



August 20, 2009

VIA Email

Desiree Brown
Office of the State Superintendent of Education
Department of Special Education
51 N Street, NE, 7th Floor
Washington, DC 20002

Re: The OSSE's July 31, 2009 Policy Statement Regarding Initial Evaluation and Reevaluation

Dear Ms. Brown,

I am submitting these comments on behalf of the Children's Law Center¹ (CLC), which represents more than 1,000 low-income children and families in the District of Columbia every year, including a significant number of children and families with various special education needs. CLC's comments on OSSE's proposed policy statement regarding Initial Evaluation and Reevaluation ("policy" or "Evaluation Policy") are based on our experience in those cases.

The policy provides an overview of the procedures that LEAs must follow in evaluating children suspected of having disabilities and determining whether such children are eligible for special education. We appreciate OSSE's efforts to clarify these procedures. We do, however, have several concerns. The policy attempts to make the federal and local regulations more accessible for Local Education Agencies (LEAs) often by paraphrasing the law. In some cases, unfortunately, the paraphrasing obscures or misstates the legal requirements. The policy also provides new "eligibility criteria" for LEAs to apply in determining whether a child fits a specific IDEA disability classification, some of which are confusing and could lead to children being inappropriately excluded from special education. The specifics of our concerns are outlined below.

1) Referral

The policy sets forth as a key concept what a referral means and the procedures to be followed once a referral is received. In that process the policy states that upon receiving a referral for an initial evaluation, the IEP team "makes the determination whether the child is

¹ The Children's Law Center, with over seventy staff members, is the largest civil legal services organization in the District of Columbia and the only organization providing comprehensive representation to children. The Children's Law Center envisions a future for the District of Columbia in which every child has a safe home, a meaningful education and a healthy mind and body. We work toward this vision by providing free legal services to 1,000 children and families each year and by using the knowledge we gain from representing our clients to advocate for changes in the law.



suspected to be a child with a disability or not” and may refuse to evaluate the child if the team believes that he or she is not a child with a disability. Evaluation Policy at 12. This part of the process as described violates Federal and local laws. Once an IEP team has received a referral, the team must conduct a timely initial evaluation. 5 D.C.M.R. § 3005.2. We urge that the policy be revised to clarify that IEP teams may not refuse to evaluate a child who has been referred for an initial evaluation.

In addition, to ensure that LEAs understand their responsibilities under the IDEA, we suggest that the policy include an explicit statement that the 120-day timeline for completing the evaluation starts when a referral is submitted. D.C. Code § 38-2561.02 (a). It would also be helpful, if the policy clarified that LEAs may not delay evaluations in order to accommodate the Student Support Team (SST) process. Regardless of whether a child is also referred to the SST, the evaluation must be completed within 120 of the submission of the referral.

2) Independent Educational Evaluation

The policy defines an Independent Educational Evaluation (IEE) and sets forth when an LEA must provide one. The policy states that “the LEA may be responsible for, at most, one (1) IEE [independent educational evaluation] at public expense.” Evaluation Policy at 8. This implies that an LEA may only ever be responsible for one IEE per child. The relevant federal regulation states that “a parent is entitled to only one independent educational evaluation at public expense *each time the public agency conducts an evaluation with which the parent disagrees.*” 34 C.F.R. § 30.502(b)(5) (emphasis added). We urge that the policy be revised to reflect the federal law requirement that an LEA may be required to provide more than one IEE to the same child if the LEA has conducted more than one evaluation with which the parent disagrees.

The policy also sets forth that individuals performing IEEs at public expense “must meet the state and local standards to conduct the examination.” Evaluation Policy at 8. Further, the policy states that the LEA is responsible for adopting the criteria for an IEE including the qualifications of the examiner. We are concerned that having each LEA adopt its own standards will lead to a wide variation in standards. We suggest that OSSE develop and published, with a public comment period, the qualifications to ensure that IEEs are valid, useful, and conducted in a manner consistent with parents’ rights.

3) Screenings / Assessments

The policy describes screenings and assessments in general, and then identifies several specific assessments. Evaluation Policy at 4-7. While the policy states that it is not providing an exhaustive listing of the assessments that may be considered by an IEP team, it might be read to create a preference for the assessments that are specifically listed, which would be problematic. We suggest that OSSE either omit the section identifying specific assessment or strengthen the language to make clear the enumerated assessments are only a few of the assessments that may be included during an evaluation.

Further, if the specific assessments are retained we urge that the definition of adaptive behavior assessment be changed. As written the definition states that a parent must be a source. Not all children have parents who can provide input. If a parent is unavailable, the LEA must instead solicit information from the child's caregiver or another person close to the child. Evaluation Policy at 4. Otherwise, children whose parents are not available to complete the adaptive behavior assessment may not be appropriately assessed. .

4) Eligibility

In the definition of the term "eligibility" the policy states that "a child may not be determined to be a child with a disability if the team determines the child did not receive appropriate instruction in reading [or] math [or has] limited English proficiency." Evaluation Policy at 3. This definition significantly differs from the federal regulation which states a child may not be determined to be a child with a disability if the *determinant factor* is lack of appropriate instruction or limited English proficiency. 34 C.F.R. § 300.306(b). A child who has not received appropriate instruction or has limited English proficiency may still be determined to be a child with a disability as long the lack of instruction or English proficiency is not the determinant factor for that determination. As written, the policy would inappropriately bar from special education *all* children who have not received appropriate instruction or have limited English proficiency. We urge OSSE to include in the definition this important qualifier.

5) Evaluation Summary Report

The evaluation summary report both as defined and referred to in the "Eligibility Categories and Criteria" section states that the report is to be prepared by "a team of qualified professional" and the parent(s) of the child. Evaluation Policy at 7 and 18. The regulations require that team must be the IEP team. 5 DCMR § 3006.5. Federal and local laws mandate that the IEP team include a specific set of members. 34 C.F.R. § 300.321; 5 D.C.M.R. § 3003.1. To avoid confusion, we urge that the policy explicitly state that the report is prepared by the IEP team.

The policy also requires that for the evaluation summary report "each team member must certify in writing whether the report reflects the member's conclusion [and] if the report does not reflect that member's conclusion, the team member must submit a separate statement presenting the member's conclusion." Evaluation Policy at 18. We believe that ensuring documentation of the members' conclusions and reasons for dissent will be very helpful. We are, however, somewhat concerned that for parents the preparation of a statement may be burdensome. We suggest that the certification and statement requirements only apply to the professionals on the team.

6) Parent Participation

The policy defines parent participation in the key concepts section. Evaluations Policy at 9. This definition does not include the specific notice and reasonable efforts requirements of the IDEA. The requirements are mentioned later under "Eligibility/IEP Team Meeting." Evaluations Policy at 17. We urge OSSE to include these requirements in

the definition section to avoid confusion and help ensure that LEAs give the legally-required notice to the parent.

7) Eligibility Categories and Criteria

We have several concerns with the “Eligibility Categories and Criteria.” Evaluation Policy at 18-31. The policy sets forth for each disability classification a definition followed by eligibility criteria. While the definitions are nearly verbatim from federal law, the eligibility requirements are not found in federal or local law. Many of the proposed eligibility criteria are overly restrictive, requiring children to meet standards that are not consistent with current psychological practices and demanding unnecessary additional evaluations. Some of the criteria also misstate federal special education law. The particular eligibility criteria that are most problematic are:

- Autism: Some children with an Autism Spectrum Disorder might be inappropriately excluded from special education under the eligibility criteria listed in the policy, while other children might be inappropriately classified as having autism when they instead have a different disability. Evaluation Policy at 19. The requirement that a child have at least three of the five listed characteristics is not appropriate given the wide range of different disorders with different characteristics (e.g., Asperger syndrome, Rett syndrome, and Childhood disintegrative disorder) encompassed under the Autism classification. We urge that the eligibility criteria should be removed and LEAs should be instructed to apply the legal definition from the IDEA and DC regulations.
- Emotional Disturbance: The policy’s requires that “the IEP team must review and/or conduct two scientific research-based interventions” in order to find a child eligible for special education under Emotional Disturbance. Evaluation Policy at 21. This limits the IEP team’s discretion to determine what evaluations are necessary and may result in the delay or prevention of children receiving required special education. We recommend that the requirement be removed. If such a requirement is to be implemented, we suggest that OSSE give specific guidance on what an appropriate “scientific research-based intervention” would entail and make clear that a delay in completing such interventions does not justify a delay in determining a child’s eligibility or providing him or her with necessary services.
- Multiple Disabilities: This policy as written requires that “the child must meet all of the criteria associated with the disability from at least two groups.” Evaluation Policy at 24. This requirement is not consistent with local and federal regulations that define Multiple Disabilities as “concomitant disabilities...the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments,” and give several non-exclusive examples of combinations of disabilities that could constitute Multiple Disabilities. 34 C.F.R. § 300.8(c)(7); 5 D.C.M.R. 3001. The regulations acknowledge that children with, for instance, both a speech/language impairment and a specific learning disability, or both an intellectual disability and an emotional disturbance, might have particular needs arising from the combination of disabilities that programs designed for children with only one disability could not adequately address. The policy as written is more

restrictive than the federal regulations and will prevent some children with multiple disabilities from being appropriately classified. We strongly urge that the policy be modified to comply with the federal regulations and remove the requirement that a child must have a disability from more than one “group” in order to qualify as multiply disabled.

- Speech or Language Impairment: The policy requires that the IEP team “review documented results of at least two or more measures or procedures” in order to find a child eligible for special education under Speech or Language Impairment. Evaluation Policy at 30. This might be read to require two full speech/language evaluations. Such an interpretation would limit the IEP team’s discretion in determining what evaluations are necessary and might have the result of delaying or preventing children from receiving required special education. We suggest that OSSE modify this section and provide guidance on the areas of speech and language that a thorough evaluation should assess (e.g., both receptive and expressive language).

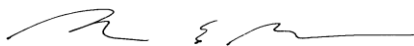
8) General Comments

We suggest that OSSE clarify the definition of “special education” for the LEAs in this policy. In our experience, LEAs do not always understand that “special education” includes modifications to classroom instruction that may not be specifically mandated to impact an academic deficit, but may be required to address, for example, a mental health issue that is negatively impacting the child’s ability to function in a classroom. As a result, LEAs fail to identify some children as children with disabilities under the IDEA. Providing the definition of special education from the federal law and the DC regulations would help ensure that LEAs understand the broad scope of the term “special education.”

We also suggest that the policy include a statement that states it is subordinate to federal and District law. Since the purpose of the policy is to provide guidance, but not fully set forth all a LEA’s legal obligations, we believe such a statement would help avoid confusion.

Thank you for considering these comments. If you have any questions about these comments, please feel free to contact me at (202) 467-4900 ext. 565, or sgreer@childrenslawcenter.org.

Respectfully,



Sharra E. Greer
Director of Policy