To: Representative Williams

From: Paula A. Fontello PAF

Date: December 16, 2013

RE: HB90 – Enrollment Preferences Task Force – Questions Presented

As previously communicated, this memo is provided in response to your request for assistance and this memo not provided as an official opinion of the Attorney General. The Enrollment Preferences Task Force was established by HB 90 to "consider the current landscape of enrollment preferences and practices used by magnet, vocational technical, and charter schools." HB 90 amended the School Choice law and among other things, allows any student to apply to a Receiving Local Education Agency (hereinafter "RLEA") by submitting an application on the standard form provided by the Delaware Department of Education (hereinafter "DDOE"). RLEAs include all Delaware public school districts, charter schools, and career and technical education schools. Additional restrictions were placed on "Receiving Districts" (hereinafter "RE") which only includes the 16 reorganized Delaware public school districts and does not include charter schools and career and technical education schools. REs may require supplemental information in the application data as long as the same information is requested from all students (choice and in-district residents).

Based on HB 90, the Task Force was created to examine the practices and enrollment preferences of magnet, charter schools, and career and technical education schools and report any recommended changes. In essence, since the task force's responsibility is to view the current enrollment preferences and practices used by the three types of schools and make recommendations, its mission is primarily a collection of policy considerations. The role of the Delaware Department of Justice in providing guidance to a state agency or instrumentality is not to provide policy guidance but to limit their input to legal advice and allow the state agency to make policy determinations. In reviewing the list of questions submitted, I did not find any current legal requirements that would prohibit the list of questions, tests, or auditions presented. Looking at HB90, it appears that the main purpose of the bill was to address concerns about discrimination in the application and acceptance process, thus my research was focused in that direction.

Both state and federal law provide protections against discrimination including discrimination based on race, color, national origin, sex, citizenship, or immigration status. The DDOE has adopted a regulation which prohibits discrimination where a program or activity receives approval or financial assistance from the DDOE. The regulation would apply to all RLEAs and extends to all programs and activities. The specific regulation is *225 Prohibition of Discrimination,* 14 DE Admin. Code 225, and states the following:

> 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.

In reviewing the questions presented, while there is no *per se* prohibition on asking the questions, it is clear that the information cannot be used for an improper purpose. Typical enrollment information includes residency, age, grade, and contact information of parent or legal guardian. See DOE's school choice information page and the Delaware Standard Application for Educational Options http://www.doe.k12.de.us/infosuites/schools/choice.shtml. Looking at the type of information being requested, many of the questions appear to be gathering information used for reporting or eligibility for federal or state programs such as homeless status under the Federal McKinney-Vento Homeless Assistance Act, or migrant status, or identification for English Language Learners ("ELL").

In addition, the U.S.D.O.E. Office for Civil Rights (herein after "OCR") engages in Civil Rights Data Collection pursuant to the statutes and regulations implementing Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and under the Department of Education Organization Act (20 U.S.C. § 3413). To fulfill this goal, the OCR collects a variety of information, including student enrollment and

educational programs and services data that are disaggregated by race/ethnicity, sex, limited English proficiency, and disability.

While it may be advisable as the best practice for a RLEA to have a two step process separating admission and enrollment information, it is not legally mandated. Each RLEA has the legal responsibility to ensure that they are complying with state and federal law and in doing so they should review their application process and practices carefully to make sure they are consistent with the law and do not have a chilling effect on the enrollment. The RLEA can not apply different rules to children based on race, color, national origin, immigration or citizenship status, disability, or other impermissible factors.

While a RLEA may request information, there are certain circumstances where the RLEA must advise whether the disclosure of the information is mandatory or voluntary. The federal government does not prohibit States or districts from collecting the social security numbers of prospective or current students. However, there needs to be a legally permissible need to collect this information. For example, a school may require a social security number for enrollment in the school lunch program. If it requests the social security number for other purposes, it needs to give notice that the disclosure is voluntary, a statement outlining why the number is requested and a description of how the information is to be used. Since refusal to disclose a social security number cannot

be grounds for exclusion from a program, the school district must be prepared to substitute an alternative number as an identifier. *See* the U.S.D.O.J. Office for Civil Rights Dear Colleague letter issued on May 6, 2011, found at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201101.html. See also 5 U.S.C.A. § 552a (note).

The questions presented also raised whether it was appropriate to ask questions regarding a student's interests in sports programs prior to enrollment. There is no specific prohibition on asking questions on sports program prior to enrollment. However, the regulations governing interscholastic athletics specifically provide some limitations regarding school choice. The regulations related to middle schools and high schools provide the following limitation:

> 10.4 School Choice
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> 10.4.1 If the number of applicants under the Delaware School Choice Program exceeds the number of available student openings, the selection criteria established by the district shall not include athletic considerations.

See 14 DE Admin. Code 1008.10.4 and 14 DE Admin. Code 1009.10.4. The restriction in the regulations only applies to school choice and does not apply to charter schools or career and technical education schools.

The following question was presented: "School districts on their choice applications can only ask choice students questions that they ask their feeder

students, why can this not be the same for charters, magnets and votech?" Charter schools, magnet schools, and career and technical education schools are somewhat different than the re-organized school districts, generally do not have the same type of feeder pattern limitations, and are often targeted to specific programs. Each of the categories of schools may have specific acceptance and enrollment criteria to determine admission based on the school programs as long as the criteria used reasonably relates to the school or program. The answer is a little different in regards to each type of school, whether it is a magnet, charter, or career and technical education school.

Turning first to magnet schools, the term magnet school is not used within Title 14 or the DOE regulations; however, when a term is undefined, the common and ordinary meaning will be utilized. The Merriam-Webster dictionary defines "magnet school" as "a school that has courses in special subjects (such as the arts or technology) and is designed to attract students from all parts of a community." Thus, under Delaware's school framework, magnet schools are generally part of a receiving district. The law requires that each "receiving district," which does not include charter schools or career and technical education schools, to adopt and make available an acceptance or rejection (admission) policy and list out the criteria for acceptance or rejection and setting priorities as required for acceptance. See 14 *Del. C.* § 405.

The law contemplates and permits admission policies that are individually tailored to the specific purpose and programs of the school as long as the policy is "reasonably related to the nature of the program or school for which the application is submitted." 14 *Del. C.* § 405(b). However, the admission policy must be the same as the policy used for students residing within the attendance zone with the exception of the mandated admission priorities listed in 14 *Del. C.* 405 (b). (returning students that still meet the requirements, students seeking enrollment based on residing in the designated feeder pattern, siblings of currently enrolled and returning students, after the initial top three criteria to students based on designating the program as the first, second, or third choice and children of school employees). After the mandated admission priorities spots are filled, then the receiving district must determine additional admissions based on a lottery process and a ranked waiting list. Thus, if a magnet school is part of a receiving district, they may require auditions or tests to **all applicants** as long as the requirement is "reasonably related to the nature of the program or school." 14 *Del. C.* § 405(b).

Turning to charter schools, the law permits charter schools to give preference in certain cases as long at the preferences comply with the law and are designated within their charter when required. The Charter school law permits preferences under 14 *Del. C.* § 506 (b) as follows:

(b) Preferences in student admissions may be given to:

(1) Siblings of students currently enrolled at the school;

(2) Students attending an existing public school converted to charter status. Parents of students at a school converted to charter status shall be provided with a plan the district will use to address the educational needs of students who will not be attending the charter school;

(3) Students enrolling in a new (nonconverted) charter school may be given preference under the following circumstances *as long as the school has described its preferences in the school's charter:*

a. Students residing within a 5-mile radius of the school;

b. Students residing within the regular school district in which the school is located;

c. ***Students who have a specific interest in the school's teaching methods, philosophy, or educational focus;***

d. Students who are at risk of academic failure;

e. Children of persons employed on a permanent basis for at least 30.0 hours per week during the school year by the charter school.

(emphasis added).

Therefore, a charter school may have some admission or enrollment criteria to determine whether a student meets the stated preferences as incorporated in the school's charter. For example questions regarding the student's interests or what ways the school will serve the student, auditions, or testing may be the school's process used to determine student's specific interests in the school's methods, philosophy or educational focus, or whether a student is at risk for academic failure, as long as the information is uniform to all applicants and is not used for an impermissible purpose.

Lastly, career and technical schools are governed by the vocational-technical school board in each vocational-technical district. 14 *Del. C.* § 1029. Each vocational-technical district is vested with the authority to determine policy and adopt rules and regulations for the general administration and supervision of the vocational-technical schools within their district. 14 *Del. C.* § 1029. The rules and regulations adopted must be in accordance with Delaware law and the DOE's regulations. *Id.* See also 14 DE Admin. Code 525 *Requirements for Career and Technical Education Programs*. Although a vocational-technical school is required to accept the general application, they are currently permitted to require supplemental information. However, it is clear that a vocational-technical district process must be consistent with other DOE regulations, including the DOE's regulation prohibiting discrimination, and all policies must be in accordance with that regulation.

In conclusion, the questions posed regarding the application and enrollment process raise a complex and challenging subject matter; however, the questions raised present policy decisions that are not resolved by any clear cut legal guidance. At the heart of the Task Force's mission is to consider all aspects of the application and enrollment process and purpose from both the applicants' and the schools' perspectives and needs, and weigh the policy considerations and formulate recommendations based on the outcome. If pursued through successful

legislation, those recommendations would then become legally binding restrictions.

If you have any additional questions, please do not hesitate to contact me.