



VIA EMAIL

November 16, 2009

Dr. Kerri Briggs
State Superintendent of Education
441 4th Street, NW, Suite 350 North
Washington, DC 20001
Attn: Jessica Morffi, osse.publiccomment@dc.gov

Re: Comments on Proposed Chapter 30, Sections 19 and 30 of Title V of the District of Columbia Municipal Regulations

Dear Dr. Briggs:

I am submitting these comments on behalf of the Children's Law Center¹ (CLC), which represents more than 1,200 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 the revised version of the Office of the State Superintendent of Education's (OSSE) proposed regulations regarding charter schools' special education obligations, and resolution meeting and due process hearing procedures are based on our experience in special education cases involving all local education agencies in the District.

We thank OSSE for its consideration of our June 26, 2009 comments regarding the first proposed chapter 30 regulations and our July 17, 2009 comments regarding the first proposed chapter 19 regulations. We appreciate that OSSE incorporated many of our suggestions into its revised proposals. These comments will focus on our remaining concerns and some new issues raised by the revisions.

I. Proposed Chapter 30, Section 19: Charter Schools' Special Education Obligations

a. School placement decisions should be within the IEP process.

The provision granting OSSE authority to unilateral "make a location assignment for the placement of the child" is improved, but remains problematic. Proposed § 3019.8(b)(5). We appreciate the revisions to this section, particularly proposed § 3019.8(b)(6) requirement that OSSE discuss with parents what school their children will attend. Nonetheless, the regulation continues to raise legal and policy concerns.

¹ The Children's Law Center, with over seventy staff members, is the largest non-profit 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.



Legally, OSSE must “ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.” 20 U.S.C. § 1414(e); *see also* 5 D.C.M.R. § 5-3013.1(a). The group deciding the educational placement must consider the geography of specific options, confirming that the term “educational placement” includes the physical location of a school. 34 C.F.R. § 300.116(b)(3); *see also* D.C. Code § 38-2561.01(6)(C). But the proposed regulation gives OSSE the sole authority to make an educational placement decision, using a term – “location assignment” – that does not appear in the Individuals with Disabilities Education Act (IDEA) and is not defined in the DCMR (including the proposed regulation). Where the term “location” does appear in special education statutes, it refers to an aspect of the IEP which is to be discussed and decided by the Individualized Education Program (IEP) team, not something a State Education Agency (SEA) determines unilaterally. 20 U.S.C. § 1414(d)(1)(A)(i)(VII).

Although the revised proposal would permit parental “input,” it still unnecessarily suggests that this input and the resulting “location” decision is separate from the IEP process. The IDEA designed a collaborative and inclusive process in which parents and a variety of professionals share all relevant information regarding a child. The best decisions for children are based on meaningful input and discussion from parents and the various educators familiar with a student or school placement options for that student. Parents and a child’s current educators typically have the most individualized information about a particular child. OSSE representatives do not know children personally and thus will face a crucial information disadvantage. OSSE representatives often have the information about the widest variety of school options (although many parents and LEA Charter staff will also be familiar with school options), but they need to merge this information with the child-specific information of other IEP team members to reach the best decisions for children. The regulation should be revised to ensure that school placement decisions are made in the context of the IEP team so that all relevant information affects that decision.

In addition, it is simply more practical to discuss the specific school options to which a student might attend in the IEP context. The regulations require the LEA Charter to inform OSSE that a placement to a more restrictive environment will be discussed at the IEP meeting. Proposed § 3019.8(b)(2). The OSSE representative, therefore, should be prepared to discuss what more restrictive schools a child may attend when they attend the IEP meeting. Declining to discuss those options can only undermine trust in the IEP process and delay important decisions for children.

- We urge OSSE to delete § 3019.8(b)(6) & (7) and to revise § 3019.8(b)(5) to read: Upon completion of the placement review process consistent with this subsection, if the IEP team for a child enrolled in the LEA Charter makes a placement decision that cannot be implemented within the LEA Charter, the **IEP team shall discuss various school placement options. When OSSE has received prior notice that a placement other than the LEA Charter may be necessary, the OSSE shall attend the IEP meeting prepared to discuss all appropriate placement options.** ~~OSSE shall make a location assignment for the placement of the child;~~²

² Bold indicates an addition and a strike through a deletion.

In the alternative, if OSSE’s final regulations include the proposed placement/location distinction, we would like to discuss with OSSE staff appropriate policy guidelines to ensure that “location” decisions are made as collaboratively, effectively, and timely as possible.

- b. *The regulations should be revised to address situations where Local Education Agency (LEA) charters lack the capacity to meet children’s needs.*

We remain concerned that the proposed regulations’ strict requirement of LEA charters to serve all students regardless of disability will lead to unintended effects on our clients, especially those who have the most severe special needs. LEA charters are all relatively small institutions, operating at most a small handful of schools. They lack the critical mass of students necessary to develop a full continuum of special education services. We appreciate that the proposed regulations encourage LEA charters to pool their resources to develop a full range of services. Proposed §§ 3019.6 & 7. The reality, however, remains that LEA charters lack that capacity, and cannot meet the needs of students with particularly unique or severe disabilities. Paying another entity to provide services for even a very small number of students with the most significant needs will cause significant financial distress for many charters.

The fiscal impact imposed by the proposed regulations may cause the LEAs to find ways to avoid accepting students with special needs or push those students out by repeated disciplinary sanctions, encouraging parents to look elsewhere, or by other means. While such actions would violate the anti-discrimination provisions of the District’s charter school statute, codified in this proposal, it would be extremely difficult for OSSE to prevent such actions. D.C. Code § 38-1802.06(b); Proposed § 3019.1. LEA charters will also have an incentive to reduce the level of services provided to individual students – even when more services are required.

There are ways for the proposed regulations to strike a better balance. Rather than strictly demand that all LEA charters be responsible for all services – even the most expensive – LEA charters should have the ability to petition OSSE to take responsibility for educating those students with the most severe needs, thus spreading the cost across the entire District rather than imposing it on relatively small institutions. This approach is consistent with the IDEA, which provides that a state education agency “shall . . . provide special education and related services directly to children with disabilities . . . if the State educational agency determines that the local educational agency . . . is unable to establish and maintain programs of free appropriate public education.” 20 U.S.C. § 1413(g). Just as SEAs apply this provision to take responsibility for services that small rural districts lack the capacity to provide, OSSE should take responsibility for providing services that small LEA charters lack the capacity to provide.

This suggested change is consistent with OSSE’s existing practice under its Policy and Procedure for Placement Review.³ OSSE rightly involves itself whenever a LEA charter is considering placing a child in a less integrated environment. OSSE’s role is essential to ensure that the LEA charter’s small size and limited capacity to provide specialized services does not lead it to place the child in a more restrictive setting than necessary. For the same reason that students at LEA charters require OSSE oversight regarding educational placement decisions as contemplated in

³ http://osse.dc.gov/se0/frames.asp?doc=/seo/lib/se0/specedsap/placement_review_policy_v1_0_final.pdf.

proposed § 3019.8(b), students need OSSE to take responsibility for the educational placements and services that ensue.⁴

This suggestion only applies to those students with the highest level of needs. LEA charters have the resources and the legal obligation to provide a free appropriate public education to the vast majority of students – including the vast majority of students with special needs. OSSE should use these regulations and its broader special education grant-making authority to enforce that obligation. Nonetheless, the disproportionate cost of providing special education services to the small group of students with the most severe needs strongly counsels in favor a revision to the proposal.

- We urge OSSE to revise Proposed § 3019.3(c) to read: *Special Education and Related Services*. An LEA Charter shall develop and implement an IEP for an eligible child within the timelines set by IDEA, local law and state policy, and shall provide special education and related services consistent with that IEP. **If a LEA Charter believes that it is unable to establish or maintain a program of services that can provide the eligible child with a free appropriate public education, it can request that OSSE provide those services as permitted by 20 U.S.C. § 1413(g). If OSSE provides such services, OSSE will use the payments that would otherwise have been available to the LEA charter to provide those services.**

Relatedly, OSSE revised the proposed § 3019.7 in such a way that may accommodate some of our concerns. The revised regulation requires when special education and related services are not immediately available through a LEA Charter, that the LEA must provide them “through an agreement with another LEA or through other appropriate means.” Proposed § 3019.7. The original proposal required LEA Charters to provide services “through an agreement with another LEA or through other appropriate resources.” By replacing the term “resources” with “means,” we understand OSSE to have adopted our recommendation that LEA Charters be permitted to request that OSSE provide such services as envisioned by 20 U.S.C. § 1413(g). The process of petitioning OSSE for assistance is an appropriate “means” available to LEA Charters under federal law, even if it was not a “resource” within their control. We urge OSSE to further clarify the regulation so that this understanding is apparent to all readers.

- We urge OSSE to clarify the meaning of the revised § 3019.7: *IEP Team Recommendation*. Pursuant to 34 C.F.R. § 300.323(c)(2), if an IEP team at an LEA Charter recommends special education and related services for an enrolled child with a disability that the LEA Charter does not immediately have available, the LEA Charter, as soon as possible following the development of the IEP, is responsible for making these services available in accordance with the child’s IEP, which may be arranged through an agreement with another LEA or through other appropriate means, **including means permitted by 20 U.S.C. § 1413(g).**

Finally, we urge OSSE to remove the requirement that a LEA charter “hold an open seat” for children placed at nonpublic schools. Proposed § 3019.9(a)(2). We understand and endorse the concept underlying this proposal – that all LEAs should help students return to less restrictive

⁴ This proposed approach is also in line with the National Alliance for Public Charter Schools model charter school law issued over the summer. See http://www.publiccharters.org/files/publications/ModelLaw_P7-wCVR.pdf page 20.

environments as soon as is appropriate. But to require LEA charters to hold an open seat is a not the best approach to achieving this goal.

All District students should have access to the full range of school choices, especially at those high-performing LEA charters that frequently have more students apply than they can accept. When a LEA charter student is placed in a nonpublic school, that charter should have the ability to open its doors to another student. Preventing that LEA charter from serving other students limits the school choices available to District children and families. Such a result runs counter to the thriving school choice climate that we have in the District.

The requirement that LEA charters “hold an open seat” also runs counter to the likely experience of children placed in nonpublic schools. Such placements occur when students have severe needs that require intensive services to address. Students will almost always attend nonpublic schools for at least one and frequently several years before returning to a less restrictive environment, and by that point, the child may be too old to even attend the LEA charter. Another student should have the opportunity to benefit from the “open seat” that the nonpublic school student leaves behind.

Proposed § 3019.9(a)(2) is also concerning because it creates incentives for LEA charters to push out or expel students with significant special education needs. LEA charters have incentives to fill as many seats as possible – both to fulfill their missions of educating as many students as possible and to receive as many per pupil allotments as possible. Under the proposed regulation, however, LEA charters are required to pay the significant cost of a nonpublic school tuition without being able to fill the seat a nonpublic placement leaves behind. In that situation, LEA charters will have a strong incentive to try to encourage parents to enroll the child in another LEA – the only mechanism under the proposed regulation that would permit the charter LEA to enroll a new student. Proposed § 3019.9(a)(2) (“unless and until the child’s parent enrolls the child in another LEA”).

We urge OSSE to revise § 3019.9(a)(2) to permit charter LEAs to fill all open seats. The simplest means of doing so is to simply cut § 3019.9(a)(2) from the regulation. If LEA charters then fill to capacity, they can use proposed § 3019.9(b) to permit a student attending a nonpublic school to return based on that student’s needs, regardless of any enrollment limits.

II. Proposed Chapter 30, Section 30: Resolution Meeting and Due Process Hearing Procedures

We thank OSSE for revising the Chapter 30, Section 30 regulations, especially § 3030.5 and § 3030.6. We offer several additional suggested revisions to further improve the regulations.

- a. The regulations should clarify when the absence of a resolution meeting can delay a due process hearing or justify a request for a hearing officer to dismiss a parent’s complaint.*

Most importantly, we urge OSSE to add language to ensure that LEAs seek to schedule resolution meetings as early as possible and at a time and place convenient to the parent – just as the existing regulations regarding IEP meetings require LEAs to schedule a meeting “at a mutually agreed upon time and place.” 5 D.C.M.R. § 3003.6(c)(1). Adding such language will address common problems that occur in our cases. In our experience, schools often call parents to inform

them of a resolution meeting on very short notice – often twenty-four hours or less. Schools also often fail to work with parents to identify the relevant IEP Team members who should attend, as required by § 3030.2 and 34 C.F.R. § 300.510(a)(4). Many resolution meetings fail to occur within the required 15-day timeframe due to inadequate notice or similar mistakes by local education agencies (LEAs).

We urge OSSE to follow the lead of other states, such as New York, in providing more explicit guidance to LEAs regarding scheduling resolution meetings. *See, e.g.* 8 N.Y. Comp. Codes R. & Regs. § 200.5(j)(2)(i). We urge OSSE to revise § 3030.1 to include the requirements of § 3003.6:

→ Change § 3030.1 to read: Resolution meeting. Within 15 days of receiving notice of the parent’s due process complaint, and prior to the initiation of a due process hearing, the local education agency (“LEA”) shall convene a resolution meeting with the parent and the relevant member(s) of the IEP Team who have specific knowledge of the facts identified in the due process complaint. **The LEA shall notify the parent early enough to ensure that he or she will have an opportunity to attend the meeting and shall schedule the resolution meeting at a mutually agreed upon time and place.**⁵ The resolution meeting need not occur if the parent and the LEA agree in writing to waive such a meeting, or agree to use the mediation process described in § 3028 of this Chapter. The resolution meeting:

We appreciate OSSE’s revisions of §§ 3030.5 and 3030.6. As both sections address similar issues, we encourage OSSE to use similar language. Specifically, the revisions added the following sentence to § 3030.5: “Any such request must include evidence of the LEA’s reasonable measures to convene a resolution meeting with the parent documented using the procedures in § 3026.4.” This language appropriately clarifies that if a LEA seeks to delay a due process hearing due to the parent’s failure to schedule a resolution meeting, the LEA must prove to a hearing officer that it made reasonable measures to convene a resolution meeting. Such language is equally appropriate in § 3030.6, which governs a LEA’s request for a hearing officer to dismiss a complaint due to a parent’s failure to participate in a resolution meeting. However, a similar sentence (“Any such request must include evidence of the LEA’s reasonable measures to obtain the participation of the parent in the resolution meeting”) was not added to § 3030.6. To avoid any misunderstandings based on the presence of this language in § 3030.5 but not in § 3030.6, we urge OSSE to revise § 3030.6 to include the indicated language.

b. The regulations should clarify that the dispute resolution process may continue beyond 30 days without delaying the due process hearing timeline.

The regulations should encourage parties to resolve disputes prior to a due process hearing. The proposed regulations, however, miss an opportunity to correct a problem caused by current LEA practice that provides perverse incentives to cut short the resolution process.

Under current practice, when 30 days pass and parties have not reached a resolution, the largest LEA, the District of Columbia Public School System (DCPS), will not permit the individuals associated with the resolution process to continue discussing a possible settlement with the parent.

⁵ This language tracks 5 D.C.M.R. § 3003.6(b)-(c).

This LEA instead directs any settlement negotiations through a single central office staff person, creating a process that is often both more adversarial than necessary and less efficient than possible. Proposed § 3030.8(c) would thus force parents to choose between maintaining their right to a prompt due process hearing and continuing efforts to resolve their due process complaint with school staff.

The forced choice induces some parents to forego the dispute resolution process and thus increase the litigiousness of these disputes. The forced choice also puts in conflict OSSE's dual goals of improving dispute resolution before due process hearings while enforcing a prompt timeline for due process hearings when a resolution is impossible.

A better approach is for parents to continue the resolution process with school staff without sacrificing their right to a prompt due process hearing. Like any looming trial date, a firm due process hearing timeline can provide a sense of urgency and efficiency to a dispute resolution process. That urgency is best felt by parties who are most familiar with each other and with the issues to continue negotiating.

We urge OSSE to add a provision clarifying that parents and school staff may continue the dispute resolution process without having to present a written agreement and without delaying the due process hearing timeline. We further urge OSSE to use its oversight authority to ensure that LEAs make school staff available to continue the resolution process beyond 30 days when appropriate.

We urge OSSE to make the following revision:

→ Change § 3030.8 (c) to read: Both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or ~~agency~~ **LEA** withdraws from the mediation process. **Both parties may, without a written agreement, continue the resolution or mediation process without delaying the start of the 45-day timeline for the due process hearing in § 3030.11.**

c. The proposed regulations should clarify that continuances may not be granted for inappropriate reasons.

The proposed regulations would include for the first time a provision regarding extensions of time for due process hearings “for good cause shown.” Proposed § 3030.12. This provision states the appropriate legal standard but does not include important guidance regarding the definition of “good cause” included in the Student Hearing Office’s Standard Operating Procedures (SOP). Those procedures ensure that continuances will not be granted due to the unavailability of a LEA witness or attorney.⁶

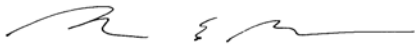
It is not clear why the proposed regulations include the “good cause” provision without including the SOP’s definition of “good cause.” We urge OSSE to either, include the definition of

⁶ District of Columbia Special Education Student Hearing Office, Standard Operating Procedures § 402(A)(2), at 23, http://osse.dc.gov/seo/frames.asp?doc=/seo/lib/seo/about/seo/pdf/Due_Process_Hearing_Standard_Operating_Procedures.pdf.

“good cause” included in the SOP or to delete proposed § 3030.12 entirely because it unnecessarily duplicates material in the SOP.

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

Cc: Beth Colleye
Virginia Crisman