

January 31, 2023

Submitted Electronically To: RA-stateboardofed@pa.gov

Re: PA Model MOU, Published in 22 Pa. Code Chapter 10 (Safe Schools)



Members of the State Board of Education,

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We appreciate the opportunity to comment on the PA Model Memorandum of Understanding (MOU), published in 22 Pa. Code Chapter 10 (Safe Schools). We are writing today to bring attention to ongoing concerns about the language used in the Model MOU and how further clarification would help reduce unnecessary involvement of youth with the justice system. We ask the State Board of Education to amend the MOU in the following ways to provide school entities with appropriate and consistent guidelines to understand their responsibility to maintaining school safety and student privacy.

Clarify the police notification requirements by eliminating a listing of infractions where notification is discretionary. The first area of concern we would like to bring attention to in the model MOU is Section II Discretionary Notification (B)(1)(a, b). Pennsylvania state law specifies a list of incidents for which immediate reporting is mandatory.¹ However, both the law itself and the Model Memorandum of Understanding between districts and law enforcement approved by the state Board of Education contain a list of incidents where notification is discretionary.² Some administrators are legitimately confused about what the law requires of them, while others wrongly insist that they must call the police when incidents fall on the discretionary list. The net effect has been to over-report less serious incidents to police departments. Notably, disorderly conduct, simple assault, failure of disorderly persons to disperse upon official order, and theft are among the incidents on the discretionary reporting list. Black students are overrepresented in arrests in several of these “discretionary” categories, as our report on Allegheny County shows.³

In October 2016, the Pennsylvania Joint State Government Commission released a report on school discipline to the Pennsylvania House of Representatives recommending the MOU eliminate mention of

¹ Safe Schools Act, as amended, 24 P.S. §§ 13-1301-A – 13-1313-A.

² *Model Memorandum of Understanding*, Pennsylvania Department of Education. Available at:

<https://www.education.pa.gov/Documents/K-12/Safe%20Schools/Model%20Memorandum%20of%20Understanding%20with%20Law%20Enforcement%20Agency.pdf>

³ Jordan, H., Makoshi, G. (2022). Student Arrests in Allegheny County. The Need for Transparency and Accountability.

<https://www.endzerotolerance.org/student-arrest-report>

offenses where notification is discretionary.⁴ Yet, the confusing language remains in state policy documents to this date. This has resulted in school administrators feeling pressure to report all items on the MOU's discretionary notification list. Discretionary referrals to law enforcement are already within the rights of school administrators.

At the State Board's September 12, 2018 hearing on MOUs, Dr. Monica McHale-Smith, a retired superintendent, delivered the following testimony about the state's Model Memorandum of Understanding, "Having the Model MOU list incidents where reporting is discretionary leaves school administrators confused as to what the law requires them to do. The net effect has been to over-report less serious incidents to police departments."

The [full report](#) (pp. 66-71) explains that there are significant variations in the MOUs adopted by districts, with some listing certain discretionary incidents as being mandatory for purposes of reporting, leading to inconsistent or excessive disciplinary action where safety concerns are not implicated.

We urge the Board to amend the Model Memorandum of Understanding to remove the list of offenses listed under Section II Discretionary Notification (B)(1)(a, b).

Incorporate federal education guidance that protects the privacy of student records under the Family Education Rights and Privacy Act (FERPA) and Individuals with Disabilities Education Act (IDEA).

In sections I (D)(c) and II (D)(2, 5, 6), the model MOU gives insufficient guidance to school districts regarding how they must protect the confidentiality of students records, particularly when a health or safety emergency occurs. Further guidance is needed in these sections to ensure school entities maintain confidentiality of records to prevent discrimination or harassment from anyone unauthorized access to student records, including unlawful access by law enforcement. We urge the board to add language clarifying the limited conditions under which student records (including special education records) can be released to law enforcement.

The US Education department advises: "In some situations, school administrators may determine that it is necessary to disclose personally identifiable information (PII) from a student's education records to appropriate parties in order to address a health or safety emergency. FERPA's health or safety emergency provision permits such disclosures when the disclosure is necessary to protect the health or safety of the student or other individuals. See 34 CFR §§ 99.31(a)(10) and 99.36. *This exception to FERPA's general consent requirement is limited to the period of the emergency and generally does not allow for a blanket release of PII from a student's education records. Rather, these disclosures must be related to an actual, impending, or imminent emergency, such as a natural disaster, a terrorist attack, a campus shooting, or the outbreak of an epidemic disease (emphasis added).*"⁵

The other major exception is when the district receives a court order signed by a judge.

Administrators are also required to protect the rights of students with disabilities, and cannot hand over full student educational records without legal permission.

⁴ Joint State Government Commission of the General Assembly of Pennsylvania, *Discipline Policies in Pennsylvania's Public Schools: Report of the Advisory Committee on Zero Tolerance School Discipline Policies*, October 27, 2016. Available at: <http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2016-10-27%20Final%20REPORT%20for%20WEBSITE%20updated%2011.16.16%20%20WB.pdf>

⁵ U.S. Department of Education. Protecting Student Privacy. <https://studentprivacy.ed.gov/faq/when-it-permissible-utilize-ferpa%E2%80%99s-health-or-safety-emergency-exception-disclosures>

Clarify the responsibilities of law enforcement authorities (Section I, E.) when making an arrest.

The model MOU states in Section I (E)(3) that law enforcement should *“Identify those responsible for the commission of the reported incident and, where appropriate, apprehend and prosecute those individuals. Identification and apprehension procedures shall involve as little disruption to the school environment as is practicable.”*

However, in an effort to minimize disruption to the school environment and protect students from unnecessary embarrassment, we suggest that MOU provide further guidance on when and how arrests are made on campus to include the following considerations. The law enforcement officer should consider the following prior to arresting the student on campus:

- Whether the arrest or summoning is in response to the commission of a school--related offense;
- The seriousness of the offense;
- Whether there is an imminent threat to public safety; and
- Whether the officer is able to accomplish the arrest by other means.

Explain the rights of students when interacting with law enforcement. Section III Law Enforcement Authority Response, B. CUSTODY OF ACTORS,

In (Section III (B)(2)), the rights of students being questioned or detained by police should be spelled out in the model MOU, including the right to a lawyer, the right to have trusted adults present during any interrogation, as well as Miranda rights, which should be given in language appropriate to the age and the sophistication of the student.

We appreciate this opportunity to offer thoughtful suggestions as to how the MOU can be updated to improve the school environment.

Sincerely,

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