



August 20, 2009

Via Email

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

**Re: Comments on Proposed Policy Regarding Related Services**

Dear Ms. Brown,

I am submitting these comments on behalf of the Children's Law Center<sup>1</sup> (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 memorandum on Related Services ("Related Services Policy" or "policy") is based on our experience in those cases.

Overall, OSSE's policy provides helpful clarification and guidance to Local Education Agencies (LEAs) based on federal and District special education regulations. There are, however, a few areas that seem to inappropriately limit LEAs' obligations to provide necessary related services. Each area of concern is outlined below.

1) Procedures Regarding Missed Related Services

We applaud OSSE for requiring LEAs to "have a plan for ensuring that a substitute provider will be available or that the missed related service session will be rescheduled" when a related service provider is absent. Related Services Policy at 9. Missed related service sessions are a frequent and serious problem, causing many of our clients to lose the intended benefits of those services. We are pleased that OSSE is using its oversight authority to ensure that LEAs make up for missed sessions.

Linking missed services to the definition of a free appropriate public education (FAPE), however, is confusing and undermines the goal of requiring missed sessions to be rescheduled. The policy could be interpreted to mean that sessions only have to be rescheduled if an LEA unilaterally determines that the missed sessions amount to a denial of FAPE. Related Services Policy at 9. This section as written seems to confuse two related but distinct issues: whether a LEA must make up for a missed related service session and whether such missed sessions represent a denial of FAPE.

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<sup>1</sup> 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.



While the effect of missed sessions on FAPE will vary from case to case, the effect of missed sessions on LEAs' behavior should not. In all cases, a LEA is responsible for implementing an IEP. 5 D.C.M.R. § 3002.3(c)-(d). When a related service provider's absence leads to a missed session that the IEP requires, the LEA should ensure a make-up session at another time or with another provider to ensure that it provides related services "in accordance with the child's IEP." 5 D.C.M.R. § 3002.3(d). Further, this section as written can be read to suggest that the LEA and not the IEP team or a hearing officer can determine if there has been a denial of FAPE and could lead some LEAs to mistakenly think that they can make a unilateral decision that missed sessions do not amount to a FAPE violation and fail to reschedule sessions. To avoid this confusion, we recommend OSSE remove the references to FAPE from this section.

We also recommend that OSSE require LEAs to notify parents not only when a child repeatedly misses related service sessions, but also when sessions are missed due to a provider's absence and inform parents of the LEA's plan to provide a substitute provider or rescheduled session. This requirement will empower parents to resolve problems in the implementation of a related service plan early.

Lastly, we recommend that OSSE require LEAs to report to OSSE the number of related service sessions that are held as anticipated and the number that are missed. This requirement will help OSSE enforce LEAs' related services obligations more effectively by providing a mechanism to monitor each LEA's compliance.

## 2) "School health and school nurse services" definition

Federal and District law describe health services provided "by either a qualified school nurse or other qualified person." 34 C.F.R. § 300.34(c)(13); 5 D.C.M.R. § 3001.1. The policy adds the phrase "as defined by the LEA" at the end of this sentence – suggesting that LEAs have authority to define who is qualified to provide a necessary service. Related Services Policy at 5. We recommend that "as defined by the LEA" be removed so the policy comports with the federal and local regulation.

In addition, we have found that there is some confusion as to whether the administration of prescribed medication to address a medical condition is included in these services. We encourage OSSE to clarify that these services do include administration of prescribed medication. Stating this point explicitly should help ensure that this service is included in IEPs when appropriate.

## 3) Speech-Language services

The policy's discussion of speech-language services contains two points that, as drafted, are likely to confuse many readers. First, the policy states that a child does not need a diagnosis of a speech or language disorder to receive speech or language therapy as a related service. Related Services Policy at 6. This is accurate – but not limited to speech-language services. When related services "are required to assist a child with a disability to benefit from special education, a LEA must provide those services, *regardless of the child's disability classification or diagnosis.*" 34 C.F.R. § 300.34(a). By making this point only in reference to speech-language services, some readers may misunderstand the policy to mean that other related services may only be provided if they match a child's diagnosis

or classification. We recommend that this paragraph be deleted or clarified that it applies equally to all related services.

Second, the policy states, accurately, that children receiving speech-language services and no special education services still qualify as children with disabilities. Related Services Policy at 7. The policy omits other related services that can qualify one as a child with a disability. District regulations treat vocational education, travel training, and “instruction in physical education if the service consists of specially designed instruction” the same way the regulations treat speech-language services; special education is not required for a child in need of such services to qualify as a child with a disability. 5 D.C.M.R. § 3001.1. To avoid misunderstandings, we recommend that the policy note that these services, like speech-language services, establish a child’s eligibility under the IDEA.

#### 4) Eligibility for Related Services

We encourage OSSE to expand the proposed policy’s discussion of eligibility to address a common misunderstanding of special education and related services eligibility criteria. 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 inappropriately refuse to identify some children as children with disabilities under the IDEA.

The proposed policy correctly states that to qualify as a child with a disability, a child must have a specified disability and, because of that disability, need special education and related services. Related Services Policy at 7. In this section, it would be helpful to provide the definition of special education from the federal law and the D.C. Municipal Regulations – “the the adaptation of content, methodology, or delivery of instruction, as appropriate to meet the unique needs of a child with a disability in order to ensure access to the general curriculum.” 34 C.F.R. § 300.39(b)(3); 5 D.C.M.R. § 3001.1. Including this definition would help ensure a child is appropriately determined a child with a disability under the IDEA when special education and related services are necessary to help a child access the general curriculum, even without an academic deficit.

#### 5) Designation of Related Services

The policy’s guidance for an IEP team’s designation of related services will lead to avoidable disputes unless revised. First, the policy states that related services “must be based on current data” without defining what makes data “current” or what sort of “data” qualifies. Related Services Policy at 8. The policy should clarify that data, even if it is several years old, suffices to justify a related service if an IEP team determines that such service is necessary for the student to benefit from special education. For instance, the lack of a new evaluation before the three-year re-evaluation timeline has passed or a LEA’s failure to obtain a new evaluation when required to do so should not prevent the child from obtaining the related services required. It should also be made clear that data includes a full spectrum of evaluation tools ranging from formal evaluations, informal assessments, teacher and parent observations, and all other relevant sources of information. The policy should also address that when contradictory data exists – such as when an evaluation and a teacher reach different conclusions about the appropriateness of a related service – the IEP team has the legal

responsibility to determine whether the related service is necessary under the IDEA. 34 C.F.R. §§ 300.320(a)(4), 300.34(a). The IEP team may not simply rely on the more “current” information.

Second, the policy states that IEP team should “consult” with related service providers, implying that related service providers are not IEP team members. On the contrary, related service providers typically should be a part of the IEP team. Federal law provides that a related service provider with “knowledge or special expertise regarding the child” is part of an IEP team in “the discretion of the parent or the agency.” 34 C.F.R. § 300.321(a)(6). In addition, related service providers are often the only individuals who can interpret the “instructional implications of evaluation results,” especially the implications for related services. 34 C.F.R. § 300.321(a)(5). The LEA “must ensure” that related service providers are part of the IEP team in these situations. §300.321(a). We urge OSSE to revise the policy to reflect that related service providers are typically members of the IEP team, not merely one person to consult prior to an IEP meeting.


#### 6) Technical suggestions

Two technical corrections will improve the policy. First, we recommend OSSE revise the definition of “interpreting services” to conform to the federal regulation. The introductory phrase – “When used with respect to children who are deaf or hard of hearing interpreting services include:” – belongs after the “(a).” The policy mistakenly places that phrase before the “(a)” suggesting that it qualifies both part a and part b. Related Services Policy at 3. The federal regulation only qualifies the first portion of the definition, not part (b). 34 C.F.R. § 300.34(c)(4).

Second, we recommend OSSE revise the definition of “medical services.” “Medical services” are diagnostic services or other evaluations performed by a physician to determine if a child has a medical disability that qualifies him/her for special education services. 34 C.F.R. § 300.34(c)(5). The policy, however, suggests that a LEA’s review of medical records is the medical services themselves. Related Services Policy at 3. OSSE should change the phrase “This service is for the LEA to review diagnostic or evaluation . . .” to “This service includes diagnostic or evaluation . . .”

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](mailto:sgreer@childrenslawcenter.org).

Respectfully,



Sharra E. Greer  
Director of Policy