February 27, 2014

BY EMAIL
Representative Kimberly Williams
Delaware General Assembly
411 Legislative Avenue
Dover, DE 19901

Re: H.B. 90 Task Force

Dear Rep. Williams:

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I am writing to provide our view on one of the issues I understand the H.B. 90 Task Force is addressing, whether various questions on different magnet, charter and votech school applications are legally permissible. I understand that the questions asked by different schools in the application process include the following:

> Race of a student, whether a student is Hispanic/Latino, student's social security number, photo id, IEP or 504 Plan, citizenship, what languages are spoken in the home, place of birth, place of parent's employment, health problems, parents married, separated, has your child repeated a grade, where does the child live: with both parents, mother, father, grandmother; does your child receive services: including occupational therapy, hearing support, speech therapy, or counseling; does your child take medication, wear glasses or wear a hearing aid; has a parent or guardian worked on a farm, in the fields or in a factory with fruits, vegetables or animals; has the parent or guardian every worked with watermelons, potatoes, mushrooms, corn, applies, chicken, or shellfish; has your family changed home in the last three years; whether the child needs transportation; whether the child has any area of interest in certain sports; in what ways do you feel that this school will serve your child?

Title 14, Section 506 of the Delaware Code limits the criteria that may be employed in the charter school admission process. Many of these questions seek information that may not be considered during the admissions process, *e.g.*, race, nationality, whether child has a disability, nature of parents' employment; etc. Some of the questions may seek information that a school needs after it has accepted a student, for example to determine the student's educational needs or to supply statistical information required for government reports. However, since decisions about what classes the student should take and related educational decisions should not be made until after the student is admitted, and the statistical reports must be based on enrolled students, rather than the larger group of students

who have applied, there is no need to collect that information before students enroll.

The questions probably lead to a disparate effect on groups who are protected by two federal statutes, Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973. Since there is no need to ask those questions during the admissions process, it is likely that asking them violates both statutes. Title VI prohibits recipients of federal financial assistance from discriminating based on race, color, or national origin, 42 U.S.C §§ 2000d-2000d-7, and Section 504 prohibits recipients of federal financial assistance from discriminating based on disability. 29 U.S.C. § 794. All publicly funded schools, indirectly if not directly, receive federal education funds that the state receives, and therefore are required to comply with Title VI and Section 504. *See* 34 C.F.R. § 100.13(i) and 28 C.F.R. § 41.3(d).

The United States Department of Education regulation implementing the anti-discrimination provision of Title VI prohibits "utilizing criteria or methods of administration which … have the effect of defeating or substantially impairing accomplishment of the program as respects individuals of a particular race, color, or national origin." 34 C.F.R. § 100.3(b)(2). Thus, if inclusion of the questions on the school application lowers the number of individuals of a particular race, color, or national origin, such as minorities, who are admitted to high performing charter schools, votech schools and desired magnet schools, inclusion of the questions violates Title VI. Likewise, under 28 C.F.R. § 41.51(b)(3)(i), the anti-discrimination provision that implements Section 504, there is a violation if inclusion of the questions has the "effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons." I believe that many of the questions described above, such as the questions about race, languages spoken at home, place of birth, parent's employment history, whether the child receives services, therapy or counseling or has an IEP, whether the child needs transportation, etc., are prohibited under these regulations.

Review of demographic data on charter schools, particularly high performing charter schools shows that the enrollment of minority and special education students in those schools is much lower than the percentage of such students in the public school districts where those schools are located. Likewise, votech and magnet schools that ask inappropriate questions (such as whether a student is under medical care, receives special education services, and who the student lives with) have a much lower rate of minority and special education enrollment than the public school districts where those schools are located.

Since being faced with those questions could dissuade some disadvantaged students, who are more likely to be minorities or to have a disability, from applying, the questions are likely to be a cause of the reduced number of those students attending some charter schools. Of course, since answers to many of the questions would be suggestive of a disadvantaged status, the answers could also be

used by charter school administrators to favor other groups of students. We don't know if that was done, but given the low numbers of disadvantaged students in the high performing charter schools, that possibility cannot be dismissed.

There are a number of questions that appear to seek information about a child's citizenship status. For example, questions ask for the child's social security number and explicitly about citizenship. The United States Supreme Court decision in *Plyler v. Doe*, 457 U.S. 202 (1982), makes clear that a public school may not request proof that a child is a United States citizen before enrolling the child and providing him or her with an education. I don't know why magnet, charter and votech schools ask those questions, but if they have the effect of dissuading non-citizens from applying, or if they are used by administrators to exclude applicants, they violate settled federal law.

My conclusion that many of the questions probably violate Title VI, Section 504 and *Plyler* is not inconsistent with the December 16, 2013 memorandum from a deputy attorney general distributed at the January Task Force meeting. That memorandum appears to be based on a Delaware administrative provision, 14 Del Admin Code 225. I assume the deputy attorney general's statement that she did not find legal requirements that would prohibit the list of questions was based on her analysis of state law. The memorandum recognized the regulations under Title VI and Section 504 that require data collection, but did not consider the federal regulations at 34 C.F.R. § 100.3(b)(2) and 28 C.F.R. § 41.51(b)(3)(i), which prohibit questions that have a disparate effect on protected groups. Nor did the memorandum consider *Plyler v. Doe.* Nothing in the December 16, 2013 memorandum suggests disagreement with my conclusion that the disparate effect regulations and *Plyler* are legal reasons why the questions must be eliminated. Certainly you will want to ask the deputy if she agrees with my understanding of what she focused on, but I think it is clear.

For the foregoing reasons, we urge the Task Force to recommend that charter, votech and magnet schools be prohibited from asking the questions listed in this letter during the admissions process.

Sincerely yours,

Richard H. Morse

cc: Paula A. Fontello, Esq.
Kathleen MacRae