CENTER FOR LAW AND EDUCATION

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March 7, 2014

Ms. Elizabeth Harris
Department of Elementary and Secondary Education
75 Pleasant Street
Malden, MA 02148

Dear Ms. Harris:

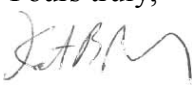
Enclosed please find the comments of the Center for Law and Education in response to the Board of Elementary and Secondary Education's solicitation for public comment on 603 CMR 53.00, Student Discipline Regulations. We appreciate having this opportunity and the Board's consideration.

The Center for Law and Education (CLE), a national resource and support center with offices in Boston and Washington, D.C., strives to assist low-income students, parents, and advocates improve their public schools and work with their communities to fulfill every student's right to a high quality education. CLE assists organizations and community groups seeking to challenge policies and systemic practices that impede low-income students, who are disproportionately students of color, English Language Learners, and students with disabilities, from attaining the same high academic standards set for all students. For over 35 years, CLE has played a major role in the shaping of education legislation and policies at the national and state level, including Title I of the Elementary and Secondary Education Act, reauthorized as the No Child Left Behind Act of 2001 (NCLB), and the Individuals with Disabilities Education Act, as amended (IDEA). In Massachusetts, CLE has since its inception provided legal and technical assistance, including co-counseling, to public interest and private *pro bono* counsel representing low-income students in education law related matters.

In the fall of 2008, CLE formed a collaborative partnership with the Boston law firm, Choate, Hall and Stewart, and the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School to provide direct representation to low-income students who are subject to disciplinary suspensions/ expulsions, inappropriate educational placements, and "push-outs" through inappropriate referrals to the juvenile court. Through our MA based work, which also includes a focus on systemic claims having a disparate impact, CLE has both represented and provided on-going legal support to public interest and private *pro bono* counsel representing students with and without disabilities, to challenge their exclusions from traditional public schools, charter schools, and institutions of higher education on the basis of their rights under due process, state and federal laws, and civil rights statutes.

Thank you for your consideration; please feel free to contact us if you have any questions.

Yours truly,



Kathleen B. Boundy, Co-Director
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Comments from the CENTER FOR LAW AND EDUCATION
Proposed Student Discipline Regulations 603 CMR 53

53.01: Authority, Scope, and Purpose

Comment:
Clarify that Due Process requires flexibility and judgment by administrators. This should be a target of professional development so as to meet the goal of using exclusion as a last resort, and is especially important in principal hearings in which students being subject to short-term suspensions may, based on disputed facts, be suspended from school activities, and do not have a right to appeal under Chapter 222. While CLE supports the intent to establish procedural safeguards required to be provided to all school age youth enrolled in public schools in the Commonwealth, it is essential to recognize that the U.S. Supreme Court in *Goss v. Lopez* concluded in 1975 that the impact of suspensions on protected interests was "not *de minimis*" 419 US at 576. It set forth the form of notice and hearing generally applicable in cases of suspension of up to 10 days to avoid "unfair or mistaken findings of misconduct…" 419 U.S. at 581-84 and, where the misconduct is not in dispute, to provide a student the "opportunity to characterize…conduct and put it in what he deems the proper context." 419 US at 584. What is significant is that the Court said nothing to indicate that the limited procedures required for the imposition of a short-term suspension were exhaustive. To the contrary, the Court emphasized that the Due Process clause is practical; thus, depending upon the nature of the case, more formal procedures may be required "in unusual situations, although involving only a short term suspension…"419 U.S. 565, 584. The type of notice and kind of hearing, the rights accorded the student at the hearing and the formality of the hearing depend upon the nature of the charge and the seriousness of the penalty. Additional procedures may be called for when there are significant factual disputes or when short suspensions result in "unusual" harm to the student. Id., 419 U.S. at 578-80, 584; *Mathews v. Eldridge*, 424 U.S. 319, 333-35 (1976). See discussion below, page 6.

Re: 53.01(2)(a): Delete "that is followed by a principal's determination". **Add** "if the principal determines" (see also 53.02(2), (3) and (4) for similar changes).

Comment: The language describing G.L. c. 71 §37H ½ should be consistent with the language of the statute, which specifies that a felony charge alone is an insufficient basis for imposing a suspension without the requisite determination that "the student's presence in school would have a substantial detrimental effect on the general welfare of the school." *Doe v. Superintendent of Schools of Stoughton*, 437 Mass. 1 (2002).

Re: 53.01(2)(b): Clarify/Define: In setting forth the minimum requirements and procedure necessary to ensure that all students who have been suspended or expelled "have an opportunity to make academic progress" during the period of their exclusion from regular classroom activities, 603 CMR 53.13(4)(a), it is essential that the Department **define** the term "academic progress" in a manner that is meaningful, measurable, and consistent for all students removed from the regular classroom or school. There is no rationale for denying students who are removed from their regular classrooms for up to two weeks of school the right to access a high-quality education program.

Their right to make "academic progress" is grounded in their rights as students to receive effective teaching and instruction provided by highly qualified teachers under Title I of the Elementary and Secondary Education Act, in the regular grade level curriculum aligned with the

State's curriculum frameworks under G.L. c. 69 and the Common Core State Standards adopted by the Commonwealth. 20 U.S.C. §6301, *et seq*. To ensure that students do not fall further behind in their coursework during periods of exclusion from their regular program, it is critical that during such periods students be provided access to a high-quality education [effective teaching and instruction of curriculum aligned with state standards]. It is not enough for students excluded from school for up to ten school days to "have the opportunity to make up assignments, tests, papers, and other school work as needed to make academic progress during the period of his or her removal from the classroom or school." 53:13(2). This requirement is consistent with the recommendations of the American Bar Association (ABA), Commission on Youth at Risk (2009). Report on Resolution 118B: Right to remain in school. 10-11, Retrieved from http://cleweb.redfinsolutions.net/sites/cleweb.org/files/assets/ABA.118B.RighttoRemaininSchool.pdf and MA Department of Education's policy on providing alternative education to students voluntarily or involuntarily out of school. See FAQ, http://www.doe.mass.edu/alted/faq.html.

It is consistent with 53.13(3) which provides: "Educational services [necessary for students expelled or suspended from school for more than ten (10) consecutive school days, whether in or out of school] shall be based on , and *provided in a manner consistent with, the academic standards and curriculum frameworks* established for all students under G.L. c. 69 §§ 1D-1F."

53.02: Definitions

Re: 53.02(2), (3), & (4): Make same change as in **53.01(2)(a)** above.

Re: 53.02(4) "Expulsion"

Comment:
CLE supports the Department's commitment to mitigating the harsh consequences of abusive and ineffective use of expulsion, as evidenced through this definition restricting consideration for using use of expulsion only for the most serious offenses set forth in GL c. 71, §§ 37 H, 37H ½ .

Re: 53.02(5) "In School Suspension": Delete entire provision.

Comment:
CLE supports the use of in-school suspension as an alternative to out-of-school suspension. However, suspension whether in or out of school amounts to a deprivation of access to education *and of the opportunity to learn through classroom instruction*, thereby implicating protected property rights requiring due process protections. See, e.g., *Riggan v. Midland Independent School District*, 86 F.Supp.2d 647, W.D. TX (2000) (due process rights implicated when student was prohibited from "participating in or benefiting from the comments of his teachers and peers during in class review.") CLE proposes use of short-term or long-term suspensions that require due process safeguards and which shall be served either "in" or "out" of school. See 53.02(6)

Re: 53.02(6): "Long-Term Suspension": After "means the removal of a student from" **delete**: "the school premises and". After "for more than ten (10) school days cumulatively" **delete** "for multiple disciplinary offenses" or **clarify** that "multiple disciplinary offenses" refers to **the same or a different** offense that occurs more than one time. After "in a school year" **Add**: "not to extend beyond the end of the school year in which such suspension is imposed."

Comment:
The statute does not require a long-term suspension to be served off the school premises.

Consistent with the language and purpose of the statute, the decision whether or not to allow students to serve their short-term or long-term suspensions "in school" and "on the school premises" should be left to schools/school districts, presumably with input from the members of the school community, including parents and students. A strong research based policy argument can be made that students who are required to attend school for the period of their short or long-term suspensions from their regular classrooms will stay more engaged in their programs.
To carry over a student exclusion from one school year to the next undermines education and sets the student up for failure.

Re: 53.02(9): "Schoolwide Education Service Plan": Before "education services available to students…" **Add**: "instructional and".

Re: 53.02(10) "Short-term Suspension": Delete "the school premises and" After "means the removal of the student from". **Add** "up to" before "ten (10) consecutive school days." After "days" **delete** "or less."

Comment:
This small change that places the emphasis on use of short-term suspensions of very limited duration is consistent with the language and purpose of Chapter 222 and these regulations to minimize the use of any exclusionary discipline that removes students from teaching and instruction.

53.04: Investigation of Disciplinary Incidents

Comment:
CLE supports what appears to be the intent of this provision that through silence suggests that a school administrator but not a school resource officer has the authority to conduct investigations regarding school-related disciplinary incidents, including through student interviews. We urge that this be expressly stated so as to ensure the protection of students.

Clarify too that the child's age matters when school personnel interrogate children for the purposes of determining *Miranda* rights, and that students may need to be mirandized even when questioning is administered by school personnel. In *J.D.B. v. North Carolina*, the Supreme Court held that age must be considered when determining whether a student is in custody for the purposes of *Miranda* rights. 131 S.Ct. 2394, 2406 (2011). The Court determined that in some circumstances "a child's age would have affected how a reasonable person in the suspect's position would perceive his or her freedom to leave" (internal citations omitted) and "a reasonable child subjected to police questioning will sometimes feel pressure to submit when a reasonable adult would feel free to go." *Id*., at 2403. Referring specifically to the context of a student in a school, the Court reasoned that "a student—whose presence at school is compulsory and whose disobedience at school is cause for disciplinary action—is in a far different position" than other adults on school grounds. *Id*. at 2405. The reasoning in *J.D.B. v. North Carolina* applies when students are interrogated by school administrators. *See N.C. v. Commonwealth of Kentucky*, 396 S.W.3d 852, 863 (Ky. 2013) (finding interrogation to be "custodial" even though all of the questioning was conducted by a school administrator rather than a school resource officer). The *N.C.* court noted that "no reasonable student . . . would have believed that he was at liberty to remain silent, or leave" under the circumstances. *Id*., at 862. Thus, students' age should be considered in the investigation of disciplinary incidents.

53.05: **Alternatives to Suspension under Section 37H ¾**

Delete "long-term" after "using" and before "suspension"

Comment:
This change highlights one of the main points of Chapter 222, which is that the use of suspension, of any length, whether in or out of school, should be avoided as a consequence until alternatives have been tried. CLE supports the suggestions made by the Education Law Task Force in its comments for this section in referencing alternatives contained in the Behavioral Health and Public School Framework, as well as the model interventions such as the MA Tiered System of Support and Restorative Justice.

53.06: Notice of Suspension under Section 37H ¾

Modify title to "Notice of Suspension **Hearing**" instead of "Notice of Suspension"

Re: 53.06(2): After "…if other than English" **Add**: "or other means of communication. The written material must be set forth in a manner that is comprehensible to lay persons, and provided in a manner accessible to persons who may require assistive technology or other accommodations." After "[t]he notice shall include: **Add** "the rights of students and parents under the procedures, including all protections at hearing."

Re: 5.06(2)(b): Delete "the basis of the charge". **Add**: "an explanation of the evidence supporting the alleged disciplinary offense, including witness statements;

Re: 53.06(2)(c): After "the potential" **Add**: "consequences" **Delete**: "length of the student's suspension"

Re: 53.06(2)(d): After "the opportunity for the student to have a hearing with the principal" **Add**: "and to present his/her side of the story; and include adequate time to prepare for the hearing". **Delete**: "concerning the proposed suspension"

Re: 53.06(2)(g): Before: "if the student may be placed on long-term suspension following the hearing with the principal" **Add**: "(a) if there is a factual dispute that cannot fairly be resolved by informal procedures, or if potential harm or consequences to the student might be serious, notwithstanding the relatively short length of a short-term suspension; or (b)"

Clarify/Add: The rights set forth at 53.08(3)(b) shall apply to "the short-term suspension situation described in 53.06(2)(g)(a)" as well as to "long-term suspension."

53.07: Emergency Removal under Section 37H ¾
Re: 53.07(1)(c): **Delete** all references to the language "five (5) school days." **Add**: "as soon as practicable and in no case more than 72 hours".

Comment:
An emergency suspension is designed to permit the school to take flexible, immediate action where it is actually necessary in order to stop or prevent immediate physical danger or extreme disruption, and based on caselaw, should be read narrowly because the danger is that the suspension/removal without the regular suspension hearing creates the possibility of mistaken judgment that cannot be completely corrected after the fact. The exception is clearly meant to apply only when taking such action prior to a regular suspension hearing is in fact necessary –

and not to situations where disruptive or violent conduct has occurred but is not an immediate continuing threat (e.g, a fight that is over), nor to situations that can be handled without removing the student from school, nor to situations in which removal may be necessary but is still possible to provide rudimentary informal hearing before ejecting the student. In *Goss*, the Court held that the suspension hearing, which must normally precede the suspension, must occur as soon as practicable (no later than three days) after the suspension where an emergency situation justifies a delay in the normal procedures. *Id*. at 582-83.

53:08: Principal's Hearing under Section 37H ¾

Re: 53.08(1): Delete entire subsection.

Re: 53.08(2)(a): Delete "dispute the charges and"

Re: 53.08(2)(b): Delete in entirety. **Replace/Add** "Where there is a factual dispute that cannot fairly be resolved by informal procedures, or if the deprivation may result in serious potential harm or consequence to the student, notwithstanding the relatively short length of the suspension of up to 10 school days, the more formal procedures of 53.08(3) shall apply to the short-term suspension proceeding."

Comment:
It has long been recognized that students living in states that recognize a right to education have a property interest in such education. *See, e.g*., *Goss* v. *Lopez,* 419 U.S. 565, 574 (1975). Thus, they cannot be deprived of that interest without receiving the minimum procedures required by the due process clause. *Id*. This applies even to short terms suspensions, as "the length and consequent severity of a deprivation . . . is not decisive of the basic right to a hearing of some kind." *Id*. at 576. Therefore, states may not withdraw a child's right to education "on the grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct occurred." *Id*.

In *Mathews v*. *Eldridge*, the Supreme Court set out a three step process for determining whether procedures are fundamentally fair and what process is due before a property interest can be taken away. 424 U.S. 319, 341-48 (1976). The factors to be weighed under the *Mathews* test are (1) the private interest that will be affected by the school's action, (2) the risk of erroneous deprivation of such interest through procedures used, and the probable value of additional safeguards, and (3) the state's interest. *See id*. Thus, a school's determination of what due process rights a student should receive depends on a balancing of the student's interest, which for a student excluded up to 10 days with no right of appeal may be very significant; the risk of erroneous deprivation of the student's private interest (likely the student's continued access to classroom instruction); and the state's interest that includes but is not limited to financial and administrative burdens associated with greater procedural safeguards.

The state's interest also includes the very important interest of ensuring that all of its children are well educated and their educational opportunities not unnecessarily limited. Rather than depending on the number of days the student is suspended, as the regulations currently propose, the school must balance these factors consistent with *Goss*, 419 U.S. at 583 ("[I]n unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required."), and as modified by *Mathews*. *See also Laney v*. *Farley*, 501 F.3d 577, 584 (6th Cir. 2007) (Gibbons, J., concurring) ("[I]mposing an in-school suspension, even of short duration, without procedural safeguards, could conceivably violate due process under different facts."). Today, given the existing achievement and graduation gap, and the importance

to the state and to struggling students that they meet the state's high standards, missed instructional time, even under ten days is a serious consequence. This is especially true for African American and Hispanic students and students with disabilities who are disproportionately suspended and expelled throughout the Commonwealth.

Re: 53.08(3): Add to title "/Short-term Suspension with Heightened Protections"
(3)(a): Delete subsection
(3)(b)(i): Add "including all witness statements and what witnesses will be called"
(3)(b)(iv): Add "and confront" after "cross-examine"

Add "(3)(b)(vi): the right to have adequate time to prepare for the hearing."

Re: 53.08(3)(c): Delete "submitted at the hearing". **Add** after "if so" "after balancing the students' interest, the risk of erroneous deprivation, and the state's interest as required by *Mathews*"

53.09: Superintendent's Hearing under Section 37H ¾

(2) Add to end "which shall be liberally granted" or "not unduly restricted"

(4) Make this section consistent with Additional language in 53.06 regarding "reasonable" notice provisions.

(5) After "consequence shall be" **Add** "The Superintendent may not impose a harsher punishment."

Add "53.09(9) If the decision of the Superintendent is favorable to the student, all records pertaining to the incident shall be expunged from student's school records except for data-reporting purposes"

53.10: In School Suspension under Section 37H ¾

Delete entire section. See **53.02(5)** above.

53.12: Disciplinary Offenses under Section 37H or 37H ½

Comment:
CLE supports the requirement that policies and procedures must be "consistent with applicable statute and provide due process of law". CLE emphasizes that consistent with *Goss*, students have the right to a hearing under G.L. 71, §37 H ½.

53.13: Education Services and Academic Progress under Sections 37H, 37H ½, and 37H ¾

Comment:
Clarify that this section provides a plan for a more structured approach to providing mandatory instruction by highly qualified teachers under the ESEA to enable students who have been removed for more than 10 days to access the curriculum and to "make academic progress" toward state standards, including Massachusetts Curriculum Frameworks as discussed in **53.01(2)(b)** above.