
MARYLAND COALITION TO REFORM SCHOOL DISCIPLINE

HOUSE COMMITTEE ON WAYS AND MEANS HOUSE BILL 1407: PRIMARY AND SECONDARY EDUCATION – STUDENT DISCIPLINE (RIGHT TO TEACH ACT OF 2020)

MARCH 4, 2020

POSITION: OPPOSE

The Maryland Coalition to Reform School Discipline (“CRSD”) brings together advocates, service providers, and concerned citizens interested in transforming school discipline practices within Maryland’s public school systems. We are committed to making discipline responsive to students’ behavioral needs, fair, appropriate to the infraction, and designed to keep youth on track to graduate. **CRSD opposes HB 1407**, which would dismantle the student discipline regulations that the Maryland State Department of Education (MSDE) promulgated based on extensive research and stakeholder input, and thereby make Maryland’s approach to student discipline both more exclusionary and less effective.

In 2014, MSDE enacted comprehensive reforms to the state’s student discipline process following five years of study which demonstrated that **an exclusionary approach to discipline – one that relies significantly on school removal – harms excluded students, deepens racial and disability-based segregation, and fails to improve student behavior or school climate**. MSDE’s findings, based on a review of national and statewide data, teacher, administrator, and parent input, and academic scholarship, included the following:

- Black students and students with disabilities are disproportionately targeted for exclusionary discipline – i.e. out-of-school suspension – even when they engage in behaviors similar to their peers, contributing to achievement gaps¹;
- The majority of disciplinary removals are for non-violent behaviors²;
- “Being separated from school is detrimental to students,” and increases the risk that excluded students drop out and enter the juvenile or criminal systems³;
- “There is no evidence that reliance on removing misbehaving students improves student behavior or school safety”⁴

¹ Maryland State Dep’t of Education, A Safe School, Successful Students, and a Fair and Equitable Disciplinary Process Go Hand in Hand, *8-9 (2012), <http://marylandpublicschools.org/stateboard/Documents/StudentDiscipline/SchoolDisciplineReport02272012.pdf>; *see also* Maryland State Dep’t of Education, School Discipline and Academic Success: Related Parts of Maryland’s Education Reform, *1-5 (2012), <http://www.marylandpublicschools.org/stateboard/Documents/StudentDiscipline/SchoolDisciplineandAcademicSuccessReport0712.pdf>

² A Safe School, *supra*, at *6.

³ A Safe School, *supra*, at *10.

⁴ A Safe School, *supra*, at *12.

- Use of exclusionary discipline undermines, rather than supports, development of a positive school climate⁵

The regulations resulting from these findings took steps to limit the use of long-term removal as a disciplinary response outside the most serious circumstances. Specifically, the regulations provide that students cannot be subjected to an extended suspension – removal from school for more than 10 days – unless (1) they have caused a “chronic and extreme disruption that has created a substantial barrier to learning for other students across the school day, and other available and appropriate behavioral and disciplinary interventions have been exhausted” or (2) where their presence in school would present an “imminent threat of serious harm” to other students or staff. Expulsion, removal of 45 days or more, is permissible only in the latter circumstance. Last year, a Task Force of the State Board of Education – comprised of educators and administrators from around the state – reviewed the regulations and issued a report which recommended that they remain in place, with additional technical assistance and monitoring from the state to support local districts with implementation. *See* MSBE, Memorandum to the Members of the State Board of Education on the Task Force on Student Discipline Regulations (August 27, 2019).⁶

MSDE’s regulations define “extended suspension” and “expulsion” as removal from the “student’s regular school program.” The regulations also require the provision of “comparable education” to any student who is serving an extended suspension or expulsion, which is typically done by way of enrollment in an alternative program – i.e. enrollment in an alternative school is typically the result of, not a substitute for, a long-term disciplinary removal. In an opinion issued last year, the State Board of Education interpreted these regulations to mean that the forced transfer of a student who commits a behavioral infraction from their mainstream school program to an alternative program is the equivalent of an extended suspension (if the transfer is for 11-44 days) or expulsion (if the transfer is for 45 school days or more) and is governed according to the above standards. *See D.B. and K.G. v. Baltimore County Board of Education*, MSBE Op. No. 19-26 (2019) at 3-4.⁷ The Office of the Attorney General has also opined, in a recent letter to the General Assembly, that requiring a student to transfer to an alternative program outside their home school in response to disciplinary violations is a “suspension” for purposes of Maryland’s statutory limitations on the use of suspension and expulsion for students in grades pre-kindergarten through second. *See* Letter from Susan Benson Brantley to Delegates Erek Barron and Susie Proctor (May 31, 2019), attached as Exhibit A.

In short, the Maryland State Department of Education, State Board of Education, and Attorney General agree that the prolonged involuntary removal of a student to an alternative program equates to an extended suspension or expulsion, and thus should only

⁵ A Safe School, *supra*, at *12.

⁶ Available at <http://marylandpublicschools.org/stateboard/Documents/08272019/TaskForceStudentDisciplineRegulations082019.pdf>

⁷ Available at <http://marylandpublicschools.org/stateboard/Documents/legalopinions/2019/082019/D.B.andK.G.Opin.No.19-26.pdf>.

be used in serious and limited circumstances. This consensus view is consistent with research demonstrating cause for concern about alternative schools and programs:

- Attending behavior-focused alternative schools is significantly associated with earning fewer credits, lower attendance, and higher suspension rates than attending regular schools [1].
- Nationally, Black boys represent 8% of enrollment in regular schools but 16% of enrollment in alternative schools [2]. In Maryland, Black students represent 34% of the student population but 59% of students suspended or expelled [3]. This disproportionality likely extends to Maryland's alternative schools.
- Nationally, boys with disabilities represent 8% of enrollment in regular schools but 11% of enrollment in alternative schools [2]. In Maryland, students with disabilities represent 12% of the student population but 25% of students suspended or expelled [3]. This disproportionality likely extends to Maryland's alternative schools.
- A lower percentage of alternative schools nationally have support staff like social workers, nurses, and counselors as compared to regular schools [2].
- Every time a child changes schools, including being transferred to an alternative school, she loses 3 months of academic progress because of disruption to classwork, breaking of relationships with teachers and peers, and stigma from being kicked out [4].

House Bill 1407 seeks to undo MSDE's 2014 regulations confining the use of ineffective and harmful exclusionary discipline by affording schools and principals unfettered discretion to remove students to alternative programs indefinitely when they engage in virtually any disruptive behavior, even in the context of a single class. Under the bill, a teacher may report a student to administrators if the student "repeatedly" or on a single occasion exhibits "unruly, disruptive, or abusive behavior that significantly interferes with the teacher's ability to maintain a conducive learning environment," and administrators may, in turn, employ a variety of exclusionary responses including "plac[ing] the student into an alternative program." HB 1407, p. 2, lines 4-15, lines 28-31, p. 3, lines 1-5. The bill goes on to provide that a student who is removed to an alternative program under this provision "may not be considered removed for the purposes of . . . § 7-306 of this subtitle," the statutory provision authorizing MSDE's discipline regulations and requiring reporting on district-level suspension and expulsion data. HB 1407, p. 3, lines 6-9; Md. Code Ann. Educ. § 7-306(d). **Thus, the bill directly overrides the approach established by Maryland's education leaders and experts at MSDE and MSBE, which limits long-term disciplinary removals from a student's home school to instances of "imminent threat of serious harm" or "chronic and extreme disruption across the school day" which cannot be remedied by other interventions. Instead, it permits schools to subject students to prolonged removals to alternative schools, including on the basis of an incident of "unruliness" that disrupts one teacher's classroom.**

By going against the wisdom of the state's educational leaders – as informed by educators, parents and other stakeholders around the state – the bill will send Maryland on a long backslide to an ineffective and counterproductive "zero tolerance" approach to discipline. The inevitable consequences will be exactly those that MSDE and MSBE have sought to avoid: student disengagement from school resulting in dropout and entry into the juvenile and criminal systems;

widening race- and disability-based gaps in achievement, and negative impacts on overall school climates.

For these reasons, the CRSD strongly opposes House Bill 1407.

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May 31, 2019

The Honorable Erek L. Barron
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Annapolis, Maryland 21401

The Honorable Susie Proctor
Maryland General Assembly
423 House Office Building
Annapolis, Maryland 21401

Dear Delegates Barron and Proctor:

You each asked for advice about a proposed alternative elementary school, the Fresh Start Academy (“FSA”), in Charles County Public Schools (“CCPS”). You asked whether the proposed program is consistent with State law. In particular, you raised a concern that the program violates Chapters 843 and 844, Maryland Laws 2017. As explained below, it is my view that the FSA would not be compliant with the 2017 law.

The Alternative Elementary School Proposal

The following description of the FSA comes from CCPS, including from handouts distributed at a public hearing that was held on May 14, 2019. According to the handout, the FSA will be a centralized academic, behavioral, psychological support program that will start with up to 12 students in kindergarten through second grade from 22 elementary schools who “repeatedly display extreme disruptive behavior...such as destruction of classrooms, running away from classrooms and causing physical harm to others...” The FSA will be located on a campus that houses an alternative education center for middle and high school students, although the FSA will be in a separate building. FSA students will ride dedicated school buses to the campus. The FSA will have a capacity of 15 students, and have one classroom for each grade. The facility will include a sensory room, which has been described as a quiet, soothing place used to calm students.

According to CCPS, a referral to the FSA can occur only after a school has exhausted other available and appropriate interventions. Referrals need to be submitted through a Student Support Team or the Student Conduct/Engagement Offices, and will be considered by a team of educators and specialists. Placement is for 45 days. The FSA will be staffed by a behavior specialist as program coordinator, three certified teachers, three classroom instructional assistants, a transition coordinator, and secretarial support. Additional counselors and school psychologists will help students attending the program.

FSA staff will develop an individual transition plan for each child when the child is ready to return to their home school. The transition coordinator will provide training to school administrators, teachers, and staff on how to continue successful support for the child. Staff from the home school will visit the FSA to keep a connection with the child and to learn techniques and strategies for reintegration to the classroom. Parents will receive training to help their child and opportunities to work with FSA staff.

State Law Governing Suspension of Pre-K through Second Grade Students

As a result of legislation enacted in 2017, Md. Laws 2017, Ch. 843 and 844, State law generally provides that “a student enrolled in a public prekindergarten program, kindergarten, first grade, or second grade may not be suspended or expelled from school.” Education Article (“ED”), § 7-305.1(b)(1). Exceptions to the general prohibition allow a suspension of these students only “if required by federal law” or “if the school administration, in consultation with a school psychologist or other mental health professional, determines that there is an imminent threat of serious harm to other students or staff that cannot be reduced or eliminated through interventions and supports” but not for more than 5 days. ED § 7-305.1(b)(2).

The intervention and support that must be provided when a student is suspended includes: (1) positive behavior invention and supports (“PBIS”); (2) a behavior intervention plan; (3) a referral to a student support team; (4) a referral to an individualized education program (“IEP”) team; and (5) a referral for appropriate community-based services. ED § 7-305.1(c)(2). Even if a pre-k, kindergarten, first grade, or second grade student is not suspended, the supports must be provided when the student is “disruptive to the school environment or [c]ommits an offense subject to suspension but for the student’s grade.” ED § 7-305.1(c)(1)(ii). The State Board of Education has adopted regulations that essentially mimic the statute. *See* COMAR 13A.08.01.11C(1)(b) and § H(1)-(2).

Legal Analysis

The key question is whether placement in the FSA would be a “suspension” under ED § 7-305.1. When interpreting legislation, the cardinal rule is to “ascertain and effectuate the intention of the legislature,” *Oaks v. Connors*, 339 Md. 24, 35 (1995), the primary source of which is the language of the act itself. *State v. Pagano*, 341 Md. 129, 133 (1996). If the language is clear and unambiguous, courts usually will not look beyond the plain meaning of the language to discern legislative intent. *Gary v. State*, 341 Md. 513, 521 (1996). Nevertheless, we do not read the words of the statute “in a vacuum.” *Lockshin v. Semsler*, 412 Md. 257, 275 (2010). Instead, we interpret the language in light of “the context of the statutory scheme to which it belongs, considering the purpose, aim, or policy of the Legislature in enacting the statute.” *Id.* at 276. If the statutory language, read in context, “is unambiguous and clearly consistent with the statute’s apparent purpose,” the inquiry will “ordinarily” end, “and we apply the statute as written, without resort to other rules of construction.” *Id.* at 275. If, however, the

statute is ambiguous, we must “resort to other recognized indicia” of legislative intent, such as “the structure of the statute...; how the statute relates to other laws; the legislative history, including the derivation of the statute, comments and explanations regarding it by authoritative sources during the legislative process, and amendments proposed or added to it; the general purpose behind the statute; and the relative rationality and legal effect of various competing constructions.” *Witte v. Azarian*, 369 Md. 518, 525-26 (2002).

CCPS may argue that students placed in the FSA have not been suspended. While ED § 7-305.1 prohibits suspension of more than 5 school days, it also mandates that the school system “remedy the impact of a student’s behavior through appropriate intervention methods including restorative practices.” ED § 7-305.1(d). Thus, CCPS may assert that placement in the FSA is such a remedy—a restorative practice—not a suspension because the student placed at the FSA would remain in a public school, receiving all academic instruction and access to other programs that CCPS offers, including transportation.

It is apparent from the legislative history that the problem that the legislature and other advocates for the bill wanted to address was “out-of-school” suspension of pre-K to second grade students. The legislative history of the 2017 legislation, now codified at ED § 7-305.1, is comprised of the testimony of 30 or so education stakeholders, including Disability Rights Maryland, the county government, the American Academy of Pediatrics, and parents. Even assuming that placement in the FSA is not an “out-of-school” suspension because the child will not be out-of-school in a literal sense, the law requires that intervention and support be provided to any pre-K to second grade student who is disruptive or who commits an act that would be a suspendable offense but for the student’s grade. ED § 7-305.1(c)(1)(ii). Intervention and support “includes” (1) PBIS; (2) a behavior intervention plan; (3) a referral to a student support team; (4) a referral to an IEP team; (5) a referral for appropriate community-based services. ED § 7-305.1(c)(2). Thus, the question is whether the FSA is an intervention and support of the type listed in the statute that can legally be used before a disruptive student is suspended.

The use of the term “includes” in the statute generally means that the list is not exclusive. *See Singer & Singer, Statutes and Statutory Construction*, § 47:25 at 444 (7th Ed. 2014). Rather, the specific terms on the list are considered examples of the class encompassed by the general term, “intervention and support.” *Id.* at § 47.14 at 378, 384; *see also Boffen v. State*, 372 Md. 724, 734-735 (2003). To avoid expanding the statute beyond its intended purpose, however, it is important to define the class that the specific enumeration encompasses. To do so, we look to the statute’s subject and purpose as the basis to determine the intended scope of the class. *Singer & Singer* at § 47:18 at 391.

The legislative intent of the 2017 legislation is set out in the Preamble:

WHEREAS, It is the intent of the General Assembly that school systems shall utilize restorative practices as an alternative to traditional school disciplinary practices to ensure that developmentally appropriate, age-appropriate, and proportional consequences are applied to a child's misbehavior in a way that supports personal growth and positive learning opportunities for all students.

Md. Laws 2017, Ch. 843 and 844.

The 2017 law defines restorative practices as “practices conducted in a whole school ethos and culture that supports peacemaking and solves conflict by building a community and addressing harm in a school setting...” ED § 7-305.1(a)(3). Restorative practices “help build a sense of belonging, safety and social responsibility in the school community.” *Id.* A placement in a program outside of the student's home school seems incongruent with the types of interventions listed in the statute. Each of the listed types seems to be an intervention that occurs in the home school setting. Certainly, PBIS and a behavior intervention plan are a whole school approach to behavior issues. The three other interventions listed are referrals for services or evaluation, not referrals to alternative program placements.¹ On its face, placement in a program removed from the “whole school ethos and culture” of the student's home school appears to be outside the general intent of the statute.² Accordingly, it is my view that even if the placement in the FSA is not viewed as an “out-of-school” suspension, the types of interventions and supports that the legislature considers appropriate are those that occur in the home school, not those that occur in an alternative placement. As such, placement in the FSA would likely violate the 2017 law.

Furthermore, in my view placement in the FSA would be considered a suspension under current law. Under the applicable law, a suspension can occur only when a team of educators determines that a student poses “an imminent threat of serious harm to other students or staff that cannot be reduced or eliminated through interventions and supports.” ED § 7-305.1 (b)(2)(ii). The law appears to presume that the school has already tried one or more of the allowable interventions and supports but has not been

¹An IEP team can recommend a 45-day placement in an alternative setting, but that process is governed by special education laws that contain very limited reasons for such placement. COMAR 13A.08.03.06.

² MSDE has published guidance for school systems to implement the 2017 legislation. The guidance includes several pages of appropriate interventions and supports. None of these are alternative programs that remove the child from the school. See *Prohibition of Suspension and Expulsion for Students in PreK to 2*, available at <http://marylandpublicschools.org/about/Documents/DSFSS/SSSP/TA/GuidanceProhibitionSuspensionExpulsionStudentsGradesPreK2.pdf>.

successful in changing the students' behavior. Thus, a five-day suspension can occur because the student poses an imminent threat of serious harm. ED § 7-305.1 (b)(2)(ii).

The Education Article does not contain a definition for "suspension." The State Board of Education defined that term in regulations that were promulgated before enactment of the 2017 legislation. A "suspension means the application of extended suspension, in-school suspension, short-term suspension or long-term suspension." COMAR 13A.08.01.11B(10). The regulations further define each of those types of suspensions, all of which have one common denominator—the removal of a student from the school itself or removal from the student's educational program. The regulations define "in-school suspension" as the removal within the school building of a student from the student's current educational program for up to but not more than 10 days. COMAR 13A.08.01.11B(4). "Short-term suspension means removal of a student from school" for not more than 3 days. COMAR 13A.08.01.11B(9). "Long-term suspension means the removal of a student from school....for 4 to 10 days...." COMAR 13A.08.01.11B(5). "Extended suspension" is

the exclusion of a student from a student's regular program for a time period between 11 and 45 school days, which only may occur under the following circumstances:

- (a) The superintendent or designated representative has determined that:
 - (i) The student's return to school prior to the completion of the suspension period would pose an imminent threat of serious harm to other students and staff; or
 - (ii) The student has engaged in chronic and extreme disruption of the educational process that has created a substantial barrier to learning from other students across the school day, and other available and appropriate behavioral and disciplinary interventions have been exhausted.
- (b) The superintendent or designated representative limits the duration of the exclusion to the shortest period practicable;
- (c) The school system provides the excluded student with comparable educational services and appropriate behavioral support services to promote successful return to the student's academic program.

COMAR 13A.08.01.11B(3). Placement in the FSA results in the removal of a student from the student's home school and from the student's current or regular education program. In that regard, the placement meets the definition of each of the four kinds of suspension.

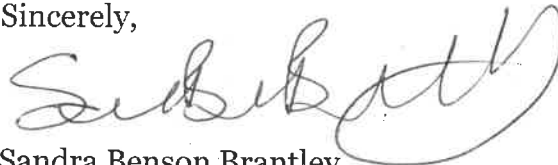
The State Board regulations also provide that if a removal is an "in-school removal" it is "not considered a day of suspension so long as the student is afforded" certain specified opportunities. COMAR 13A.08.01.11C(2). It is my understanding that CCPS believes that the placement in the FSA is akin to an in-school suspension. The

The Honorable Erek L. Barron
The Honorable Susie Proctor
May 31, 2019
Page 6

regulations provide, however, that an in-school suspension occurs “within the school building” and can last only 10 days. COMAR 13A.08.01.11B(4). Placement at the FSA is a 45-day placement outside of the building and comes closer to the definition of an “extended suspension.” COMAR 13A.08.01.11B(3). For example, if a student is suspended for up to 45 days, the superintendent must decide that the student poses an imminent threat of serious harm or is chronically and extremely disruptive. According to CCPS’s information, a similar determination will be made for placement in the FSA. Likewise, if an extended suspension is imposed, the school system must provide the student with “comparable educational services and appropriate behavioral support services to promote successful return to the student’s academic program.” COMAR 13A.08.01.11B(3)(c). The FSA seems to be designed to provide those same types of services.

For the foregoing reasons, it is my view that placement in the FSA would be a “suspension.” As a result, I believe that a 45-day placement would violate the 5-day limitation for suspensions in ED § 7-305.1(b)(2) for public prekindergarten, kindergarten, first grade, or second grade students.

Sincerely,

A handwritten signature in black ink, appearing to read "Sandra Benson Brantley", written in a cursive style.

Sandra Benson Brantley
Counsel to the General Assembly