinary or intervention measures that the school may impose if it determines that discrimination has occurred.

10.1.2.4 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.

10.2 Notwithstanding the requirement in Section 12.0 for an implementation date of January 1, 2019, the requirement set forth in subsection 10.1 may be satisfied by posting these policies on each School District or Charter School website (in lieu of reprinting handbooks or codes of conduct) by January 1, 2019, with hard copies provided to any requesting party. The policy shall be printed in the handbook and/or codes of conduct for the beginning of the 2019-2020 school year and be included in any electronic or website version of those documents.

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

11.0 Implementation

11.1 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.

11.2 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.

11.3 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.

11.4 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 the school board of the School District or Charter School for the necessary policies, program changes, and budget resource allocations needed to achieve adherence to this regulation.

11.5 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 unlawful 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 endorse or recommend 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).

12.0 Policy Reporting Requirements and Timelines

This regulation shall become effective on January 1, 2019 and each School District and Charter School shall establish its anti-discrimination policy for implementation by that date. 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.

13.0 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.

EXHIBIT 1

Guidance to assist School Districts and Charter Schools in creating an anti-discrimination policy.

The following guidance is intended to assist School Districts and Charter Schools in developing their own anti-discrimination policy consistent with regulation 225. School Districts and Charter Schools may, but are not required to, adopt the language provided below.

School Districts and Charter Schools should seek to prohibit the following behavior:

- 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).
- Disallowing a student's access to locker rooms or bathrooms on the basis of the student's gender identity or expression.
 - NOTE: Schools are encouraged to work with transgender students and their families to determine how to best provide access to bathrooms and locker rooms. This may include providing access to the facility that corresponds to a student's gender identity, access to a private and non-stigmatizing alternate facility such as a single stall restroom, nurse's office or gender neutral facility, access to a private area within a locker room, or a different schedule to change so a student can use a locker room separately from their peers. Such opportunities and accommodations should be open to any student to promote a safe and comfortable environment for everyone.
- 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 of 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.