



VIA EMAIL

July 17, 2009

Dr. Kerri Briggs
State Superintendent of Education
441 4th Street, NW, Suite 350 North
Washington, DC 20001
Attn: Tameria Lewis

Re: Comments on Proposed Chapter 30, Section 19 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 1,000 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 regulations regarding the special education obligations of charter schools are based on our experience in special education cases, especially those involving charter schools, both District charters and LEA charters.

We applaud OSSE for clarifying that special education laws apply to all schools and drafting regulations designed to ensure that children with disabilities enjoy the same school choices that all other District children have. We also appreciate the need to develop regulations that hold the District's various charter schools accountable for complying with special education laws while also permitting the flexibility and support necessary for charter schools to thrive.

We have two significant concerns with the proposed regulation. First and foremost, the provision granting OSSE authority to unilaterally "make a location assignment for the placement of [a] child." This proposed regulation violates federal and District law requiring the involvement of parents in placement decisions. Proposed § 3019.8(b)(2). The exclusion of the individuals who know the most about a student's unique needs from school placement decisions will lead to worse decisions for children and create unnecessary friction and litigation between parents and school officials.

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.



Second, we are 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.

We are concerned that the fiscal impact imposed by the proposed regulations will 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 Individuals with Disabilities Education Act, 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.² 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 proposed § 3019.8(b), students need OSSE to take responsibility for the educational placements and services that ensue.³

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

² http://osse.dc.gov/se0/frames.asp?doc=/seo/lib/se0/spcedsap/placement_review_policy_v1_0_final.pdf.

³ This proposed approach is also in line with the National Alliance for Public Charter Schools model charter school law issued last month. See http://www.publiccharters.org/files/publications/ModelLaw_P7-wCVR.pdf page 20.

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 of several revisions to the proposed regulations, described in our section-by-section comments below.

1) Proposed § 3019.3: Responsibilities of LEA charters regarding students with the most severe special needs

The proposed regulation states the default position: LEA charters bear responsibility for meeting a student’s special education needs and complying with special education legal requirements, such as evaluations and reevaluations, and placements in the least restrictive environment. We support the clear delineation of these responsibilities.

For reasons explained above, however, OSSE is far better suited to take responsibility for certain services for students with the greatest level of need. As permitted by federal law, we urge OSSE to revise the regulation to permit LEA charters to ask OSSE to take responsibility for services the LEA charter cannot provide. Consistent with federal law, OSSE would maintain oversight authority and the ability to determine if, in fact, the LEA charter cannot provide the required services.

- 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.**⁴

The proposed regulations also suggest that LEA charters bear the responsibility for state functions regarding due process complaints and mediation. Proposed § 3019.3(h) states that a “LEA Charter shall be responsible for providing the due process rights afforded children and their families under the IDEA and its implementing regulations.” The phrase “providing the due process rights” is vague. Due process rights include everything from notice of IEP meetings to access to the student hearing office. We assume that OSSE will remain responsible for the student hearing office and suggest that it revise the proposed regulation to clarify that continuing responsibility. In addition, LEA charters should only be required to respond to due process complaints when their actions – and not the actions of a prior LEA which may be the subject of a complaint for compensatory education – are the subject of the complaint.

- We urge OSSE to revised Proposed § 3019.3(h) to read: *Due Process Complaints*. An LEA Charter shall be responsible for providing the due process rights afforded children and their families under the IDEA and its implementing regulations and for

⁴ Bold indicates an addition and a strike through a deletion.

responding to any due process complaint made in respect of a child enrolled in the LEA Charter of which the LEA Charter has notice, including any child who attends a nonpublic school. **The Student Hearing Office, located within OSSE, will continue to adjudicate due process complaints.**

Mediation is inextricably bound up with due process hearing procedures. That is why the student hearing office Standard Operating Procedures include multiple references to mediation.⁵ Just as OSSE continues to oversee the student hearing office, OSSE should oversee mediation. OSSE's role ensures the independence and efficiency necessary for these operations. Indeed, federal regulations impose on the states the requirement to maintain a list of qualified independent mediators and to "bear the cost of the mediation process." 34 C.F.R. §§ 300.506(b)(3) & (4). Yet proposed § 3019.3(i) provides that LEA charters are responsible for offering mediation. Rather than require each LEA charter to build a mediation structure, the regulations should provide that OSSE will maintain a role in handling the due process elements of special education complaints, including mediation.

- We urge OSSE to revised Proposed § 3019.3(i) to read: *Mediation*. Pursuant to 34 C.F.R. § 300.506, an LEA Charter shall ensure that policies and procedures are established and implemented to resolve disputes through the mediation process. The mediation process shall be available to a parent of a child enrolled in the LEA Charter, including any child who attends a nonpublic school. **Pursuant to 34 C.F.R. § 300.506(b), OSSE shall maintain a list of qualified mediators and shall bear the cost of the mediation process.**

2) Proposed § 3019.5: Changes in enrollment and responsibility for costs incurred by other LEAs

The proposed regulation includes a problematic provision governing responsibility for compensatory education services when a child changes LEAs. The proposal adds a new provision requiring a receiving LEA to "implement any plan for compensatory education" from a student's IEP, hearing officer determination or settlement agreement. Proposed § 3019.5(d). This provision effectively makes a receiving LEA responsible for compensating a student for another LEA's failures. Compensatory education services are, by definition, designed "to compensate for a past deficient program." *D.W. v. District of Columbia*, 561 F.Supp.2d 56, 61 (D.D.C. 2008). LEAs should remain accountable for their deficient programs, even if a student later chooses to enroll in another LEA. We agree that it is better for the receiving LEA to administer a student's entire IEP, including any compensatory education. But the cost of compensatory services should remain with the LEA responsible for deficiencies leading to those services. The federal regulation noted in the proposed regulation contains no language that prevents this result. 34 C.F.R. § 300.323(e).

- We urge OSSE to revise Proposed § 3019.5(d) to read: Pursuant to 34 CFR 300.323(e), in the event a child with an IEP in effect transfers between an LEA

⁵ Student Hearing Office, Standard Operating Procedures, §§ 200, 700.4, 1002.1, http://osse.dc.gov/seo/frames.asp?doc=/seo/lib/seo/about/seo/pdf/Due_Process_Hearing_Standard_Operating_Procedures.pdf.

Charter, a District Charter or DCPS, the receiving LEA is responsible upon enrollment for ensuring that the child receives special education and related services according to the IEP, either by adopting the existing IEP or by developing a new IEP for the child in accordance with the requirements of IDEA. The receiving LEA must implement any plan for compensatory education put into place by the sending LEA, a Hearing Officer Determination or Settlement Agreement, unless and until the receiving LEA agrees in writing with the parent to waive or modify it, **however, the receiving LEA shall be entitled to reasonable compensation for provision of compensatory education obligations from the LEA whose deficiencies lead to the compensatory education obligations.**

3) Proposed § 3019.7: IEP Team recommendations for services that a LEA charter does not have available

The proposed regulation encourages LEA charters to work together to jointly develop capacity to provide special education services. Proposed §§ 3019.6 & .7 We support the proposed regulation's provision for such cooperative services as an important means of developing a full continuum of services available to all students in all LEAs.

We do not support, however, the proposed regulation's requirement that LEA charters bear the responsibility for providing *all* services. LEA charter schools do not currently have access to a full range of special education services through agreements with each other or any other means. In a best-case scenario, it will take a significant amount of time to develop those services, and some other means of service delivery in the meantime is essential. In a worst-case scenario, many necessary services will remain unprovided, children's right to FAPE will be violated, and LEA charters will have incentives to discriminate against students with disabilities. In both scenarios, OSSE has an essential role to fill: providing services that LEA charters are unable to.

Similar to our recommendation regarding proposed § 3019.3(c) and consistent with federal law, we urge OSSE to amend § 3019.7 to provide LEA charters the opportunity to seek OSSE assistance when services are unavailable.

- IEP Team Recommendation. If an IEP team at an LEA Charter recommends services for an enrolled child with a disability that the LEA Charter does not immediately have available, the LEA Charter is responsible for delivery of these services which may be arranged through an agreement with another LEA or through other appropriate resources to provide such services required by an IEP. **If a LEA Charter believes that it is unable to provide such services, 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.**

4) Proposed § 3019.8: Placement decisions must be made in compliance with federal and local law and cannot be made unilaterally by OSSE.

The proposed regulations rightly respect the role of the IEP team in making “a placement decision.” Proposed § 3019.8(b)(2). The proposed regulation, however, assigns to OSSE the task of making “a location assignment for the placement of the child” in violation of both federal and District law.

The IDEA provides that OSSE and all LEAs “shall 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). 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). District regulations require educational placement decisions to be “[m]ade by a group of persons, including the parents and other persons, knowledgeable about the child, the meaning of the evaluation data, and the placement options.” 5 D.C.M.R. § 5-3013.1(a). But the proposed regulation gives OSSE the sole authority to make an educational placement decision.

The proposed regulation terms the decision at issue “a location assignment,” a phrase that does not appear in the IDEA and is not defined in the DCMR (including the proposed regulation). Proposed § 3019.8(b)(2). Where the term “location” does appear in special education law, it refers to an aspect of the IEP which is to be discussed and decided by the IEP team, not something a SEA determines unilaterally. 20 U.S.C. § 1414(d)(1)(A)(i)(VII). OSSE should include parents in decisions about where the child will receive educational services.

OSSE unilaterally making the placement decision and excluding parents and other members of the IEP team from that decision harms the process in multiple ways. First and foremost, it prevents parents from sharing important information that can impact a placement decision. School placements are about more than matching a student’s IEP with a school’s programs on paper. Considerations ought to include all of a child’s unique needs, including, for example, particular teachers or clinicians who have good (or bad) relationships with the child, neighborhood rivalries or gang issues that may render a particular placement dangerous, and geographic location that facilitates (or hinders) parental involvement in the child’s education.

Second, it undermines the collaborative process that informs the entire IEP. When OSSE acts without the IEP team, unnecessary friction is created, which leads to unnecessary special education litigation in a system already beset by anomalous numbers of due process complaints.

Third, these problems add unnecessary delay. By the time an IEP meeting convenes and recommends a school placement change, the student has most likely been struggling for some time. In many of our cases, children are in crisis, and need a new placement as soon as possible. The proposed regulation forces children to wait another ten school days for a new placement – and longer if more conversation or litigation ensues from the failure to consult with parents about school placements. For children in crisis, that is ten days too long.

We urge OSSE to revise this regulation to respect the federal and District law and, as importantly, the crucial role parents play in placement decisions.

- We urge OSSE to revise § 3019.8(b)(2) to read: In the event that the IEP team for a child enrolled in the LEA Charter makes a placement decision that cannot be implemented within the LEA Charter, **and a parent or the LEA Charter has provided notice to OSSE that the LEA Charter is likely unable to provide the student with a free appropriate education at least one week prior to the IEP meeting**, the OSSE shall **attend the IEP meeting prepared to discuss all appropriate placement options.** ~~a location assignment for the placement of the child within 10 business days of the IEP Team's placement decision.~~

5) Spaces at LEA charters when students are placed in nonpublic schools

We are concerned by the proposed regulation's 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 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.

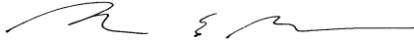
Proposed § 3019.9(a)(2) is also concerning because it creates incentives for LEA charters to push out or expel students with significant special education needs. LEA charters have incentives to fill as many seats as possible – both to fulfill their missions of educating as many students as possible and 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.

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

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