



Mohammed Choudhury
State Superintendent of Schools

To: Members of the State Board of Education
From: Mohammed Choudhury, State Superintendent of Schools
Date: May 23, 2023
Subject: COMAR 13A.01.07.
Nondiscrimination in Education
Permission to Publish

Purpose

The purpose of this item is to request permission to publish new regulations COMAR 13A.01.07.01 – 13A.01.07.07, *Nondiscrimination in Education*.

Regulation Promulgation Process

Under Maryland law, a state agency, such as the State Board of Education (State Board), may propose a new or amended regulation whenever the circumstances arise to do so. After the State Board votes to propose such a regulation, the proposed regulation is sent to the Administrative, Executive, and Legislative Review (AELR) Committee for a 15-day review period. If the AELR Committee does not hold up the proposed regulation for further review, it is published in the Maryland Register for a 30-day public comment period. At the end of the comment period, Maryland State Department of Education (MSDE) staff reviews and summarizes the public comments. Thereafter, MSDE staff will present a recommendation to the State Board to either: (1) adopt the regulation in the form it was proposed; or (2) revise the regulation and adopt it as final because the suggested revision is not a substantive change; or (3) revise the regulation and re-propose it because the suggested revision is a substantive change. At any time during this process, the AELR Committee may stop the promulgation process and hold a hearing. Thereafter, it may recommend to the Governor that the regulation not be adopted as a final regulation or the AELR Committee may release the regulation for final adoption.

Background/Historical Perspective

Effective July 1, 2022, the Maryland General Assembly enacted legislation amending Education Article, §2-303(b) and implementing Education Article, §26-701 et seq., Annotated Code of Maryland, prohibiting unlawful discrimination and retaliation in education in Maryland public and nonpublic schools that receive state funds. Specifically, the law prohibits all Maryland public and nonpublic schools that receive state funds including county boards of education, public prekindergarten programs, public primary and secondary schools,

nonpublic prekindergarten, primary and secondary schools that receive public funds from discriminating or retaliating against a student, a prospective student, or the parent or guardian of a current or prospective student because of race, ethnicity, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, or disability. The law requires the State Board, in consultation with the State Superintendent, to adopt regulations to establish procedures for complaint processing, mediation, and enforcement to carry out the requirements of the law.

Executive Summary

MSDE recommends promulgating the following:

- Regulation .01 to establish the scope of this regulation applicable to all Maryland public and nonpublic schools that receive state funds including county boards of education, public prekindergarten programs, public primary and secondary schools, nonpublic prekindergarten, primary and secondary schools that receive public funds. Exclude from the scope certain forms of lawful discrimination as defined by the law.
- Regulation .02 to define terms: Administrative law judge, Complainant, Department, Discriminatory Act, Gender Identity, Office of Administrative Hearings (OAH), Party or Parties, Protective Hairstyle, Race, Respondent, Sexual Orientation and Superintendent.
- Regulation .03 to prohibit discrimination or retaliation by refusing enrollment, disciplining, or withholding privileges from a student or prospective student (or the parent or guardian of a student or prospective student) on the basis of race, ethnicity, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity or disability. Require county boards of education to adopt and maintain a written antidiscrimination policy and to include the specific antidiscrimination statement of the statute in their student handbook.
- Regulation .04 to establish procedures for filing a complaint of discrimination and requiring any complaint to be filed within 60 days from the later of the date of the last discriminatory act or when the complainant learned of the discrimination. Permit the State Board, which may have concurrent jurisdiction, to stay action of an appeal that also alleges discrimination filed pursuant to COMAR 13A.01.05.
- Regulation .05 to establish procedures for any entity named in a complaint to respond to the allegations within 30 days of written notice of the complaint.
- Regulation .06 to establish procedures for mediation requiring MSDE within 5 days of receiving the response to contact the parties to see if they are agreeable to meditation and if they are agreeable, to refer the complaint to the OAH for mediation to be completed within 60 days of the filing of the complaint. Establish procedures for the Superintendent to make a decision within 120 days of the filing of the complaint if the complaint is not resolved by mediation. Establish procedures to reopen any complaint.

- Regulation .07 to establish procedures for appeals. Provide for the Superintendent to delegate to OAH to make the final administrative decision on the appeal of the Superintendent's decision. Require any request for a hearing to be filed within 10 days from the date of notice of the Superintendent's decision or within 130 days after the complaint is filed if no decision has been made. If the complaint is also before the State Board, require the party to choose between filing an appeal of the Superintendent's decision to the OAH or proceed with the State Board appeal. Establish hearing procedures for the appeal before OAH. The proposed regulations, as required in the law, require the State Board, in consultation with the State Superintendent establish procedures for complaint processing, mediation, and enforcement of this legislation and authorizes a person to file a discrimination complaint with the State Superintendent of Schools and requires the State Superintendent to mediate an agreement between the involved parties before imposing penalties, including the withholding of state funds to a program or school. The proposed regulations provide sixty days for an initial Department response – including a five-day mediation period – and another sixty days for final decision and determination. Final decisions from appeals is delegated to administrative law justed of the Office of Adminsitritve Hearings to Hearings to make the final administrative decision on the appeal of the Superintendent's decision in a complaint brought under this chapter.

Action

The MSDE requests permission to publish new regulations COMAR 13A.01.07.01 – 13A.01.07.07, *Nondiscrimination in Education*.

Attachments

COMAR 13A.01.07.01 – 13A.01.07.07, *Nondiscrimination in Education*

Title 13A
STATE BOARD OF EDUCATION
Subtitle 01 STATE SCHOOL ADMINISTRATION
Chapter 07 Nondiscrimination in Education

Authority: Education Article, §§2-303, 4-108, and 26-701 et seq.; State Government Article, §§10-122 and 10-201 et seq., Annotated Code of Maryland; Federal Statutory References: 29 U.S.C. §794 et seq. and 42 U.S.C. §12101 et seq.

.01 Scope.

A. This chapter implements Education Article, §§2-303(b) and 26-701 et seq., Annotated Code of Maryland, prohibiting unlawful discrimination and retaliation in education in Maryland public and nonpublic schools that receive state funds.

B. This chapter applies to the following entities in Maryland:

- (1) All county boards of education;
- (2) All public prekindergarten programs;
- (3) All public primary and secondary schools;
- (4) All nonpublic prekindergarten programs that receive state funds; and
- (5) All nonpublic primary or secondary schools that receive state funds.

C. This chapter does not apply to:

(1) With respect to discrimination on the basis of sex, a prekindergarten program or school that limits admission to students of only one sex;

(2) With respect to discrimination on the basis of religion, a nonpublic prekindergarten program or nonpublic school that is affiliated with a religious institution:

(a) Providing instruction on the religious beliefs of the religion with which the program or school is affiliated;

(b) Declining to provide instruction in beliefs that are different from the religion with which the program or school is affiliated;

(c) Requiring student attendance at religious events inherent to the religion with which the program or school is affiliated;

(d) Having a preference in or limiting admission to a student of certain religious beliefs or a student who is a member or is part of a family that is a member of the religious institution affiliated with the program or school, if the program or school has had the preference or limitation continually since the date on which the program or school was established; or

(e) Granting tuition discounts for a student of certain religious beliefs or who is a member or is part of a family that is a member of the religious institution affiliated with the program or school if the practice of granting the discounts was established the later of before July 1, 2022, or since the date on which the program or school was established; and

(3) With respect to discrimination on the basis of disability, a nonpublic prekindergarten program or nonpublic school that is in compliance with §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 et seq., or the Americans with Disabilities Act, 42 U.S.C. §12101 et seq., as applicable.

.02 Definitions.

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

B. Terms Defined.

(1) “Administrative law judge” means a hearing officer designated by the Maryland Office of Administrative Hearings to render the final decision of the Superintendent in a hearing.

(2) “Complainant” means a person who files a complaint alleging a discriminatory act under this chapter.

(3) “Department” means the Maryland State Department of Education.

(4) “Discriminatory act” means an act prohibited under this chapter.

(5) “Gender identity” means the gender-related identity, appearance, expression, or behavior of a person, regardless of the person's assigned sex at birth, which may be demonstrated by:

(a) consistent and uniform assertion of the person's gender identity; or

(b) any other evidence that the gender identity is sincerely held as part of the person's core identity.

(6) “Office of Administrative Hearings” means the administrative unit of Maryland government which is responsible for processing requests for hearings, for scheduling and conducting hearings, and for rendering decisions pursuant to State Government Article, §9-1601 et seq., Annotated Code of Maryland.

(7) “Party or Parties” means the complainant and the respondent.

(8) “Protective hairstyle” includes braids, twists, and locks.

(9) “Race” includes traits associated with race, including hair texture, afro hairstyles, and protective hairstyles.

(10) “Respondent” means a person accused in a complaint of a discriminatory act.

(11) “Sexual orientation” means the identification of an individual as to male or female homosexuality, heterosexuality, or bisexuality.

(12) “Superintendent” means the State Superintendent of Schools.

.03 Nondiscrimination in Education.

A. Educational entities have a responsibility to protect every student’s right to learn in an environment free from unlawful discrimination.

B. Entities identified in Regulation .01B of this chapter may not:

(1) Discriminate against a current student, a prospective student, or the parent or guardian of a current or prospective student on the basis of race, ethnicity, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, or disability;

(2) Refuse enrollment of a prospective student, expel a current student, or withhold privileges from a current student, a prospective student, or the parent or guardian of a current or prospective student because of an individual's race, ethnicity, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, or disability; or

(3) Discipline, invoke a penalty against, or take any other retaliatory action against a student or parent or guardian of a student who files a complaint alleging that the program or school discriminated against the student, regardless of the outcome of the complaint.

C. Entities identified in Regulation .01B(1) of this chapter shall adopt and maintain a written antidiscrimination policy that prohibits unlawful discrimination as described in §B of this regulation.

D. Entities identified in Regulation .01B of this chapter shall include the following antidiscrimination statement in their student handbook:

“It is the policy of the State of Maryland that all public and publicly funded schools and school programs operate in compliance with:

(1) Title VI of the federal Civil Rights Act of 1964; and

(2) Title 26, Subtitle 7 of the Education Article of the Maryland Code, which states that public and publicly funded schools and programs may not:

(i) Discriminate against a current student, a prospective student, or the parent or guardian of a current or prospective student on the basis of race, ethnicity, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, or disability;

(ii) Refuse enrollment of a prospective student, expel a current student, or withhold privileges from a current student, a prospective student, or the parent or guardian of a current or prospective student because of an individual's race, ethnicity, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, or disability; or

(iii) Discipline, invoke a penalty against, or take any other retaliatory action against a student or parent or guardian of a student who files a complaint alleging that the program or school discriminated against the student, regardless of the outcome of the complaint.”

.04 Complaints.

A. A complainant alleging discrimination in violation of Education Article, §26-704, Annotated Code of Maryland, may file a complaint in writing with the Superintendent.

B. A parent or guardian of a minor alleging discrimination may file a complaint on behalf of the minor.

C. The complaint shall be delivered by regular mail or electronic mail to the Department.

D. The complaint shall be in writing and include the following information:

(1) The complainant's name, mailing address, email address, telephone number and signature;

(2) The respondent's name, mailing address, email address, and telephone number;

(3) The date of any alleged discriminatory acts;

(4) A statement of facts describing any discriminatory acts;

(5) A statement of the relief requested; and

(6) Any supporting documents, exhibits, and affidavits.

E. The complaint shall be no longer than 15 pages, excluding attachments.

F. Deadlines.

(1) A complaint shall be filed within 60 days from the later of the date of the last discriminatory act or when the complainant learned of the discrimination.

(2) A complaint shall be deemed to have been filed within the 60-day period if, before the expiration of the 60-day period, it has been:

(a) Delivered to the Department; or

(b) Deposited in the United States mail, as registered or certified mail or Express Mail, or deposited with a delivery service, such as Fed Ex, UPS, or DHL, that provides verifiable tracking of the item from the point of origin.

G. Concurrent Jurisdiction with State Board.

(1) The State Board may stay action of an appeal filed pursuant to COMAR 13A.01.05 that also alleges discrimination in violation of Education Article, §26-701 et seq., Annotated Code of Maryland, pending a mediation agreement or final decision on a complaint filed under this chapter.

(2) The parties shall immediately provide to the State Board written notice of the mediation agreement or final decision.

(3) The provisions of this chapter do not extend any filing deadlines for any appeals filed with the State Board pursuant to COMAR 13A.01.05.

.05 Response to Complaints.

A. Upon receiving a complaint, the Department shall provide written notice of the complaint to the program or school that is the subject of the complaint and, if applicable, the county board in which the program or school is located.

B. Within 30 days of receipt of written notice of the complaint, the county board, program, or school, shall submit a written response to the Superintendent setting out its position.

C. The response shall contain the following information:

(1) A statement of facts relevant to the complaint;

(2) An argument on each allegation raised in the complaint, including citations of authority, reference to relevant legal principles, and reference to pages of documents and exhibits relied upon, if any;

(3) A statement of the relief requested; and

(4) Any supporting documents, exhibits, or affidavits.

.06 Department Response.

A. The Superintendent is authorized to enforce this chapter consistent with Education Article, §§2-303(b) and 26-701 et seq., Annotated Code of Maryland.

B. Calculating Deadlines. The last day of the period of time prescribed by any regulation of this chapter shall be included, unless it is a Saturday, Sunday, or a State legal holiday, in which event the period ends on the next day which is not a Saturday, Sunday, or State legal holiday.

C. Mediation.

(1) Within 5 days of receiving the response from the county board, program, or school, the Department shall contact the parties and determine if the parties are willing to attempt mediation of an agreement between the complainant and the respondent to remedy and eliminate the alleged discrimination.

(2) Mediation is a voluntary process for each of the parties.

(3) If the parties are agreeable to mediation of the complaint, the Department will refer the complaint to the Office of Administrative Hearings for mediation to be completed within 60 days of the filing of the complaint.

(4) Mediation procedures shall be in accordance with the Administrative Procedure Act, State Government Article, Title 10, subtitle 2, Annotated Code of Maryland, and COMAR 28.02.01.18.

(5) If mediation is successful, the Superintendent shall issue a written statement to both parties of the mediation findings and agreement, including the timeline within which any agreed actions must be taken.

(6) If a mediation agreement is not reached within the 60-day time period, the parties shall give written notice to the Superintendent.

D. Superintendent's Decision.

(1) The Superintendent shall make a decision based on the filings with the Department unless additional information is requested by the Department from either of the parties.

(2) Before issuing a decision, the Superintendent may request the parties to present additional documents, answer any questions, or present oral argument.

(3) Within 120 days after the complaint is filed, the Superintendent shall issue a written decision including:

(a) Findings of Fact;

(b) Conclusions of Law; and

(c) Notice of Appeal Rights, including any deadlines for filing an appeal.

(4) If the Superintendent finds that a county board, program, or school has violated Education Article, §26-704, Annotated Code of Maryland, the decision shall specify:

(a) Any actions required to remedy or eliminate the discrimination, including the timeline within which the actions must be taken; and

(b) Notification of how to reopen any complaint to remedy or eliminate the discrimination required by the Superintendent's final decision.

(5) The Superintendent's decision may require the Comptroller to withhold funding from the county board, program, or school in an amount to be determined by the Superintendent in accordance with Education Article, §2-303(b), Annotated Code of Maryland.

(6) If the Superintendent does not issue a decision within 120-day time period, the complainant may appeal to the Office of Administrative Hearings as described in Regulation .07 of this chapter.

E. Reopening Complaints.

(1) A complainant alleging that a county board, program, or school did not remedy or eliminate the discrimination as agreed in mediation or required by the Superintendent's decision may reopen a complaint previously made without having to file a new complaint or engaging in mediation.

(2) If the Superintendent finds that a county board, program, or school did not remedy or eliminate the discrimination as agreed or required by the Superintendent's decision, the Superintendent shall issue an updated written decision to both parties requiring the Comptroller to withhold funding from the county board, program, or school in an amount determined by the Superintendent in accordance with Education Article, §2-303(b), Annotated Code of Maryland.

.07 Appeals.

A. The Superintendent has delegated authority to administrative law judges of the Office of Administrative Hearings to make the final administrative decision on the appeal of the Superintendent's decision in a complaint brought under this chapter.

B. Hearing Requests.

(1) Either party may appeal the Superintendent's decision to the Office of Administrative Hearings by filing a request for hearing with the Department.

(2) The hearing request must be filed within 10 days from the date notice of the Superintendent's decision is sent to the party; or

(3) If the Superintendent does not issue a decision within the 120-day time period required by Regulation .06D(3) of this chapter, the hearing request may be filed within 130 days after the complaint is filed.

(4) If the subject of the Superintendent's decision is also before the State Board on an appeal filed pursuant to COMAR 13A.01.05 as described in Regulation .04H of this chapter, the party shall choose between:

(a) Filing a request for hearing to appeal the Superintendent's decision to the Office of Administrative Hearings and withdrawing the State Board appeal; or

(b) Pursuing the appeal before the State Board pursuant to COMAR 13A.01.05 and foregoing a hearing request to appeal the Superintendent's decision.

(5) The hearing request shall state:

(a) The name and address of the parties and any representatives of the parties;
and

(b) The date of the Superintendent's decision.

(6) The Superintendent and the Department may not participate as a party in an appeal.

(7) The Department shall forward a hearing request to the Office of Administrative Hearings within 5 days of the filing date.

C. Hearing Procedures.

(1) Except as otherwise provided in this chapter, hearing procedures shall be in accordance with the Administrative Procedure Act, State Government Article, Title 10, subtitle 2, Annotated Code of Maryland and COMAR 28.02.

(2) The party filing the appeal and request for a hearing shall have the burden of proof by a preponderance of the evidence.

(3) The appeal hearing shall be held in the county where the alleged discrimination occurred.

D. The administrative law judge shall issue, by regular mail, a decision and order to the parties stating:

(1) Findings of Fact;

(2) Conclusions of Law; and

(3) If the administrative law judge finds that the respondent has violated Education Article, §26-704, Annotated Code of Maryland, a directive:

(a) To cease and desist from engaging in the discrimination; and

(b) To take any affirmative action necessary to effectuate the purposes of Education Article, §§26-701 et seq., Annotated Code of Maryland.

E. A decision by an administrative law judge of the Office of Administrative Hearings in an appeal under this chapter is the final administrative decision and may be appealed to circuit court pursuant to State Government Article, §10-222, Annotated Code of Maryland.