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VIA EMAIL: osse.publiccomment@dc.gov

July 26, 2017

Elisabeth Morse
Deputy Assistant Superintendent of Elementary, Secondary, and Specialized Education
Office of the State Superintendent of Education
810 First Street, NE
Washington, DC 20002

**Re: Comments on the Advanced Notice of Proposed Rulemaking for new Special Education Regulations in Chapter 30 of Title 5A of the DC Municipal Regulations**

Dear Ms. Morse:

Thank you for the opportunity to comment on the Advanced Notice of Proposed Rulemaking for a new Chapter 30 (Special Education) of Subtitle A of Title 5 of the District of Columbia Municipal Regulations (DCMR). I am submitting these comments on behalf of Children's Law Center (CLC),[1] which represents more than 2,000 low-income children and families in the District of Columbia every year. Many of the children we work with are eligible for special education. Our comments are based on our experience representing these children and their families. We also represent children in DC's foster care system and have particular knowledge of the complexities of serving their needs in special education.

We appreciate the challenge presented in crafting regulations about special education for DC's complex public education system, which has over 60 Local Education Agencies (LEAs) and a unique financial structure for some special education placements. We know this has been a years-long work project for many people, and we thank you for starting this rulemaking process with this Advanced Notice of Proposed Rulemaking (ANPR) to allow earlier public comment. We thank OSSE for adding requirements that parents receive copies of important documents within 5 days after a meeting, like the final comprehensive evaluation report and documentation of eligibility, and for keeping the requirement that parents can copy all the educational records for free, given that so many DC families of children with disabilities are low income. We also believe that adding that the relevant school staff and related service providers should have access to the IEP within 5 days of the IEP meeting is a positive addition.[2]

Our comments provide suggestions in many areas of the proposed regulations, to strengthen the education and protections provided to children with disabilities, ensure meaningful participation of parents in their child's education as envisioned by the IDEA, and align regulations with existing law. We do have significant concerns in a number of areas and recommendations for best practice changes in others. We have tried to be comprehensive and suggest language to address concerns now, but we would be happy to work together over the coming months on wording for any and all sections.

**Placement**

Children's Law Center has significant concern about several provisions in the proposed regulations regarding placement of students with disabilities. All decisions about placement should be guided by the totality of the child's unique, individual needs and the full complement of setting, services, supports, accommodations, staffing, facilities, access to nondisabled peers in classes or transitional time, classroom size, "fit" with needs of peers, and other environmental factors that the particular child needs.[3] The proposed regulations at subsection 3023.1(a) state that the placement should be based on the child's "level" of needs as documented in the IEP, but placement should be based on more -- the unique and individualized set of needs for that particular student. One challenge that IEP teams currently face is that the IEP system does not give them a place to easily record all the necessary aspects of the child's needs in the IEP, so just stating that placement should be based on the IEP is not helpful without providing a clear place for teams to record all the important aspects of a program for the unique child, in the IEP system.[4]

In addition, some provisions of federal law indicating that placement can implicate the school or classroom where the student will be taught were omitted from the proposed rules about deciding placement. Specifically, the team deciding placement, including the parent, must consider age-appropriate classrooms and distance from the child's home, under 34 CFR § 300.116. Those placement factors need to be in DC regulations.

Our suggested regulation is:[5]

3023.1 The LEA shall ensure that the determination of the appropriate educational placement for a child with a disability is:

(a) based on the **totality of the** child's **unique needs** ~~level of need~~, **including those** ~~as~~ documented in the child's IEP.

…

**(d) as close as possible to the child's home.**[6]

3023.4 A child with a disability shall be educated in the school that the child would attend if the child did not have a disability unless the **child's**

**unique needs or nature or** severity of the child's disability warrants a more restrictive placement.

**3023.5 A child with a disability is not removed from age-appropriate general education classrooms solely because of modifications needed in the general education curriculum.**[7]

**Placement Outside of the LEA**

Children's Law Center appreciates that in DC's unique landscape, including many small LEAs and our local statutes that require OSSE to pay for nonpublic special education placements, OSSE has a role in placement outside of the LEA. However, the specifics of that role are best left to policy rather than formal rulemaking, so we suggest that OSSE leave details, other than the role described in DC Code, out of regulations. The rulemaking process is very lengthy, years long, for OSSE. OSSE needs to be more nimble with needed changes to the process for nonpublic placements, as needs within OSSE and the community evolve.

In addition, we are concerned that the process as proposed in this ANPR goes beyond OSSE's general supervision responsibilities as envisioned in federal regulations and practiced in other states. SEA participation in meetings without the parent in preparation for IEP team decisions about placement is not contemplated by the law.[8] Child-level contemporaneous participation by SEAs in IEP placement meetings is also questionable.

We are most concerned that OSSE's procedures to involve itself in child-level contemporaneous IEP decisions impermissibly delay FAPE for students that the IEP team already believes need a different placement.[9] Given those concerns, we recommend that OSSE remove the specific provisions about the SEA review process from the future rulemakings.

As part of removing specific procedures from future proposed regulations, we urge OSSE to remove the proposed definitions of "placement" and "location assignment." Most states and the U.S. Department of Education have declined to put a definition of placement into statute or regulation because it is such a complex determination based on unique needs of each child that it is hard to accurately define the concept. See discussion above. As written, the definition of "placement" is not comprehensive of current law, which recognizes that classrooms or schools at the same categorical point on the continuum (with the same number of hours outside general education) can vary greatly in a variety of ways that are important for a child's FAPE. As written, the proposed definition blatantly favors oversimplified LEA arguments about what placement means.

We suggest that the section about the process for LEAs to work with OSSE for placement outside of the LEA be limited to what is included in DC Code, deleting proposed subsections 3026.1 through 3026.8 and replacing with:

> **3026.1 If an LEA anticipates that it may be unable to provide a child with a disability with an appropriate special education placement in accordance with the IDEA and other applicable laws or regulations, the LEA shall notify the SEA in writing.**
>
> **3026.2 OSSE shall cooperate with the LEA to provide a placement in a more restrictive setting in conformity with the IDEA, and any other applicable laws or regulations.**[10]

In addition, several sections of DC Code use the phrase "special education placements" where OSSE proposes to use the phrase "location assignment" or "location of services," which must be changed, since DC Code has supremacy over OSSE regulations and policies.

> 3026.10 Decisions regarding a child's ~~location of services~~ **placement outside the LEA** shall give preference to appropriate special education schools or providers located in the District of Columbia; provided that the placement is appropriate for the child and made in accordance with the IDEA and this Chapter**. Special education placements** ~~location assignments~~ shall be made in the following order of priority[11]: …
>
> 3026.12 The LEA shall submit to the SEA a request for a change ~~in location assignment~~ from ~~a~~ **one** nonpublic special education school or program to another nonpublic special education school or program. The SEA shall issue a ~~location assignment~~ **notice of school** in accordance with state-established procedures. [12]

If OSSE chooses to keep more of the procedures for nonpublic placements in future proposed regulations, OSSE needs to make significant changes to protect the right of the student to timely appropriate education and the rights of parents to be included. Accurately defining placement should be priority, if OSSE includes the nonpublic placement process in regulation. The definition, as proposed, is not supported by all the cases about placement and is not supported by DC Code's usage of placement.[13] Judges have found that, given the unique needs of particular students, placement can include the particular school that a student is attending and often look to factors about the environment that are not captured in categorical descriptions of points on the continuum. We recommend the following definition:

> "Placement" refers to **that unique combination of facilities, personnel, peer composition, class size and ratios, course offering, location, equipment or any other factors material to the child's educational progress, necessary to provide instructional services to a child with a disability, including those specified in the IEP, in any one or a combination of public, private, home and hospital, or residential settings.**[14]

OSSE should also delete the definition of "location assignment" and instead use "service location" and its definition in DC Code § 38-2571.01. Using a different phrase than DC Code for the same concept is confusing and unnecessary.

We would be happy to work with OSSE on specific wordings during the next few months, but we are able to describe what procedures we believe should be in regulations, or in the next iteration of OSSE's policies. OSSE should make significant changes because the proposed regulations would create an unacceptable minimum 45-business-day delay on provision of the child's needed FAPE. That is 63 calendar days - nine weeks - an entire quarter of a 180-day school year. As stated by the Court in *Blackman v. District of Columbia*, 277 F. Supp. 2d 71 (D.D.C. 2003), every day that a child does not have a FAPE is a violation and harms the child. OSSE should not be signaling to LEAs that delaying provision of FAPE for an entire quarter of a school year is acceptable, especially given the crisis DC has with discriminatory discipline practices and with abysmally low achievement (academic, graduation, and post-graduation) for children with disabilities.[15] OSSE should be setting an example that services need to be provided as soon as possible, so that children do not continue to lose ground. In our experience, by the time LEAs get to the point of being willing to notify OSSE that a change in placement is needed, the LEA and parent have tried many strategies and the child is in crisis at school, whether academic, behavioral, or functional.

To rectify the proposed long delay of FAPE, OSSE should focus its process on cooperating to provide an appropriate placement for the child.[16] First, OSSE should mandate a quick deadline for the LEA to submit a short notification to OSSE that the child might need a placement outside the LEA. The current procedures that require the school to send extensive documents at the initial notification often result in long delays of notice to OSSE, which needs to be rectified. Because OSSE and the LEA have access to all the child-level data in SEDS, OSSE should not need the LEA to submit extensive information as the initial notification. We agree that OSSE does need to know some information to facilitate a cooperative relationship with the IEP team and help with an appropriate match of school for a student when the IEP team does not know the landscape of placement options, so OSSE should gather additional documents during the process.[17]

OSSE should also, as now, submit applications to schools that may be a match as part of the cooperative process. However, regulations should specify the protections for parents that OSSE currently practices. Parents must be notified and consent to release of educational information and records before packets are submitted, consistent with IDEA and FERPA. Parents must also have the right to notice and visit proposed placements or service locations, consistent with DC Code.

Most importantly, the IEP team should have control of the timing of IEP and placement meetings for the child, because this is a decision about the child's FAPE. OSSE is not a member of the IEP team, so IEP teams should not be required to wait for OSSE to ensure that a child's IEP and placement provide FAPE. Once the IEP team has made a decision that the child needs a nonpublic placement and the specifics about placement that need to be in the IEP, OSSE should issue a notice about the appropriate nonpublic school match within 10 days, as is the practice now. Because this is about the FAPE for the child, the LEA and the parent must consent to extensions of time. Once OSSE has issued notice of a school match, the LEA should have a quick deadline to provide the parent with the formal prior written notice in SEDS and to set up transportation.

**Nonpublic Placement Selection**

We are also concerned that proposed section 3026.8, which includes restrictions on placing children in nonpublic programs that are ten, eleven, or twelve months by design will exclude most, if not all, of the current schools on the Certificate of Approval list for students with some types of disability needs. In addition, with the advent of longer school years in many Public Charter Schools and DCPS schools for children in general education, this restriction on a longer school year for students with disabilities seems inappropriate. We are not sure what problem OSSE is attempting to solve such that this severe restriction belongs in regulations.

Proposed subsection 3026.16 about Psychiatric Residential Treatment Facilities (PRTF), as written, impedes parents' rights to freely consent regarding the child's medical needs or not to. The LEA may ask a parent to go through the Department of Behavioral Health (DBH) or Department of Health Care Finance (DHCF), but no parent should have to go through those processes, if they do not want to, for their child to receive the PRTF that is FAPE. In our experience, those processes can also delay FAPE for the child. IDEA, FERPA, and health care information protection laws give the parent the right to decline DBH and DHCF processes, so we suggest:

> 3026.16 If a child's placement is made at a residential treatment facility, the LEA **may ask for** ~~shall obtain~~ parental consent authorizing the LEA to contact **the following agencies**, **but in no case may this request delay**

**provision of the placement nor may parent's decision not to consent deny or delay placement**:

(a) The District of Columbia Department of Behavioral Health (DBH) to determine whether the child qualifies for a certification that admission to a PRTF is medically necessary; ~~and~~ **or**

(b) DHCF to determine whether the child is eligible or entitled to receive Medicaid benefits.

**LEA Transition for Nonpublic Students**

We truly appreciate how OSSE has included a provision that will help parents of children in nonpublic placements better understand what to do when the child is aging out of the LEA that placed the child. However, the regulations should ensure that the notice to the parent is early enough that the child will be able to participate in the common lottery process. Subsection 3026.19(c) should be adjusted so that notice will be provided by January (before the high school lottery deadline). We also suggest that the notice should include information about the lottery and about the Parent Training and Information Center, Ombudsman for Public Education, and Student Advocate.

**LEA Responsibility for FAPE for Highly Mobile Children in Foster Care and Juvenile Delinquency Placements**

Over the last year, OSSE has demonstrated its commitment to the education of highly mobile children in the foster care system, taking the lead with the changes regarding school stability transportation from the Every Student Succeeds Act. OSSE adds additional clarity by using the phrase "custody of the District of Columbia Child and Family Services Agency" rather than "ward of the State" when specifying LEAs' duties for Child Find, offers, and provision of FAPE. OSSE should also demonstrate commitment to the highly mobile students in the care of the Department of Youth Rehabilitation Services (DYRS), those placed through the PINS calendar in DC Superior Court by Court Social Services.

OSSE should align the language around student residency with the recently finalized rules in Title 5-A of Chapter 50, which uses the phrases "residency" and "resident student," for clarity and consistency.[18] This will help against confusion about students in psychiatric residential treatment or group homes out of state (whether placed via IDEA, Medicaid, insurance, DYRS, or Court Social Services). Although current law is clear that they remain the responsibility of the DC LEA, since the child never intends to stay in the other state and is thus not a resident of that other state, schools do not understand and Ward letters are required in many situations. Highly mobile children often have trouble gathering all the documents that DC LEAs require for full enrollment/registration. That is why we strongly

recommend including clear language that children placed via DYRS or Court Social Services are highly mobile students in the LEA, even if they are not enrolled.

3002.1 The LEA shall make available a free appropriate public education (FAPE), in the form of special education and related services, to each child with a disability, between three (3) and twenty-two (22) years of age, who ~~resides in~~ **is a resident of** the District of Columbia or is in the custody of the District of Columbia Child and Family Services Agency **or committed to the Department of Youth Rehabilitation Services (DYRS)**.

3002.2 The LEA's responsibility to make FAPE available extends to any child with a disability who ~~resides in~~ **is a resident of** the District of Columbia or is in the custody of the District of Columbia Child and Family Services Agency, including children who are suspended or expelled by the LEA, and highly mobile children ~~enrolled~~ in the LEA such as migrant or homeless children, **children committed to DYRS or Court Social Services**, even if the child is advancing from grade to grade.

**Enrollment and Responsibility for FAPE**

Given DC's complex public education system, we agree that OSSE needs to clarify when the obligation to provide FAPE begins for a new LEA when a parent exercises school choice to a public charter school whether that move is during or between school years. In multiple sections of the proposed regulations, students transferring during the school year become the responsibility of the new LEA on the date of the completion of the child's registration in the enrollment process (defined in section 3099). OSSE's proposal is problematic for two reasons. One is that DCPS, as the geographic LEA "of right" for all DC residents, has the obligation to provide FAPE, whether or not the child is enrolled in any school or no school (prekindergarten students in particular). In the past, DCPS has argued that the student needed to complete the entire registration/enrollment process, which involves a particular school enrollment. Courts found multiple times that DCPS caused a denial of FAPE, and the only thing the parent needs to prove is that the child is a resident of DC before DCPS must evaluate, create an IEP, and provide a placement.[19] To avoid future litigation on this same topic and avoid leaving any students without a clearly responsible LEA, OSSE should clarify that for DCPS, the child needs only to be a DC resident to have FAPE offered and provided.

The other problem is that enrollment provisions, as written, encourage schools to delay fully registering children with disabilities and are ripe for abuse. OSSE's proposed

definition of "enrollment" in section 3099 references a "parent signature on a 'letter of enrollment agreement form'"[20] Signing and submitting the MySchool DC Enrollment form is confirming enrollment and giving up a seat in the other school, so the date that form is signed should be the date that the new LEA should start to offer and provide FAPE, rather than some undefined future date when the school enters the child in its information system. Some schools are conditioning full enrollment/registration on receiving many pieces of information, including the child's IEP from the parent, which can allow the school to discriminate against students with disabilities. In our experience, schools have delayed full registration and counselled children out in that undefined time period between the parent submitting a one-page enrollment form and the school feeling that all paperwork had been provided in order to put them in the system. Given that there are no deadlines for schools to register a student in their own information systems and the enrollment/registration process is ripe for such discrimination, the parent's signature on the MySchoolDC form accepting a seat should be the date the new LEA begins responsibility during a school year.

For transfers between school years, the proposed regulation setting July 1 as the start date to provide FAPE is not realistic for students or schools, however we agree that schools should start to plan on July 1. Reality, in our experience, for students transferring between schools during the summer (or as a result of the lottery process in the spring of the prior school year) is that the earliest the new LEA can provide FAPE is the first day of that LEA's new school year. It does not make sense for LEAs to begin to have responsibility to provide services on July 1 during Extended School Year (ESY). ESY continues services and goals from the last school year. LEAs cannot plan for some unknown number students for ESY who transfer in for the next school year. LEAs that do not serve the grade last attended, such as for students moving from 5th to 6th grade or 8th to 9th grade, cannot appropriately provide ESY ensuring access to the general curriculum from the last grade. They cannot submit for transportation for ESY in time for a July 1 start. For all these reasons, the new LEA should have to provide services, and thus a FAPE, starting on the first day of that LEA's school year. To facilitate that FAPE will actually start on the first day of school, OSSE should put in regulations that the new LEA has to begin requesting records, do all steps to access SEDS for the student, get transportation set up at least 14 business days before the LEA's start, and otherwise plan for the student, starting on July 1 (or as soon as possible for a student who submits enrollment paperwork later than July 1). In addition to our suggestions for changes below, we suggest deleting proposed subsection 3016.5 in its entirety.

3002.4 The LEA's obligation to provide FAPE to a child with a disability commences a**s follows** ~~upon completion of the child's registration in the enrollment process as defined in 5-A DCMR §2199~~:

(a) For children enrolling in a new LEA **during the annual lottery process or** after the end of a school year but prior to the first

day of the following school year, the obligation to **plan for the student's FAPE** begins on July 1 **and the responsibility to provide FAPE begins on the first day of the LEA's school year for the school**. **The responsibility to plan for the child's FAPE includes, but is not limited to, requesting records, taking all steps to have access to SEDS, planning to provide needed services, and arranging transportation at least 14 business days in advance.**

(b) **For children transferring during the school year from an out of District of Columbia school into the District of Columbia,** the obligation to provide FAPE begins upon **submission of the parent signature on an enrollment agreement or enrollment form**, e**xcept for DCPS as the LEA for all DC resident children or children in the custody of CFSA or highly mobile children including children committed to DYRS; DCPS has obligations under this Chapter regardless of enrollment.**

(c) **For highly mobile students transferring schools during the school year, such as children in the custody of CFSA or committed to DYRS, the LEA's responsibility to plan for FAPE for the student begins as soon as the LEA becomes aware from the public agency or parent that the student will likely be soon attending a school in the LEA.**

(d) If a child is registered in the Student Information System (SIS) of more than one LEA, the most recent date of documented parental consent for enrollment shall determine the LEA that is responsible for providing FAPE to the child.

We suggest the following related changes, as well:

3004.1 Each LEA shall implement policies and procedures to ensure that all children with disabilities between three (3) and twenty-two (22) years of age enrolled in the LEA **(except as specified below for DCPS)**, including children with disabilities who are homeless, children who are in the custody of the District of Columbia Child and Family Services Agency, children who are making progress grade to grade, and highly mobile children, who are in need of special education and related services, are identified, located, and evaluated, and a practical method is developed and implemented to determine which children are currently receiving needed special education and related services. This obligation is also known as the "child find" obligation.

**(a)** **DCPS's policies and procedures for child find shall encompass not only children enrolled in the LEA, but all children who are residents of DC including children age 3 to 22, including children in the custody of CFSA, committed to DYRS, or placed by Court Social Services, unless DCPS has proof that the child is enrolled in another DC LEA.**

**(b)** DCPS's policies and procedures for child find shall also encompass homeschooled and resident and nonresident parentally-placed private school child over three (3) years of age attending religious and other private elementary and secondary schools and **prekindergarten programs or community-based organization prekindergarten** located in the District.

3021.1 The LEA shall ensure that there is an IEP in effect **for each child in its jurisdiction**~~each enrolled child~~ who has been determined eligible for special education and related services throughout the calendar year, including the summer months.[21]

3050.2 A request to initiate a due process hearing shall be made in writing and include:

(a) The name of the child;
(b) The address of the residence of the child;
(c) The name of the parent initiating the hearing;
(d) The address of the parent initiating the hearing;
(e) The name of the LEA **against which the complaint is being filed or** in which the child is enrolled; …

The definition in section 3099 also needs corresponding clarifying changes:

"Enrollment" means a process through which a child obtains admission to an LEA that includes~~, at a minimum, all of~~ the following stages:

…

(f) **The** LEA's obligation to determine eligibility for special education services**, develop an IEP,** or to provide special education services ~~on an existing IEP~~ is triggered upon **submission of the parent signature on an enrollment agreement or enrollment form**~~completion of registration~~.**except for DCPS as the LEA for all DC resident children or children in the custody of CFSA or highly mobile children including children committed to**

**DYRS, which has obligations under this Chapter regardless of enrollment.**

**Procedures when a Charter School Closes**

We have proposed modest changes to the section of the proposed regulations which addresses the closure of a public charter school LEA. The proposed subsection 3002.5 lacked deadlines for some of the requirements, which would be important for these provisions to happen in a timely fashion for children. Additionally, the closure of a public charter school, particularly as a result of official action taken by the chartering authority, may signal an increased likelihood that children with disabilities who attended that public charter school were denied FAPE. A child should not be denied the opportunity to obtain compensation for the FAPE denial within the two year statute of limitations period because of the LEA's closure.

3002.5 If a public charter school LEA closes or ceases to operate, in full or in part, for any reason, including without limitation voluntary relinquishment or revocation of its charter by the chartering authority, the public charter school LEA shall adhere to charter closure procedures established by the SEA and chartering authority, as follows:

(a) Within fourteen (14) **calendar** days of the official action taken by the chartering authority or voluntary relinquishment of the charter, the LEA shall**, in writing,** notify the parents of all enrolled children with disabilities, including children with disabilities placed at a nonpublic special education school or program, of the responsibility to enroll the child with a disability in another LEA;

(b) The LEA shall ensure all student records are updated in the state-level special education data system, including updating any IEP that has expired or will expire within thirty (30) days of the closure of the public charter school or campus. **No substantive changes shall be made to an IEP without a meeting of that child's IEP team.**;

(c) The LEA shall provide to the parent a copy of the child's IEP and other relevant documentation of the receipt of special education services **within twenty-one (21) calendar days of the official action taken by the chartering authority or voluntary relinquishment;** and

(d) The LEA shall address or resolve all outstanding child-level findings of noncompliance **within thirty (30) calendar days of the official action taken by the chartering authority**.

(e) **A child and parent shall not be denied the opportunity for due process for a dispute about any right under the IDEA within the statute of limitations period, because of the LEA's closure.**

**Child Find and Referrals for Evaluation**

Children with disabilities need to be identified and receive services as quickly as possible. Thus, we have concerns about some of the proposed changes in this ANPR surrounding referrals and requests for evaluation. Creating a two-tier system of potential referral sources, one that triggers the evaluation process and the other that does not, will likely result in more confusion and missed identifications.[22] In our experience, too often schools are on notice that a child may have a disability, from things like doctor's letters, social worker contacts, or from the youth, but do nothing to move the evaluation process forward. In our experience in a medical-legal partnership, no doctor is contacting a school with a referral for special education or evaluation to ask the school to "determine if the child is suspected of being a child with a disability." Instead, they are contacting the school to request that an evaluation be started for the child. In addition, the Court in *D.L. v. District of Columbia* agreed that a functioning child find system in DC needs to trigger the evaluation process when the LEA hears from any referral source.[23] We recommend that all potential referral source contacts listed in subsections 3005.1 and 3005.2 be considered requests for initial evaluation, and thus subsections 3005.2 and 3005.4 need to be deleted. We appreciate the addition at subsection 3005.3 that screenings or pre-referral interventions should not delay evaluation.

We also suggest a related change in the child find section:

3004.4 A child find referral may be made by any source with knowledge of the child that suspects a child may be eligible for special education and related services, for the LEA or public agency to ~~determine whether the child should be evaluated to determine eligibility for special education and related services~~ **begin the initial evaluation process**.

In addition, the law surrounding Child Find is clear that a referral is not necessary to trigger a needed evaluation process.[24] We recommend adding an additional subsection under section 3005, to be clear for LEAs:

**3005.X A referral or request for evaluation is not a required step for the LEA's child find and initial evaluation responsibilities to be triggered, if the LEA has information that should cause the LEA to suspect that the child has a disability.**

**Parent Consent and the Initial Evaluation Process**

As OSSE is aware, the *Enhanced Special Education Services Act of 2014* intended to ensure that students in DC get faster special education evaluations, and thus earlier services, by providing that evaluations be completed within 60 days of consent. Several provisions in the proposed regulations provide opportunities for the LEA to lengthen the amount of time before the 60-day deadline is triggered by consent. In particular, a new proposed provision references a consent form, when a form is not required under the law,[25] and adds elements not required for consent under federal law. A parent's request for an evaluation for special education, when provided in writing, can constitute consent for initial evaluation. Many parents are able to include in a written request details that prove that they are consenting and informed.[26] In addition, the general definition of "reasonable efforts"[27] does not ensure that LEAs will seek consent (if needed) quickly, because it does not provide a short but reasonable deadline to start seeking consent after referral. Here are our suggestions to ensure that parent consent is recognized timely:

3005.5 The LEA shall notify the parent of receipt of any referral received under §3005.~~3~~**1 or provide a copy, without cost to the parent, of the documentation of an oral referral, within five business** days.

(a) This notification shall include information regarding:

(1) The initial evaluation process;

(2) Parental consent requirements; and

(3) Resources the parent may contact for assistance.

**(b) This notification shall also include a consent to evaluate that the parent can sign and return.**

3006.3 ~~After providing prior written notice,~~ the LEA shall ~~obtain~~ **ensure that it has** consent, **as defined in 3099**, from the parent of the child before proceeding with the initial evaluation. ~~The consent form shall contain:~~

~~(a) information about the purpose of the evaluation process;~~
~~(b) the types of child-level data being assessed; and~~
~~(c) any additional assessments needed.~~

3006.4 The LEA shall make ~~and document~~ reasonable efforts, as defined in this Chapter, to obtain parental consent within thirty (30) days from the date on which the child is referred for an evaluation. **Reasonable efforts for purposes of obtaining parental consent for evaluation must begin within five (5) business days of referral or of suspicion that the child may have a disability, and must be documented.**

**Expedited evaluation and eligibility determinations for students who are under the care of CFSA or DYRS**

When students are involved with CFSA or DYRS, they often have an urgent need for special education services. It is not unusual for a student in DYRS or CFSA custody to be years behind grade level. These students are at very high risk of disengagement and dropout. To address these students' needs, we suggest, as did the U.S. Department of Education, that OSSE create an expedited evaluation and eligibility determination timeline for them.[28] We suggest that their evaluation process should be completed within 30 days, to align with federal guidance. This should not be unduly burdensome because both CFSA and DYRS routinely assess the children who come into their care.[29] These assessments can provide existing data that simplifies the special education evaluation process for the school. The expedited evaluation for students in custody of CFSA or involved with DYRS should be added in section 3006.

**Evaluation Reports**

The regulations need to be clear that parents have a right, under the *Special Education Student Rights Act of 2014*, to advance copies of assessment reports, data charts, and other items that will be discussed in an eligibility meeting.[30] In the proposed draft, provisions in section 3007 contradict the rights conferred in DC Code, so they must be corrected. In addition, this proposal removes some helpful specifics about assessment reports that are in current regulations at 5 DCMR E § 3006.2. We recommend they be put back in before proposed subsection 3007.10:

**3007.x No fewer than 5 business days before a scheduled meeting where eligibility for special education services will be discussed, the LEA shall provide parents with an accessible**

**copy of any evaluation, assessment, report, data chart, or other document that will be discussed at the meeting; provided, that if a meeting is scheduled fewer than 5 business days before it is to occur, then these documents shall be provided no fewer than 24 hours before the meeting.**[31]

**3007.xx Each assessment report shall include the following:**

**(a)** **the date of assessment and the date of the report;**

**(b)** **a description of the child's performance in each area assessed, including specific strengths and weaknesses;**

**(c)** **information relevant to the child's disability, educational needs, and additions or modifications needed to enable the child to meet the child's IEP goals;**

**(d)** **instructional implications for the child's participation in the general curriculum;**

**(e)** **if an assessment is not conducted under standard conditions, a description of the extent to which it varied from standard conditions (e.g., the qualifications of the person administering the test, or the method of test administration); and**

**(f)** **the signature and title of the qualified examiner(s) who administered the assessment procedure and who wrote the report.**

**Re-evaluations**

In our experience, too many children in DC do not receive appropriate re-evaluations every three years. We have encountered children who have not had formal assessments performed in as long as a decade. Children grow and develop every year, so such a long time between assessments means that LEAs are missing current needs. The regulations need to make clear that re-evaluations should include assessments, so that the child's current educational performance and needs are fully known. We recommend replacing proposed subsection 3007.5 in its entirety:[32]

**3007.5 A re-evaluation to determine whether the child is a child with a disability, determine the present levels of performance or educational needs of the child, or determine additions or modifications to enable the child to meet the IEP goal or make progress in the general curriculum should include assessments,**

**unless the child has had assessments in all areas of suspected need within the last year.**

In addition, the LEA needs a deadline to complete the re-evaluation, when requested by a parent or teacher or when warranted. We suggest a 60-day deadline, as with initial evaluations.

3008.1 The LEA shall conduct a re-evaluation of each child with a disability in accordance with the requirements of this Chapter at least once every three (3) years, or if:

(a) ~~The LEA determines that~~[33] the child's educational or related service needs, including improved academic achievement and functional performance, warrant an evaluation; or

(b) The child's parent or teacher requests an evaluation.

**(c) Reevaluation under (a) or (b) must be completed within 60 days.**

**Criteria for Eligibility/Category of Disability**

We appreciate that these proposed regulations remove several problematic criteria in several disability categories that exist in the current operative OSSE policy, and we hope to see that policy rescinded soon. Specifically, we are grateful that OSSE seeks to remove the restrictive response-to-intervention requirement that is not in federal law from the criteria for Emotional Disability,[34] since States may not narrow the definitions in the IDEA.[35]

OSSE's definition of Multiple Disabilities is also improved. Removing the overly restrictive List A, B, and C structure that illegally made it impossible for DC students to be eligible as Multiply Disabled if they had, for example, both a Specific Learning Disability and Emotional Disability, is appreciated. However, the proposed regulation at subsection 3012.8(a)(2) adds additional criteria that impermissibly narrow the federal definition of Multiple Disabilities. Subsection 3012.8(a)(2) should be removed in its entirety. Developmental Delay was also omitted from the list of eligibility categories that can be part of Multiple Disabilities, and should be added as subsection 3012.8(a)(1)(xi).

In the proposed criteria for Emotional Disability, we have concern about specifying six months as what "a long period of time" means. Six months is an extremely long time in the life of any child and is two-thirds of a standard school year.

In addition, if the emotional concern is very extreme (such as severe depression, schizophrenia, or severe PTSD), a much shorter period of time is a long period of time. Given that children develop quickly and school curriculums move quickly, OSSE should use the unspecific but flexible federal language.

Developmental Delay is an extremely important category, so that children with disabilities are identified and receive services while they are young. DC should take the option under federal law that children can be eligible in this category until age 9.[36] For young children, it is sometimes not possible to identify the exact cause of their delay. Forcing them into narrow categories at a young age may cause them to be misdiagnosed. Secondly, as per the Order in *DL v. DC*, the regulations need to add that for children exiting Part C services, they are presumptively eligible under the Developmental Delay category, because all Part C children "have identified disabilities or significant developmental delays" of 50% delay in one area or 25% delay in two areas currently.[37] The regulations should adopt the Part C eligibility criteria, in order for there to be a fully smooth and effective transition with no breaks in services. We also suggest some clarifying language, because there has been confusion about what "through age 7" has meant under current regulations:[38]

3012.4 Developmental delay means a condition in which a child, age three (3) through ~~seven (7)~~ **nine (9) (meaning up until the child's 10th birthday),** experiences severe developmental delays in one (1) or more of the following areas: physical development, language and communication development, social or emotional development, cognitive development, or functional or adaptive development. Developmental delay does not include autism, traumatic brain injury, intellectual disability, emotional disturbance, other health impairment, visual impairment, hearing impairment, or speech/ language impairment.

(a) In determining eligibility on the basis of developmental delay, the IEP Team shall consider assessments and child data related to:

(1) Whether the child experiences ~~severe~~ developmental delays of at least ~~two (2) years~~ **twenty-five (25%)** below his or her chronological age and/or at least **1.5** ~~two (2)~~ standard deviations below the mean, as measured by appropriate standardized diagnostic instruments and procedures in the following areas:

(i) Physical development;

(ii) Language and communication development;
(iii) Cognitive development;
(iv) Adaptive development; or
(v) Social or emotional development~~, only if concomitant with delays in another area of development listed in (i) through (iv)~~.

…

(d) To remain eligible for special education and related services, a child identified as having a developmental delay shall qualify as having another category of disability prior to child's **tenth (10th)** birthday.

Lastly, since the State criteria cannot narrow the federal classifications, and LEAs should not be able to create their own additional "inappropriate determinant factors" beyond the list in federal law, we suggest the following change for clarity in each category:

> The IEP Team shall confirm that the child-level data demonstrates that the child's educational performance has been adversely affected by [the particular disability] and not any of the inappropriate determinant factors **listed in 5 DCMR A § 3011.2 (34 CFR 300.306).**

**Educational Performance is More than Academics**

We have experienced confusion about the requirement that the child's disability must adversely affect the child's educational performance, in that teams often narrowly consider the child's grades or academic performance. We recommend that OSSE specifically add a definition that explains that educational performance is more than academics, as is clearly intended by the plain meaning of the IDEA and well established in case law.[39] As referenced throughout the law, educational performance includes, but is not limited to, academics, physical education, social/emotional skills, engagement with school, adaptive functioning, sensory functioning, and communication.[40] We look forward to working with OSSE over the coming months about exact wording to place the clearly established law that educational performance is much more than academics into the regulations.

**Eligibility and Link to Section 504**

Many children who are eligible for plans and services under Section 504 of the Rehabilitation Act do not receive them, if the child is found ineligible for special

education. While the reference to Section 504 in the proposed regulations in section 3011 is more helpful than if it was omitted, the LEA's responsibility under Section 504 should be more explicit. Add to subsections 3011.3 and 3011.6:

> **The LEA has a responsibility under Section 504 of the Rehabilitation Act to provide services and accommodations to children with disabilities who are not eligible under this Chapter. LEAs should immediately consider the child for eligibility under 504 without creating additional barriers.**

**Parental Participation in IEP Team Meetings**

In order for parents to be equal and meaningful participants in IEP meetings as envisioned in the IDEA, the focus for LEAs needs to be on scheduling at a mutually convenient time and place. Notifying the parent of a meeting date is not working together for a convenient time, but an invitation with several possible dates is more cooperative. For many parents, work schedules are determined two weeks in advance, and they must ask for time off a week before schedules are posted. We have also experienced challenges with schools who predetermine that they only hold meetings on one day each week or will not meet early in the morning, which makes scheduling at mutually convenient times very challenging when parents have existing commitments (e.g., work, standing medical appointments for their child with a disability). Our suggestions for OSSE to capture the cooperative spirit for meeting scheduling are:

3010.1 The LEA shall ensure that the parent of a child with a disability is present at each IEP Team meeting or afforded the opportunity to participate by making reasonable efforts as defined in this Chapter to:

(a) ~~Notify the parent in writing of the meeting no later than five (5) business days prior to the meeting to ensure that the parent will have an opportunity to attend.~~ Schedule the meeting at a mutually agreed on time and place, **including that schools may have to be flexible about meeting on different days of the week or different times of the day; and**

(b) **Communicate with the parent to schedule the meeting, including written invitation, no later than 15 business days before the proposed possible meeting dates.**

3010.2 The LEA shall demonstrate reasonable efforts as defined in this Chapter to contact the parent for the purposes of inviting the parent to participate in the IEP Team meeting no later than ~~five (5)~~ **15 business days** before the meeting, unless the parent agrees to a meeting date that is within ~~five (5)~~ **15 business days** of the initial contact.

3010.3 The **invitation**~~notice~~ to the parent required in §3010.1 shall include:

(a) The purpose, time, date, and location of the meeting;

(b) The participants who will attend the meeting;

(c) Information advising that the parent may invite other individuals to participate in the IEP Team meeting who have knowledge or special expertise regarding the child, including representatives from the IDEA Part C system for initial IEP meetings; and

(d) Beginning with the first IEP to be in effect when the child turns fourteen (14), that a purpose of the meeting will be the consideration of the postsecondary goals and transition services for the child, that the LEA will invite the child, and identify any other agency that will be invited to send a representative.

(e) **Beginning with the first IEP to be in effect when the child turns fourteen (14), consent forms to be signed by the parent for the purpose of allowing the LEA to invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services or a representative of any other specified agency.**

The section regarding the parent's right to documents five days before a meeting so that they can meaningfully participate should be revised to conform to the *Special Education Student Rights Act*'s letter and intent. The proposal changes the wording in DC Code § 38–2571.03(3) and would have substantive effect on the cooperative process of meeting scheduling. For example, it would allow the LEA to delay providing "notice" of a meeting that had been previously scheduled with the parent in order to delay providing copies of documents for review. Also, LEAs need regulations to be clear that their failure to provide records in advance denies meaningful participation of the parent; too many LEAs are currently delaying meetings (and delaying FAPE for the child) when they have failed to comply, rather than making true efforts to comply.

3010.4 The LEA shall provide, at no cost to the parent, an accessible copy of any evaluation, assessment, report, data chart, or other document that will be discussed at the meeting. Such accessible copies shall be provided no fewer than five (5) business days before a scheduled IEP Team meeting, if the purpose of which is to discuss the child's IEP or eligibility for special education and related services. However**, if a meeting is scheduled fewer than 5 business days before it is to occur**~~if notice of the meeting is provided to the parent fewer than five (5) business days from the date of the scheduled meeting~~, such accessible copies shall be provided no fewer than twenty-four (24) hours before the meeting. **LEA failure to provide documents to parents as per this section shall be presumed to impede the parent's meaningful participation in the meeting.**

**IEP Development and Parental Consent**

In the proposed regulations, the law surrounding the LEA's responsibility to develop an IEP and parent consent needs to be clarified. As drafted, the proposed regulations about consent to initial provision of special education and related services confusingly indicate that the parent would have to consent to an IEP and to provision of services before seeing or knowing what would be in that IEP and services. The concept of informed consent, as contained in the IDEA, necessitates that the parent be fully informed about the special education and related services in the IEP for their child, before having to provide consent. Parents need to be "fully informed of all information relevant to the activity for which consent is sought," under Federal IDEA regulations.[41] Courts around the U.S. have agreed that the parent must be aware of what is in the IEP before providing consent to provision of services.[42] For clarity, we suggest the following change:

3017.4 If, **after reasonable efforts to obtain a response,** the parent of a child with a disability fails to respond to a request for, or refuses to consent to, the initial provision of special education and related services, all of the following apply:

~~(a) The LEA is not required to convene an IEP Team meeting or develop an IEP for the child for further provision of special education and related services.~~[43]

(b) The LEA shall not be considered to be in violation of the requirement to make FAPE available to the child because

of the failure to provide the child with further special education and related services.

(c) The LEA may not use mediation or due process procedures to obtain agreement or a ruling that the services can be provided to the child without parental consent.

In addition, the proposed provision indicating that a parent may not decline particular services in the IEP, at proposed subsection 3017.2, does not conform to federal law and should be deleted. Federal regulations state, "A public agency may not use a parent's refusal to consent to one service or activity … to deny the parent or child any other service, benefit, or activity of the public agency, except as required by this part."[44] In the alternative, any such section should include, for clarity, that the parents do have the option to consent to services and simultaneously exercise their right to mediation, due process hearing, or state complaint resolution of disagreement.

We have concern that the proposed Related Services subsection 3013.1 is similarly confusing and contradictory to established practice and law. In practice, the IEP meeting discussion flows around the child's needs and goals before discussion of special education and related services needs together. The proposed clause could lead schools to believe that they should delay assessing the child's need for related services until after they have designed an IEP with special education services, and start another assessment timeline, which would delay all the appropriate services for the child. We suggest deleting subsection 3013.1 entirely.

Several of the definitions of related services need a few clarifications, because the wording, as copied from the CFR, is not always fully comprehensive. The Occupational Therapy definition should include services to improve or habilitate sensory integration and modulation.[45] The Psychological Services definition oddly omits that the school psychologist can provide services, such as group and individual counseling and assist in the development of positive behavioral intervention strategies, which many school psychologists do in our PCS and DCPS.

Lastly, the definition of Speech-Language Pathology omits two of the important roles that speech-language pathologists play. One is their important role in services for children who need communication assistive technology in selecting that technology and in ongoing training of the child, school personnel, peers, and parents.[46] The other is their important role in providing services to habilitate feeding and oral motor impairments at school to allow the child to participate in lunch with peers (and finish lunch timely).[47]

**Extended School Year**

We continue to have concern that OSSE's criteria for extended school year (ESY) are too narrow to capture all children who need consistent services. Specifically, and as highlighted by *D.L. v DC*, we experience too many children denied ESY because the LEA did not collect or keep data, or because it is an initial IEP without past data to examine.[48] Courts have found that predictive data and opinion should be used to decide ESY.[49] Thus, OSSE should remove the requirement of hard data from prior three months. In addition, limiting the criteria to only the regression-recoupment standard is too narrow and not individualized to all the possible unique needs that can necessitate ESY. For example, in *Reusch v. Fountain*, the U.S. District Court found that a class of children with disabilities had been denied FAPE because the criteria used did not allow consideration of individualized expert opinion about future needs (instead inflexibly requiring data of past regression), nor account for children who need ESY because of a breakthrough or emerging skill, because of the child's severity of disability, or because of some other unique set of needs.[50] In addition, to correct the problem that OSSE's current ESY policy has created with too many young children experiencing substantial disruption in services, OSSE should make children with Developmental Delay presumptively eligible for ESY. Children with other disability categories are generally so severe that they should also be presumptively eligible for ESY, including Autism (especially because a characteristic of the disability is difficulty with transitions), Multiple Disabilities, and Intellectual Disability.

3016.1 The IEP Team shall determine whether the provision of extended school year services is necessary for the provision of FAPE to a child with a disability on an individualized basis as part of the **initial IEP development and** annual IEP review.

3016.2 In determining whether extended school year services are necessary for the provision of FAPE, ~~the IEP team shall utilize at least three (3) months of progress monitoring data from the current school year, or any relevant current data if three (3) months of progress monitoring data from the current school year is not available,~~ **the IEP team may consider the following factors:**

(a) The impact of break in service on a critical skill;

(b) The degree of regression of a critical skill;

(c) The time required for recoupment of a critical skill;

**(d) The child's degree of progress toward mastery of IEP goals related to critical life skills;**
**(e) The presence of emerging skills or breakthrough opportunities;**
**(f) Interfering behaviors;**
**(g) The nature or severity of the child's disability, including that children with Autism, Developmental Delay, Multiple Disabilities, and Intellectual Disability should be presumed to have a disability that requires consistent services unless demonstrated otherwise for the unique child;**
**(h) Vocational factors, for children with vocational or employment goals and objectives, whether paid employment opportunities will be significantly jeopardized if training and job coaching are not provided during the summer break, or**
**(i) Special circumstances.**[51]

The regulations also should specifically say that extended school year is not just about summer services, because in practice in DC, schools do not consider anything other than summer services.

3016.3 The LEA shall not limit extended school year services to particular categories of disability or unilaterally limit the type, amount, or duration of these services, **including that LEAs may not limit provision of extended school year services to only the summer.**[52]

We commend OSSE for adding subsection 3016.4, that eligibility for ESY should not limit access to summer school that a student may need in order to earn credits. The regulations need to go further, however, reminding LEAs that least restrictive environment mandates apply to ESY. ESY cannot be provided solely in out-of-general-education classrooms and special education and related services need to be provided in general education summer school.[53]

3016.4 A child's status as a child with a disability, or a child with a disability who receives extended school year services, shall not limit the child's access to summer school in order to earn credits needed to advance between grades or graduate from high school. **Least restrictive environment requirements apply to extended school year programming, such that special education and**

**related services must be available in general education settings during extended school year.**

We suggest that OSSE add a provision stating that the ESY decisions, including placement and where the student will attend, should be made early enough that a parent can exercise due process and classroom observation rights.[54] At the same time, that provision should recognize that there are reasonable causes for later decisions, such as children found eligible later or a meeting that had to be postponed for health reasons of the child or parent. Connecticut's regulations provided a model for this suggested addition:[55]

**3016.x The LEA shall ensure that consideration of the child's eligibility for, and the content, duration and location of the child's extended school year services is determined so as to allow the parent sufficient time to challenge the determination of eligibility, the program or the placement before the beginning of the extended school year services, unless there is a reasonable need to make the determination later.**

**Translating IEPs**

The DC Code is clear that schools need to provide a free, final IEP copy to parents within five days, except when they need more time to translate to comply with the *Language Access Act of 2004*. The proposed regulations alter the clear language that is codified in DC Code, for some unknown reason. The regulations need to use the language in DC Code.

3018.3 The LEA shall provide the child's parent with the completed IEP, at no cost to the parent, no later than five (5) business days after the IEP Team meeting to develop the IEP. If the IEP has not been completed by the fifth (5th) business day after the meeting or additional time is needed to translate the IEP to comply with the *Language Access Act of 2004* (D.C. Code § 2-1931 et seq.) ~~as may be required by District of Columbia~~ law, the LEA shall provide the parent with the latest available draft IEP and a final copy upon completion provided that the final copy of the IEP shall be provided to the parents no later than fifteen (15) business days after the meeting at which the IEP was agreed upon.

**Homebound, Hospital, and Home Instruction**

We thank OSSE for proposing regulations about homebound, home instruction, and hospital instruction for the first time. Our clients have too often been denied instruction, either because LEA policy is not to provide services or services are denied overtly or by long delay, when they are unable to attend school for extended or for intermittent periods due to illness or hospitalizations. Our clients with valid physician certifications are routinely denied services by DCPS, despite the fact that no other licensed medical professional has issued a competing opinion of the child's need. Even when instruction is provided by the LEA, it often takes many weeks for the instructor or related service professionals to begin, after a long review, and only a few hours per week are provided as a default, without real IEP team decision.

The regulations will need additional details and requirements to ensure that children with disabilities who must be at home or in hospitals will receive a FAPE. OSSE should set deadlines for the LEA to approve or deny home or hospital instruction requests, deadlines for services to begin, and minimum hours of instruction. OSSE should specify that LEAs must not practice medicine (or other licensed professions such as psychology or clinical social work) by having a lay administrator override a licensed medical professional's certification.

For some children with disabilities, life involves hospital stays or periods of needing to stay home. For example, a child with sickle cell, who likely is a child with Other Health Impairment, will often have to be intermittently hospitalized or at home for pain and treatment. Similarly, a child with cerebral palsy may have intermittent seizures that require staying home, or a child with an emotional disability may have times of instability that require intermittent psychiatric hospitalization. In those situations, the child's disability is the reason for the need for homebound or hospital services, and it is not accurate to say that the LEA should provide services only to the same extent as they do for children without disabilities. For those children, the IEP (or 504) team should anticipate the needs and plan for them in the IEP (or 504 Plan). In addition, homebound services are often necessary for pregnant or new parent teens and are required for compliance with Title IX.

The regulations should include something like the following, which we have modelled on provisions in regulations in Maryland, Delaware, Connecticut, New York, and New Jersey:[56]

3024.1 Homebound services **and hospital instruction** are education services that an LEA ~~may~~ **shall** provide to a child who is unable to attend school due to an illness or injury, **or due to pregnancy, childbirth, or related medical condition to pregnancy or childbirth.**

3024.2 The LEA shall provide homebound services and hospital instruction to children with disabilities **as determined by the IEP team or 504 team and pursuant to this chapter.** ~~to the same extent that it provides such services to children without disabilities.~~

3024.3 If a child with a disability requires homebound services or hospital instruction for an extended period of time because of a medical condition, the LEA shall ensure that an IEP team meeting is convened to **determine the amount and frequency of services and placement needed to provide a FAPE to the child, within five (5) business days.** ~~modify the placement and IEP of a child with a disability.~~ **For a child with a chronic condition that causes intermittent absences, the plan for providing the services the child needs for FAPE should be included in the IEP and activated promptly.**

3024.4 ~~The LEA shall develop a written policy regarding eligibility for and provision of homebound services and hospital instruction, and may include a requirement for medical documentation of the need for such services.~~ **The LEA shall begin educational services as soon as possible, but not later than ten (10) days after receiving appropriate certification by a licensed medical professional.**

**3024.x Homebound, hospital, or home instruction must be provided a minimum of five (5) hours per week at the elementary level or minimum of ten hours per week at the secondary level.**

**3024.x Procedures for eligibility shall be limited to appropriate certification by a licensed medical professional (which includes psychologists and clinical social workers) that the student cannot attend school. Any review for denial must be by a corresponding licensed medical professional.**

**Services for Students Transferring**

The final regulations about students who are transferring, and how quickly they are provided services, will be extremely important for Children's Law Center's clients. If schools do not quickly provide comparable services, many children start to have behavioral difficulties or increased academic problems without the special education and related services that they need. Our children in the custody of CFSA move often, between schools and foster homes in DC and Maryland. Moving homes creates great instability. School can be a place where they can receive services to help stabilize, if these regulations provide them the quick comparable services that they need. But, many of our other clients are also highly mobile between schools, as parents seek a school that can meet their child's needs, or when they are effectively pushed out or counselled out of schools. Highly mobile children need their schools to act quickly to meet their needs, and OSSE, as the SEA, needs to ensure that happens with quick deadlines in these regulations. If you add up the possible delays in the proposed regulations, students can be waiting 15 days for the new school to get the IEP and then another 20 days for comparable services, over a month. Other states require that records and comparable services be provided within a week, and DC should do the same, except for cases when a special program needs to be found for the child.[57]

OSSE also needs to make it clear to DC LEAs that comparable services means implementing the previous IEP (the same, or equivalent).[58] We have struggled with DCPS on this point, because DCPS has forced children with full-time IEPs to attend general education classes for 30 days before considering the full-time services. The U.S. Department of Education has stated, "the new school district's IEP Team may not arbitrarily decrease the level of services to be provided to the child as comparable services."[59] OSSE needs to make the point that existing IEP services should be provided.

3021.1 The LEA shall ensure that there is an IEP in effect **for each child in its jurisdiction**~~each enrolled child~~ who has been determined eligible for special education and related services throughout the calendar year, including the summer months.[60]

3021.2 Within **three (3) business** ~~five (5) calendar~~[61] days of ~~enrollment~~ **transfer**, the LEA shall send a written request for the child's educational records to the child's parent and previous LEA, including a request for all documentation pertaining to the referral for or provision of special education or related services to the child.

3021.3 The LEA shall respond to a request for educational records of a previously enrolled child by providing such records **as soon as possible** within **five (5) business** ~~ten~~ (~~10~~) ~~calendar~~ days of the receipt of the request, even if the provision of such records necessitates the physical transfer of paper records.[62]

3021.4 The child's new LEA shall ensure that any existing IEP or supporting special education documentation received from the child's parent or previous LEA is uploaded into the appropriate State-level data system within **two business** ~~ten (10) calendar~~ days of receipt.[63]

3021.5 The LEA, in consultation with the parent, shall make FAPE available to a child who transfers into the LEA in the form of comparable services.

(a) Comparable services shall be provided as soon as possible, but no later than **five (5) school days, unless the child has an IEP that requires a full-time special classroom, a special school or residential in which case within ten (10) school days** ~~twenty (20) calendar days~~ of the LEA's receipt of the child's existing IEP, IFSP, or services plan.

(b) The LEA shall provide the parent of a child with disabilities with prior written notice **specifying what comparable services will be provided** before the provision of comparable services.

**(c) Comparable services means the same or equivalent services implementing the existing IEP, and the LEA may not arbitrarily decrease the services in the IEP as comparable services.**

We are extremely concerned about the proposed section 3021.6, which would deny any services to a child if the previous LEA or school fails to provide records, visiting the error of the past LEA on the child. This will result in a denial of FAPE to the child, which will be bad for both the school and the child. This is why the federal regulations state that comparable services are in consultation with the parent, so that the parent can describe what the child was getting in the absence of records. If a parent or other source is telling the LEA that the child has an IEP or has a disability, the school's Child Find duties have clearly been triggered. Instead of telling schools not to

provide services, OSSE's regulations should tell the school to provide what services it can, based on consultation, and then evaluate and determine eligibility.[64]

> 3021.6 ~~The LEA is not required to provide special education and related services to the child, including comparable services, if it is unable to obtain the existing IEP after exercising reasonable efforts to obtain the child's educational records~~. **If the LEA is not able to obtain the child's IEP, the LEA shall provide comparable services by consulting the parent or other reasonable sources such as CFSA or DYRS about what services are needed, and complete an evaluation and eligibility, and new IEP as appropriate.**
>
> 3021.7 ~~Upon enrollment,~~ The LEA shall begin collecting and reviewing child-level data to assist in its determination of whether a transfer child's existing IEP is appropriate to meet the unique needs of the child **as soon as possible**.
>
> 3021.8 If a child transfers from an LEA within the District of Columbia, the LEA shall determine whether to adopt the existing IEP or develop a new IEP within 30 calendar days ~~of enrollment~~ **transfer**~~.~~
>
> (a) If the LEA determines that the existing IEP is appropriate, the LEA shall document adoption of the IEP within thirty (30) calendar days of **transfer** ~~enrollment~~.
> (b) If the LEA determines that the existing IEP is not appropriate, the LEA shall develop and finalize a new IEP within sixty (60) calendar days of **transfer** ~~enrollment~~.

The timelines for evaluation for transfers seem extremely long. This ANPR appears to give 30 days to determine whether necessary, 30 days to seek consent, 60 days to evaluate, and another 30 days for the IEP, a total of five months. That is more than half the school year. It is also not clear whether continued comparable services are to be provided during that time, which is required by the IDEA.[65] For highly mobile children, the U.S. Department of Education urges expedited evaluation: "There are compelling reasons for school districts to complete evaluations and eligibility determinations for highly mobile children well within the evaluation time frame that is applicable in a State, and we strongly encourage school districts to complete their evaluations of highly mobile children within expedited time frames (e.g., within 30 days), consistent with each highly mobile child's individual needs, whenever

possible."[66] We urge OSSE to adopt the expedited 30-day evaluation timeframe and an expedited IEP development timing for DC's mobile students.

> 3021.9 If a child transfers from an LEA outside of the District of Columbia, the LEA shall determine whether it is necessary to conduct an evaluation to determine the child's eligibility under this Chapter. **The LEA shall provide comparable services during this process.**
>
> (a) If the LEA determines it is not necessary to conduct an evaluation, the LEA shall document adoption of the child's existing eligibility within thirty (30) calendar days of ~~enrollment~~ **transfer**.
>
> (b) If the LEA determines it is necessary to conduct an evaluation, or if the LEA is unable to obtain the existing IEP or other necessary student records, the LEA shall:
>
> (1) Obtain parental consent **as soon as possible**;
>
> (2) Conduct an evaluation and determine eligibility within **thirty (30)** ~~sixty (60)~~ calendar days in accordance with this Chapter; and
>
> (3) Develop an IEP within **fifteen (15)** ~~thirty (30)~~ calendar days of the eligibility determination.

The proposed subsection 3021.10 seems problematic, in that IEP teams will likely not know what services that they should provide or may terminate services for the child. Perhaps a solution would be to mandate that the IEP team meet and review data to create a new annual IEP prior to the expiration date.

> 3021.10 The LEA may not adopt an existing IEP that is expired or will expire within thirty (30) calendar days of the child's **transfer** ~~enrollment~~**, instead the LEA must meet to review data and create an updated IEP before the expiration**.

**<u>Equal Access to Generally Extended School Time</u>**

We appreciate that OSSE has included subsection 3022.2, to ensure access to nonacademic and extracurricular activities and services, in the least restrictive environment appropriate for the student. We note that transportation is often needed to ensure that access, and we recommend that OSSE add that **transportation should be provided as needed** in subsection 3022.2. When reading this provision, we also thought about how some of our clients have had challenges with receiving appropriate

services in DCPS and Public Charter Schools during extended school days or longer school years that schools have been adopting for all students. For example, the self-contained classrooms in several extended school day schools have an earlier dismissal time than the non-disabled peers in their school. We suggest adding a provision to the regulations to correct this:

> **3022.x An LEA or a school of an LEA that has adopted a longer school day or longer school year shall provide special education and related services to children with disabilities, to ensure access to the longer learning time to children without disabilities.**

**Post-Secondary Transition**

In our experience, post-secondary transition planning and services are an area for growth in DC's LEAs and with the Department of Disability Services (DDS). We appreciate that this proposal provides some additional protections or services for the student beyond those in federal law.[67] For example, proposed subsections 3027.5 and 3027.6 require the LEA to provide students with disabilities courses of study that afford them the opportunity to earn a regular high school diploma and a graduation plan that is reviewed annually and modified as needed.[68] However, several subsections need strengthening to improve transition practices in DC LEAs.

Proposed subsection 3027.7, which requires the LEA to identify the adult services and evaluations the child may need one year prior to graduation or attainment of an IEP Certificate of Completion, needs to be strengthened. In order to access adult services (e.g., RSA, DDS, DBH), students aging out of special education need to have evaluations that show that they are eligible for those adult programs. It's important to have those evaluations done while the student is still in school so that the student can transition smoothly to the adult program. Students who are disconnected when they graduate often struggle to connect to a program that can help them find a job or further their education. We suggest that IEP teams ensure that students have the necessary evaluations completed before they graduate, by having a plan for how the needed evaluations will be complete in the student's transition services plan in the IEP.

> Not later than one year before a student's anticipated high school completion or attainment of a certificate of IEP completion, the IEP team shall identify which adult services might be appropriate for the child, and in consultation with the appropriate DC agency when feasible, determine whether any additional evaluations are needed to determine the student's eligibility for those services **(from DDA, RSA, DBH, or any other relevant agency)**. **If additional evaluations are necessary, the IEP team shall develop a plan for them to be completed before the student graduates or**

**attains a certificate of completion. The IEP shall include a statement of whether additional evaluations were determined to be needed and, if so, the plan for completing them.**

Proposed subsection 3027.4 requires that the LEA invite a transition-service-providing agency to an IEP Team meeting when the purpose of the meeting will be for the consideration of postsecondary goals and transition services, and once the LEA has consent from the parent to invite said agency. Subsection 3027.4 is problematic, as written, because we rarely see transition service providers at IEP meetings and have been told by LEAs that the providers have not been invited because the LEA has not obtained the parent's consent to invite the providers. Our attorneys and GALs have not been aware of a request for that consent. Because obtaining consent has been a barrier, we recommend that multiple subsections be amended to address this problem.

By including a statement regarding the status of the parent's consent, the IEP team will be prompted to have a discussion about the transition services providing agency and the necessary consents. We recommend that section 3027.1 be amended to include the following additional subsection:

(d) **If the IEP team determines that the child needs transition services, the IEP shall include a statement summarizing whether the parent or a child who has reached the age of (18) years old has consented to the LEA inviting a representative of any participating agency that is likely to be responsible for providing or paying for transition services to an IEP Team meeting**.

For similar reasons, we recommend that subsection 3027.8 be amended as follows:

3027.8 Beginning at least one (1) year before a child with a disability reaches the age of eighteen (18), his or her IEP must include **the following:**

**(a)** a statement that the child has been informed of his or her rights under Part B of the IDEA that will transfer to the child on reaching the age of eighteen (18)**; and**

**(b)** **a statement summarizing whether the child has been provided with the consent forms required for the LEA to invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services to an IEP Team meeting to an IEP Team meeting.**

The regulations, currently, do not have a deadline by which the LEA must invite RSA to a meeting. By requiring LEAs to invite a transition-service-providing agency no later than 10 days in advance, there is any increased chance that agency will be able to attend the meeting and contribute its knowledge and expertise to the benefit of the team and the child. Thus, we recommend that subsection 3027.4 be amended as follows:

> 3027.4 To the extent appropriate and with the consent of the parent or a child who has reached the age of eighteen (18) years old, the LEA shall invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services, to an IEP Team meeting **no less than ten (10) days in advance of the IEP Team meeting** if a purpose of the meeting will be the consideration of postsecondary goals for the child and the transition services are needed to assist the child in reaching those goals.

Additionally, we recommend that the following amendment be made to subsection 3010.3 in order to ensure that LEAs are providing parents the opportunity to give consent to the invitation of transition service providing agencies to the child's IEP Team meeting:

> 3010.3 The **invitation** ~~notice~~ to the parent required in §3010.1 shall include: …
>
> **(e) Beginning with the first IEP to be in effect when the child turns fourteen (14), consent forms to be signed by the parent for the purpose of allowing the LEA to invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services or a representative of any other specified agency.**

Lastly, although section 3027 addresses secondary transition, it does not provide any additional guidance for middle schools regarding how to plan for students' transitions to high school. Rather, there is one subsection that simply states that IEPs for middle school students must include the same items that IEPs for high school students must contain plus one goal that addresses "readiness for, and transition to, high school."[69] While OSSE has published numerous resources relating to specific aspects of transition planning for students between ages 10 and 14,[70] the DCMR does not require that IEPs for middle school students address any of these aspects. Therefore, we recommend that subsection 3027.1(a)(i) be amended as follows:

(i) For children attending middle school, at least one (1) goal must address **the educational, employment, community living or self-determination skills needed to ready the child for the** ~~readiness for and~~ transition to high school.

**IEP Certificate of Completion**

Section 3028 contains new regulations relevant to a more rigorous IEP Certificate of Completion. This is a very interesting idea that could be used to provide students with severe impairments with pathways to vocations or community integration and involvement. We are concerned that the content areas that are identified in subsections 3028.1 and 3028.2 may not be an appropriate measure for students with more severe disabilities. We are concerned that students who do not have the ability to meet even the proposed IEP Certificate of Completion requirements will be unable to leave the school setting with a documentation of their achievements. Providing these students with some type of documentation of their skill or school participation (thus allowing them to participate in graduation activities) provides motivation for them to continue their education. One solution to this concern is to allow LEAs to continue to determine when a student has earned a certificate of completion. Another solution would be to further broaden the array of diploma options available for DC students. The National Center on Secondary Education and Transition (NCSET) discusses this second option in its information brief on graduation requirements and diploma options for students with disabilities.[71] Maryland could be a model for DC; it offers a Maryland High School Certificate of Program Completion to students with disabilities who cannot meet the standard diploma requirements and have been enrolled in more than 4 years of school after the 8th grade and the student is either about to turn 21 or the IEP team and the parents have determined that the student has:

> …developed appropriate skills for the individual to enter the world of work, act responsibly as a citizen, and enjoy a fulfilling life, including but not limited to:
> - Gainful employment;
> - Work activity centers;… and
> - Supported employment; …[72]

Maryland students who receive this certificate are also provided an "Exit Document" that describes the student's skills.[73] Therefore, we recommend that subsection 3028.1 be amended to as follows:

3028.1 The LEA shall develop and publish by July 1, 2018, and update annually thereafter, a uniform IEP Certificate of Completion policy establishing:

(a) Minimum credit unit **or minimum hour** requirements in **any** ~~all~~ of the following content areas:

(1) English Language Arts;

(2) Mathematics;

(3) Life Science/ Physical Science; ~~and~~

(4) History/ Social Studies**;**

**(5) Life skills classes;**

**(6) Job Shadowing;**

**(7) Job Training;**

**(8) Experiential Learning in a Job or Trade; or**

**(9) Services to Improve Adaptive Functioning**.

(b) Requirements related to community service hours, as appropriate; ~~and~~**or**

(c) Any other LEA requirements.

We further recommend that subsection 3028.2 be amended as follows:

3028.2 If an LEA does not develop and publish a uniform IEP Certificate of Completion policy by July 1, 2018, the following requirements shall apply:

(a) Completion of a minimum ~~of fourteen~~**number of** unit credits**, as determined by the IEP** ~~including minimum units in the following content areas:~~

~~(1) Two (2) units of English Language Arts;~~

~~(2) Two (2) units of Mathematics;~~

~~(3) Two (2) units of Life Science/Physical Science; and~~

~~(4) Two (2) units of History/Social Studies;~~

(b) Satisfactory completion of community service hours, as determined by the IEP team; and

(c) Satisfactory completion of the student's IEP goals, as determined by the IEP Team

In the alternative of accepting our recommendations for subsection 3028.2, we suggest that OSSE add another subsection that would lay out a policy for an IEP diploma that adheres to the recommendations we put forth above for subsection 3028.2. This solution would create a uniform IEP Certificate of Completion, as well as an IEP diploma, which would be a diploma option for students whose disabilities prevent

them from being able to meet the requirements for the IEP Certificate of Completion. An IEP diploma would acknowledge such student's achievement of the goals set by his or her IEP team.

**Travel Training**

OSSE has not proposed to change the definition of "travel training" in this proposed rulemaking in section 3099. However, the regulations could be used to inform LEAs about best practices with travel training, in order to assist children with building independence as part of transition services. We suggest the following addition to the definition of "Travel Training" in section 3099 to make the definition more comprehensive of nationally established standards explained by Easter Seals Project Action, the national training and technical assistance center on accessible transportation:

> **A comprehensive travel instruction program includes instruction in essential travel skills, making judgments about safety and danger, managing basic life skills, knowing how to handle travel disruptions, and using appropriate social and communication skills.**[74]

**Paraprofessionals**

Section 3031 provides a good starting point for discussion of paraprofessionals. We were not clear whether this section is just for classroom-based assistants or was meant to also apply to dedicated aides for particular students. The three "types" of support do not encompass all the reasons a child might need a dedicated aide; some might need help learning life skills, emotional skills, or communication skills. Also, given that these positions often provide low pay and have high turnover, a degree may not be the best way to ensure a base of knowledge. However, simply one year of experience also may not be enough. Other states we examined require two years of applied experience or passage of an exam.[75]

We have found that particularized training to the needs of the assigned child(ren), including embedded on-the-job training and feedback, to be very valuable for our clients. OSSE should consider a robust training requirement instead of the credential or one-year experience ideas. Minnesota's statutes and Georgia's Rules and Regulations provide possible models.[76] OSSE should also consider adding details to the supervision requirement because of the difficulty of the work, such as a number of direct supervision hours or that supervision must be daily.

For medical aides, we support the idea that a post-secondary credential is necessary in addition to robust particularized training, but we are concerned that one

year of any health service experience would not provide the needed knowledge base. It would also be most appropriate for the supervision of the health assistant to be by a physician or a nurse.

Lastly, the idea that Behavioral Support Services in DC IEPs are provided by aides does not reflect current practice. All DC LEAs use that descriptor for what the federal regulations (and these proposed regulations) call counseling services or psychological services, usually provided by a licensed social worker or licensed psychologist. If OSSE is envisioning changing that practice, it will need to be widely trained on and disseminated.

**Independent Educational Evaluations**

Independent educational evaluations (IEEs) at public expense are an extremely important way that low-income parents can meaningfully participate in their child's education, since they do not have the funds nor the expertise of the school district. Delaying IEEs ends up delaying the child getting necessary services. Although LEAs are supposed to either provide the IEE at public expense without unnecessary delay or file for due process hearing, LEAs in DC rarely, if ever, file those complaints. Instead, they fail to respond to parents for months about the IEE. Because of this regular noncompliance, OSSE should set a definition of "without unnecessary delay" as some other states have done. This will help parents get responses faster and provides more certainty. We recommend requiring LEAs to either provide the IEE at public expense or file for a Due Process Hearing within 15 days of request, as in Rhode Island.[77]

In addition, when the LEA fails to complete the child's evaluation or re-evaluation in a timely fashion, or at all, the parent should have a right to an IEE at public expense. In our experience, when a school fails to complete an evaluation timely after referral, they insist on doing their own evaluations and taking another full 120-day or 60-day period to do so, because their staff are unable to expedite. An IEE for an untimely evaluation used to be a parent right under the *Blackman* case, to allow the child to get needed evaluations and needed services, in a more timely way.

3039.2 A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the LEA **or if the LEA has failed to complete an evaluation in accordance with the deadlines in this Chapter**.

(a) If the parent requests an independent educational evaluation at public expense, the LEA shall, ~~without unnecessary delay~~ **within 15 (fifteen) days**, either:

(1) File a due process complaint to request a hearing to show that its evaluation is appropriate **or that the LEA evaluation was completed on time**; or

(2) Ensure that an independent educational evaluation is provided at public expense, unless the LEA demonstrates in a hearing in accordance with IDEA and this Chapter that the evaluation obtained by the parent did not meet the LEA's criteria.

**Classroom Observations**

The *Special Education Student Rights Act* sets specific rights and parameters for classroom observations for children with disabilities. We noted that a few specifics differed in this ANPR from the Act as codified in DC Code, and those differences seem like substantive change. We recommend that the regulatory language track the Code exactly:

3042.2 …

(c) The LEA shall not impose any conditions or restrictions on such observations except those necessary to ensure that:

…

(3) Any potential disruption to the learning environment arising from multiple observations **occurring in a classroom simultaneously** is avoided. …

3042.3 The time allowed for observation by the parent or the parent's designee shall be **of** sufficient **duration** to enable the parent or designee to ~~observe~~ **evaluate** a child's performance in a current program or the ability of a proposed program to support the child.

**Discipline Protections**

Children with disabilities in DC are disproportionately excluded from school with suspensions and expulsions. As OSSE's own recent report found, when controlling for other factors, children with disabilities are still 1.4 times more likely to be

suspended, and that they are more likely to be subjected to long exclusions.[78] This is unacceptable evidence that discipline practices in DC LEAs, as applied, are discriminating against children with disabilities. This is also an indication that children with disabilities routinely have unmet needs that should be addressed.[79] As the SEA, OSSE should utilize the special education regulations to change LEA practices to ensure that children get new or changed IEP services when they are experiencing behavioral difficulties in school. Currently, LEAs look at the manifestation determination review requirements as a free pass to suspend students for ten cumulative days without changing anything. Ten days of school is a lot of days to miss without services, and contributes to children becoming disengaged from school.

OSSE should create greater protections for DC's children with disabilities, mandating that schools use positive interventions early for a student starting to get into trouble at school. We recommend that the IEP team must convene to consider amended services, including a Functional Behavior Assessment and/or a new or updated Behavioral Intervention Plan in the IEP for any student who experiences a disciplinary exclusion from school.

We recommend that OSSE require a manifestation determination review (MDR) earlier, so that children are not subjected to as many suspensions as they suffer currently. OSSE should also eliminate the confusions in the current process in which LEA determines whether there has been a "pattern of behavior" when a student has been suspended for 10 days cumulatively, in order to decide whether there has been a change of placement necessitating an MDR. This LEA determination creates confusion and inconsistencies, and OSSE could just eliminate the confusion by mandating that LEAs conduct MDRs when a student has been suspended for a set number of cumulative days, as other states have done.[80] We recommend that DC increase protections for students and mandate an MDR after five days of cumulative suspension, since a whole week of missed school is significant, and an indication that the child has unmet needs that should be addressed by the IEP team. We would be happy to work with OSSE in the coming months on the language for these needed additional protections for DC's children.

In addition, we recommend several changes to conform to federal regulations. In addition to the role a child's IEP Team plays in a manifestation determination resulting from a disciplinary change of placement, federal law provides additional obligations of

the IEP Team that should be included in this section. First, federal law states that if the disciplinary removal of a student with a disability constitutes a change in placement, then the student's IEP Team determines appropriate services.[81] Therefore, CLC recommends that the proposed subsection 3043.6 be revised to add the following:

> **(c) If the removal is a change of placement under § 3043.3, the child's IEP Team shall determine the appropriate services.**

Additionally, federal law also obligates the IEP Team to determine the interim alternative educational setting for these services.[82] Therefore, CLC recommends that a new subsection be added under section 3043 with the following language:

> **3043.xx The child's IEP Team shall determine the interim alternative education setting for services under subsections § 3043.5, § 3043.6, and § 3043.8.**

Both federal law and OSSE's proposed regulations provide special circumstances in which an LEA may remove a student to an interim alternative educational setting regardless of a manifestation determination "for not more than forty-five (45) school days."[83] However, the proposed provision contains terms that should be defined in section 3099, including: 'weapon,' 'illegal drugs,' 'controlled substance,' and 'serious bodily injury.' Both federal and DC laws already provide definitions for these terms, which OSSE should incorporate in section 3099.[84]

Parental notification of a disciplinary change in placement should conform to federal law. While the proposed subsection 3043.9 states that the written notification be provided to the parent "within one (1) day of the decision," federal law clearly states that notification must be provided "[o]n the date on which the decision is made."[85] Therefore, subsection 3043.9(a) should be corrected as follows:

> (a) Written notification to the parent shall be provided **on the date on which the decision was made.** ~~within one (1) day of the decision~~.

As stated in both federal law and OSSE's proposed regulations, the purpose of a manifestation determination meeting is to determine (1) if the misconduct was caused or related to the child's disability or (2) if the misconduct resulted from a failure of the LEA to implement the child's IEP.[86] However, just as the child's IEP Team has

obligations when condition (1) is met federal law obligates the LEA to take immediate steps to remedy relevant deficiencies when condition (2) is met.[87] Therefore, CLC recommends that a new subsection 3043.12 be added with the following language:

**3043.12 If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was the direct result of the LEA's failure to implement the IEP, the LEA must take immediate steps to remedy those deficiencies.**

**Educational Decision Makers for Foster Children**

In this proposed rulemaking, several provisions in current Chapter 30 that limited when a foster parent can act as the IDEA parent were removed and replaced with more general provisions found in the CFR. The more general provisions are more confusing, since it would be difficult for an LEA to know about other sources of law regarding foster parent responsibilities or about CFSA contracts. We suggest including the previous limitations, most importantly a court order suspending biological or adoptive parent's educational rights and giving the foster parent those rights or responsibilities. The following is our suggestion for the definition in section 3099:

"Parent" means:

(a) A biological or adoptive parent of a child;

(b) A foster parent **if all of the following apply:** ~~unless District of Columbia law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent;~~

**(1) The biological or adoptive parent's authority to make educational decisions on the child's behalf have been terminated, suspended, extinguished, or limited by judicial order or decree;**

**(2) the Court has determined that it is in the child's best interest, including considering that the foster parent has an ongoing, long-term parental relationship with the child, for the particular named foster parent to serve as the educational decision maker for special education, evidenced by an order appointing them in that role;**

**(3) the foster parent is willing to make educational decisions under the IDEA; and**

**(4) the foster parent has no interest that conflicts with the interests of the child;**

(c) A guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child ~~is a ward of the State~~ **in the custody of the DC Child and Family Services Agency**); …

We also recommend the following changes to the definition in section 3099:

> **"Educational surrogate parent"** means an individual who is appointed by the **SEA** ~~LEA~~ **or by judicial order** to advocate for a child with a disability, or a child suspected of having a disability, **in all matters relating to rights under the IDEA**, including during evaluation through possible placement **and provision of FAPE**, when no parent can be identified or the whereabouts of the parent cannot be determined or if the child is **in the custody** ~~a ward~~ of the District of Columbia **CFSA**, as needed.

We are concerned about a new provision that would allow the LEA to go forward with an initial evaluation process for a child in the custody of CFSA without a parent consent. The provision would not be good practice for schools when working with children in foster care, given that a competent decision maker can be appointed either through the Court or through the surrogate parent process at OSSE. Although this could cause delay, we worry more that an LEA would not move forward with evaluation, rather than get the surrogate parent/appointed educational decision maker that the child needs.[88] Also, when read with the definition of "parent," parts of the proposed section are unnecessary. In the situation described that a parent cannot be located for a CFSA ward, the LEA should notify OSSE of a need for a surrogate parent and notify CFSA.

> 3006.6 In the case of an initial evaluation, if the child is in the custody of the District of Columbia Child and Family Services Agency and is not residing with the child**'s biological or adoptive** parent, the LEA **shall request that the SEA appoint an educational surrogate parent** ~~is not required to obtain parental consent~~ **and make reasonable efforts to notify the DC Child and Family Services Agency**, if ~~any of the following apply:~~ despite reasonable efforts

to do so, the LEA cannot determine the whereabouts of the parent of the child (as parent is defined in 3099).

(a) ~~The rights of the parent of the child have been terminated in accordance with District of Columbia law; or~~

(b) ~~The rights of the parent to make educational decisions have been limited or terminated by a judge in accordance with District of Columbia law, and consent for an initial evaluation has been given by an individual appointed by the judge to represent the child.~~

In appointing educational surrogate parents, we recognize that OSSE has a difficult task finding qualified and willing volunteer surrogates. However, the regulations need reasonable deadlines so that children do not wait extended periods for a surrogate parent, which delays their FAPE. In addition, as proposed, OSSE would be giving itself unnecessary work by having LEAs inform about every foster child, many of whom have active biological or adoptive parents, or who have other appointed educational decision makers, and would not need OSSE's attention. We also have some clarifying language about the scope of the surrogate parent's role. We suggest the following:

3035.1 The LEA shall ensure the rights of a child with a suspected or identified disability are protected by requesting that the SEA appoint an educational surrogate parent in any of the following situations:

(a) A parent, **as defined in section 3099**, cannot be identified;

(b) The LEA, after reasonable efforts, cannot determine the location of a parent;

(c) The child with a suspected or identified disability is ~~a ward of the District of Columbia~~ **in the custody of CFSA and may need a surrogate parent**; or

(d) The child is an unaccompanied homeless youth as defined in the McKinney-Vento Homeless Assistance Act.

3035.2 The LEA shall notify the SEA of any child who may be in need of an educational surrogate parent **within five (5) business days**.

3035.3 Upon receiving notice, the SEA is responsible for determining whether a child needs an educational surrogate parent **within 14**

**calendar days**, and for assigning an educational surrogate parent **within 10 calendar days of determining need**. If the child is ~~a ward of the District of Columbia~~ **in the custody of CFSA**, the surrogate parent alternatively may be appointed by the judge overseeing the child's case.

…

3035.6 An educational surrogate parent appointed by a judge overseeing the case of a **child in the custody of CFSA** ~~District of Columbia ward~~ shall be recognized by the SEA and the LEA provided that the individual is identified as a surrogate parent under IDEA or that the responsibility ~~and~~ **or** authority granted to the individual specifically includes the authority to make decisions regarding special education **or rights under the IDEA**.

3035.7 Unless a court order specifies otherwise, an educational surrogate parent appointed by a judge may represent the child only **regarding rights and procedures under the IDEA**~~in matters relating to identification, evaluation, educational placement, and the provision of FAPE to the child.~~

**Impartial Due Process Rights and Procedures**

We have proposed several changes to sections 3050-3056. The proposed language in these sections largely adheres to federal law and federal regulations, with a few exceptions.

Proposed subsection 3052.2 is one which deviates substantially from the phrasing used in the CFR. The rephrasing proposed by OSSE is needlessly confusing. To resolve this issue, we have suggested replacing it with the following language which more closely aligns with the CFR:[89]

3052.2 ~~Each party shall disclose all evaluations completed by that date and related recommendations that the party intends to use at the hearing to all other parties no later than five (5) calendar days before the hearing.~~ **At least five (5) business days prior to an impartial due process hearing, each party must disclose to all other parties all evaluations completed by that date and any**

**recommendations based on the offering party's evaluations that the party intends to use at the hearing.**

We have suggested two changes to section 3050. The smaller change is to specify that the SEA provides the mandated information *in writing*. To our knowledge, OSSE's policy is already to provide a written document regarding the "availability of mediation and any free or low cost legal services and other relevant services available." This change would memorialize that practice.

3050.3 When an impartial due process hearing is requested, the SEA shall inform the parent **in writing** of the availability of mediation and any free or low cost legal services and other relevant services available.

The second change OSSE should make is the complete removal of subsection 3054.4, which requires the "submitting attorney" to "disclose any financial interest...involving any participant in the proceedings including a nonpublic school or program or private provider of a service." This proposed provision is problematic for a number of reasons. First, it is not based on any local or federal law, nor is it based on common legal practice in cases involving experts or employees of a party. Second, by only requiring this of the "submitting attorney," this provision will overwhelmingly disadvantage parents and students with disabilities, as nearly all due process complaints in DC are filed by a parent. Finally, the term "submitting attorney" is confusing, as the law never uses the term "submitting attorney" in this context. Also, why would attorneys, but not an unrepresented parent or LEA, need to disclose this information? If OSSE decides against removing this provision, at a minimum, it should be written in a more balanced way which does not so strongly disadvantage parents of children with disabilities. If kept, it should be clear that both parties must disclose financial interests in the outcome of the due process litigation. This would include LEA staff members who testify as a part of their job and receive a salary from the LEA, as well as LEA-contracted evaluators and service providers.

~~3050.4 No later than five (5) business days before a due process hearing, the submitting attorney shall disclose any financial interest of which he or she is aware of involving any participant in the proceeding including a nonpublic school or program or private provider of a service.~~

We have proposed the title to section 3053 be changed from "Resolution Meeting" to "Resolution Process" to mirror the federal regulations.[90] This also provides for a more expansive section which can also refer to resolution settlement and voiding of a

resolution settlement, as discussed in the following paragraph. We have additionally proposed adding language to subsection 3053.1 which requires the resolution meeting be held at a mutually convenient time and location for the parties to the complaint. This would ask the LEA to consider a parent's work schedule when scheduling a resolution meeting. Similarly, it would ask that a parent consider the schedules of the LEA's meeting participants, including teachers' class schedules.

We have proposed adding an additional subsection to 3053.3 out of a desire to define the term "failure to participate" with some specificity. The reason for this is to protect parents against some issues we have seen in recent years, particularly in cases where DCPS is the LEA, where at times they are very rigid in their scheduling of resolution meetings. For example, they may offer very limited options to meet. We do not want parents to be penalized for "failing to participate" where they are responsive to these proposals, but are unavailable at the limited times proposed by the LEA. Similarly, if under extraordinary circumstances a parent is unable to attend the meeting in person (but can attend, for example, by phone), or they have to cancel a meeting at the last minute as a result of a legitimate emergency, the child and parent should not be unduly penalized by an extension of the due process timeline. The current language is very broad, creating a burden which will unequally affect the parent over the LEA.

3053 RESOLUTION ~~MEETINGS~~ **PROCESS**

3053.1 No later than fifteen (15) calendar days after receiving notice of the parent's due process complaint, and prior to the initiation of a due process hearing, the LEA shall convene a resolution meeting with the parent and the relevant members of the IEP Team who have specific knowledge of the facts identified in the due process complaint. **The resolution meeting shall be held at a mutually convenient time and in a mutually convenient location.** The LEA shall not be required to convene a resolution meeting if the parent and the LEA agree in writing to waive the meeting or agree to use the mediation process described in 3049 of this Chapter. The resolution meeting shall meet all of the following standards:

3053.3 Except where the LEA and the parent have jointly agreed to waive the resolution process or to use mediation, when the parent who has filed a due process complaint fails to participate in the resolution meeting, the LEA may request that a hearing officer order a continuance to delay the timelines for the resolution process and due process hearing until the meeting is held.

**(a)** **For the purposes of 3053.3, a parent's failure to participate shall be defined as a parent's failure to respond at all to requests by the LEA to schedule the resolution meeting.**

~~(a)~~ **(b)** Any such request shall include evidence of the LEA's reasonable efforts, as defined in this Chapter, to convene a resolution meeting with the parent.

~~(b)~~ **(c)** The reasonable efforts shall be documented using the procedures in this Chapter.

~~(c)~~ **(d)** The parent shall have an opportunity to respond to the request and related evidence prior to the hearing officer ruling on the request.

Subsections 3054.3 and 3054.4 should be moved under section 3053. 34 CFR § 300.510 outlines the "Resolution Process," which is mirrored by much of section 3053, currently entitled "Resolution Meeting." CFR § 300.510(d) and (e) are nearly identical to subsections 3054.3 and 3054.4, which is why they would be more appropriately included in section 3053 with the rest of the provisions related to the resolution process. By including subsection 3054.4, in particular, under a separate section entitled "Due Process Hearings and Hearing Officer Determinations," it is no longer clear that "settlement" is only referring to a settlement established through the resolution process. Read as it has been proposed by OSSE, this could mean even a settlement executed between the parent and the LEA the day before the scheduled due process hearing may be voided within three days. This defies principals of judicial efficiency and would inject a great deal of uncertainty into the later settlement process. As a separate matter, as it is currently drafted, subsection 3054.4 allows for the voiding, by either party, of a settlement agreement executed by the parent and the LEA. This provision aligns with the federal regulations except that it proposes a deadline of three calendar days when the federal regulation gives a deadline of "three business days."[91]

~~3054.3~~ **3053.5**[92] If a resolution to the dispute is reached at the meeting described in this section, the parent and the LEA shall execute a legally binding agreement that is signed by both the parent and a representative of the LEA who has the authority to bind the LEA, and contains a provision stating that it shall be enforceable in any state court of competent jurisdiction or in a District Court of the United States.

~~3054.4~~ **3053.5**[93] If the LEA and the parent execute an agreement pursuant to this section, either party may void such agreement.

(a) The agreement may be voided within three (3) ~~calendar~~ **business** days after the agreement's execution.

(b) The party who voids the agreement shall provide written notice to all other parties to the agreement.

**Attorneys' Fees**

With respect to section 3056, which addresses Attorneys' Fees, we have proposed two changes. First, to change the title of the section to refer to attorneys in the plural possessive, rather than the singular, to align with the language of the CFR.[94] Second, a suggested timeline of 91 days for submitting the request for reimbursement is more sensible than a suggested timeline of 45 days. The deadline for an appeal of a hearing officer decision (HOD) is 90 days.[95] Parents are entitled to appeal an HOD, even if they have prevailed. Requiring a submission for fees before the timeline expires for the LEA and the parent to file an appeal disadvantages both parties and may result in unnecessary extra work for the LEA, which could be processing that request unnecessarily.

3056 ~~ATTORNEY'S~~ **ATTORNEYS'** FEES

3056.3 Parents who have prevailed against the LEA in administrative proceedings brought in accordance with the IDEA shall submit any request for reimbursement of attorney's fees within ~~forty-five (45)~~ **ninety-one (91)** calendar days of the issuance of the hearing decision in which the child, parent, or guardian prevailed or execution of a settlement agreement requiring the payment of such fees. Failure to meet this timeline may result in delayed processing by the LEA.

**Reasonable Efforts**

We have several recommendations to strengthen and clarify the definition of "reasonable efforts" in section 3099. First, we noted that it only applies to attempts regarding a parent, not to get records from a school or to contact CFSA, DYRS, or OSSE on issues, such as a surrogate parent or records for a child in foster care. The solution that might make the most sense is to define "reasonable efforts" in each place it is used in the regulations. For example, we made recommendations in the section about parent consent for initial evaluations that attempts to gain consent for evaluation should start within five (5) days or referral or suspicion that the child may have a disability, above, so that schools will not "slow walk" a consent to a parent after a referral.

Next, we believe that several common sense additions need to be made to ensure that LEAs are making and documenting attempts to current contacts. In our experience, LEAs unfortunately have been known to "count" a call to a disconnected number as one reasonable attempt or "count" a letter that is later returned to sender. The regulations should make clear that such an attempt at contact cannot justify delayed compliance. Or, as in *DL v. DC*, the LEA characterizes the reason for delayed compliance as the parent if it has made any three attempts. Part of the problem is that there are several different data systems at schools, and the SEDS database (or TOTE for transportation) sometimes do not get updated when the front desk at a school is given a new number or address. Parents generally do not know that new contact information needs to be entered in multiple places by multiple different people. Thus, we recommend that reasonable efforts to communicate with a parent include asking at the beginning of the year how the parent likes to be contacted and checking with the front desk or registration personnel about any updated contacts.

Lastly, the proposed regulations are unreasonable in giving parents only five days to respond to an LEA, by saying that that school must start attempts five days before a proposed action. As we discuss above, many parents have employment where they must request time off weeks in advance for a meeting. For meetings or for other issues like evaluation or reevaluation, parents may want to consult with a resource, such as the Student Advocate, Ombudsman, Parent Training and Information Center, or an attorney, before responding. Schools are given thirty days to do many tasks in these regulations, and parents should have the benefit of as much time for their important decisions and responses.

> **"Reasonable efforts"** means at least three (3) ~~attempts~~ ~~to~~ contacts to the parent **for the particular issue. Reasonable efforts include asking the parent at the beginning of the school year or on transfer what the parent's**

**preferred method of contact is. Contacts mean, for example, that the telephone number is not disconnected, a voicemail was left, the voicemail box does not identify a different owner, certified mail is signed for, or the email address does not bounce back. Reasonable efforts include checking with other personnel, such as teachers, registrars, attendance counselors, or front desk staff for updated contacts, as necessary**. **Contacts must use** ~~using~~ at least two (2) of the following modalities**, one of which must be the parent's preferred modality,** on at least three (3) different dates no fewer than ~~five~~ (~~5~~) **twenty-five** (**25**) days prior to the proposed LEA action:

(a) Telephone calls made or attempted and the results of those calls;

(b) Correspondence sent to the parents and any responses received; or

(c) Visits made to the parent's last known place of residence or place of employment and the results of those visits.

**Miscellaneous Clarifications**

A few times in the proposed regulations, instead of the accepted "general education" setting or classes, "regular" classes or education is used. Since that is an outdated term, "general education" should be utilized.

In subsection 3051.1 about stay put during due process proceedings, this ANPR substitutes "present placement" for "current placement." This may be a substantive change from federal law at 34 CFR § 300.518, and we are unsure why OSSE proposes this change when so many years of case law have clarified the stay put "current placement."

Here are a few other minor clarifications:

3007.7 The LEA shall ensure that:

…

(e) The child is assessed in all areas related to the suspected disability, including, if appropriate:

(1) Academic performance;

(2) Health;

(3) Vision;

(4) Hearing;

(5) Social and emotional **needs** ~~status~~;

(6) General intelligence (including cognitive ability and adaptive behavior);
(7) **Communication needs** ~~Communicative status~~; and
(8) Motor abilities

3009.2 The IEP Team for each child with a disability includes the following additional mandatory IEP Team participants, as appropriate:
…
(e) Other individuals.
(1) At the discretion of the parent or the ~~agency~~ **LEA**, other individuals who have knowledge or special expertise regarding the child, including related services personnel, as appropriate.
…

3018.4 In developing an IEP for a child with a disability, the IEP Team shall consider and document:
(a) The child's strengths and needs.
(b) The concerns of the parent for meeting the educational needs of the child.
(c) The results of the most recent evaluation.
(d) The academic, developmental, **social-emotional,** and functional needs of the child.
(e) The child's need for assistive technology devices and services.

Defining FAPE as Meaningful Educational Progress

This year, the United States Supreme Court issued a groundbreaking clarifying decision in *Endrew F. v. Douglas County School District*, 137 S.Ct. 988 (2017), defining FAPE as meaningful progress in light of the child's circumstances. DC has the opportunity to use these regulations to disseminate the new standard and to ensure that children in special education are truly able to make educational progress. Narrowing the achievement gap, including the wide gap for children with disabilities, is a priority for DC residents, as we saw with the debates about the new ESSA plan and see routinely from DCPS and Public Charter School Board communications. These regulations should work towards our State's shared goal of improved outcomes for children with disabilities. We suggest amending the current definition of "FAPE" at

section 3099 to actualize the standard from *Endrew F*. and DC's value of better outcomes for our children with disabilities:

> "Free appropriate public education" or "FAPE" means special education and related services that adhere to all of the following:
>
> (a) Are provided at public expense, under public supervision and direction, and without charge;
>
> (b) Meet the standards of the State Education Agency, including requirements of this Chapter;
>
> (c) Include an appropriate preschool, elementary school, or secondary school education; ~~and~~
>
> (d) Are provided in conformity with the **child's** individualized education program**; and**
>
> **(e) Result in the child with a disability making meaningful educational progress.**

Additionally, DC law should define "educational progress" as follows, to actualize the *Endrew F*. decision:

> **Educational Documented growth in the acquisition of knowledge and skills, including social/emotional development and life skills, that is commensurate with the student's chronological age, developmental expectations, and individual educational potential.**[96]

**<u>Conclusion</u>**

Thank you for the opportunity to comment and for your engagement with us throughout this process. We look forward to future conversations about ways the Chapter 30 regulations can clarify and strengthen the education that children with disabilities receive. We know that we all share the same goal of improving the achievement and outcomes of children with disabilities. If you have questions, or want to discuss anything, I can be reached at (202) 467-4900 ext. 580 or rmurphy@childrenslawcenter.org.

Respectfully,

Renee Murphy
Supervising Attorney - Policy

[1] Children's Law Center fights so every child in DC can grow up with a loving family, good health and a quality education. Judges, pediatricians and families turn to us to be the voice for children who are abused or neglected, who aren't learning in school, or who have health problems that can't be solved by medicine alone. With 100 staff and hundreds of pro bono lawyers, we reach 1 out of every 9 children in DC's poorest neighborhoods – more than 5,000 children and families each year. And, we multiply this impact by advocating for city-wide solutions that benefit all children.

[2] Proposed § 3018.2.

[3] *See A.K. v. Alexandria City School Board*, 484 F.3d 672, 680 (4th Cir. 2007) (holding that the particular school is to be identified in the IEP because the location influences the nature and amount of IEP services); *Accord*, *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994); *Glendale Unified Sch. Dist. v. Almasi*, 122 F. Supp. 2d 1093, 1107 (C.D. Cal. 2000*); see also DeLeon v. Susquehanna Community School District*, 747 F. 2d 149, 153-54 (3d Cir. 1984) ("touchstone in interpreting section 1415 has to be whether the decision is likely to affect in some significant way the child's learning experience"). *See also*, *Eley v. D.C.*, 47 F.Supp.3d 1, 17 (D.D.C. 2014) ("Courts in this District have observed that " 'educational placement' in the IDEA [means] 'something more than the actual school attended by the child and something less than the child's ultimate educational goals,' and can include both the physical location of educational services and the services required by the student's IEP." ); *K.B. v. DC*, 2015 WL 5191330 (D.D.C. 2015) (deciding that two nonpublic schools were "the same placement" not solely because both were special education schools on the LRE continuum, but because both had "similar disability classifications" of other students, small classes, low student-teacher ratios, therapeutic supports, and focus on college preparation); *Spilsbury v. District of Columbia*, 307 F. Supp. 2d 22, 26-27 (D.D.C. 2004) (noting that "the IDEA clearly intends 'current educational placement' to encompass the whole range of services that a child needs" and the term "cannot be read to only indicate which physical school building a child attends"); *Alston v. District of Columbi*a, 439 F. Supp. 2d 86, 90-91 (D.D.C. 2006) (same); *Laster v. District of Columbia*, 394 F. Supp. 2d 60, 64-65 (D.D.C. 2005) (same). *See also*, *Lunceford v. DC, 745 F.2d 1577 (DC Cir. 1984) (*if a parent can identify a "fundamental change in or elimination of a basic element" of the educational program, that is a change of placement). *See also, P.V. v. School District of Philadelphia*, No. 12-CV-00376, 2013 U.S. Dist. Lexis 21913 (E.D. Pa. Feb. 19, 2013) **(**holding that transferring a class of students with autism from one school to another even without making changes to the educational services was a change in "educational placement" because of the nature needs connected with Autism).

[4] *See, K.P. v. D.C.*, 2015 WL 5540685, *6 (detailing the fundamental aspects of a student's program that were not recorded in her IEP but were "unwritten understandings" of the entire IEP team).

[5] **Bold** means recommended additions, and ~~strikethrough~~ recommended deletions.

[6] We have used the verbatim language in 34 CFR § 300.116(b)(3).

[7] 34 CFR § 300.116(e).

[8] US Department of Education, Office of Special Education Programs, General Supervision: Developing an Effective System: Implications for States, presentation for OSEP Part B Regulations Regional Implementation Meetings, slide 2. Available at http://slideplayer.com/slide/10595408/

[9] *See also*, DC Appleseed (September 2016) *A Place for Every Student: Managing Movement Along the Special Education Continuum in D.C.*, page 16, 20. Available at http://www.dcappleseed.com/wp-content/uploads/2016/09/A-Place-for-Every-Child.pdf (hereinafter, DC Appleseed Report).

[10] DC Code § 38-2561.03(a).

[11] DC Code § 38-2561.02(c).

[12] *See id*, that DC Code refers to private "facilities" as placements, not location assignments.

[13] DC Code § 38-2561.02(c) (private school facilities are called placements, not location assignments, "service locations" or "location of services"); *See* Note 3 citations.

[14] This definition is modelled on California's definition of placement, with some additions because of DC cases on this subject. *See* 5 CCR § 3042(a). If OSSE will not accept our definition, the current state of the law dictates that OSSE must at a minimum make the following change: "Placement" refers to a child's learning environment, **including its classification** by level of restrictiveness, as determined by the child's IEP Team.

[15] Students with disabilities are 1.4 times more likely to be suspended out of school, controlling for race and other factors. OSSE (2016). State of Discipline: 2015-2016 School Year, p. 34. https://osse.dc.gov/sites/default/files/dc/sites/osse/page_content/attachments/2015-16%20OSSE%20Discipline%20Report%20Updated%20Jan%206%202017.pdf. Only **five percent** of students in special education are proficient (Level 4+ on PARCC) in English/Language Arts (ELA) and **six percent** in Math. **60% are scoring at the lowest level** (Level 1) in ELA and 49% in math, compared to 25-30% of all students. *See* Detailed 2015-16 and 2014-15 PARCC and MSAA Achievement Results, OSSE, at https://drive.google.com/open?id=0BxRyVj1IhggyY0JKTnRXOHhUd0U. Only 46% of children with disabilities graduated with a diploma. ED Data Express, District of Columbia State Snapshot, Regulatory Adjusted Cohort Graduation Rate, Children with Disabilities: 2014-15. https://eddataexpress.ed.gov/state-report.cfm?state=DC&submit.x=39&submit.y=16. Only 37% of students with disabilities were enrolled in any post-secondary school or training or employed within one year of leaving high school. District of Columbia IDEA Part B, Local Education Agency Report for Federal Fiscal Year 2014 (July 1, 2014- June 30, 2015). http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/Report%20to%20the%20Public%20Part%20B%20FFY%202014.pdf *See also*, DC Appleseed Report, p. 26 (showing data about achievement gap in DC for students with disabilities is worse than for other jurisdictions).

[16] *See* DC Code § 38-2561.03(a) (stating that the SEA shall cooperate with LEA).

[17] Related to this matching role for OSSE is solving the problem that DC IEPs often do not contain the needed information about what specific factors the student needs in his or her placement. Many DC children experience potentially harmful transfers between nonpublic schools, which may indicate that the initial match was faulty. *See* DC Appleseed Report, p. 25 (research revealed that a majority of children who left nonpublic schools did not transition back to a public school, instead going to another nonpublic school or leaving school).

[18] *See* 5 DCMR A §§ 5001, 5099.

[19] Over a decade of cases support this point that enrollment is not required for DCPS to identify, evaluate, and create an IEP for a resident student. *See District of Columbia v. West*, 54 IDELR 117 (D.D.C. 2010); *James ex. rel. James v. Upper Arlington City Sch. Dist.*, 228 F.3d 764, 768 (6th Cir. 2000), *Hawkins ex. rel. D.C. v. District of Columbia*, 539 F. Supp.2d 108, 115 (D.D.C. 2008), *District of Columbia v. Abramson*, 493 F. Supp. 2d 80,82 (D.D.C. 2007). *See also D.S. v. District of Columbia*, 54 IDELR 116 (D.D.C 2010) ("Because DCPS has an ongoing, affirmative obligation to locate children with disabilities residing in the District and to provide them with a FAPE, a child's school enrollment status has never been a condition precedent to the filing of a due process complaint.").

[20] *See* MySchoolDC Enrollment Form, available at http://www.myschooldc.org/sites/default/files/dc/sites/myschooldc/page/attachments/SY17-18%20MSDC%20Enrollment%20Form_Final_ENG_SPA.pdf. Although are still several LEAs who do not use MySchoolDC for their process, they have some form of an Enrollment form.

[21] Wording from 34 CFR § 300.323.

[22] Referrals can be oral or written, so how a school would know about whether an oral referral from a physician was with parent authorization is unclear; the school could go by the physician's representation.

[23] Order (May 18, 2016), *D.L. v. District of Columbia* (Case No. 05-1437), at para. 2(b).

[24] *See Henry v. Friendship Edison PCS*, 880 F.Supp.2d 5, 7 (D.D.C. 2012*); Adams v. State A/Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999); *Jana K. ex rel. Tim K. v. Annville-Cleona School Dist.*, 39 F. Supp. 3d 584, 593 (M.D.

Pa. 2014); *Scott v. District of Columbia*, 45 IDELR 160 (2006). *See also, Reid v. DC*, 401 F.3d 516, 519 (DC Cir. 2005) (stating that the LEA may not ignore the child's needs nor await parental demands before providing services).

[25] *See* 20 USC § 1414(a)(1)(D); 34 CFR § 300.9 (neither requiring a consent on a form).

[26] *See Board of Educ. of Evanston-Skokie Community Consol. School Dist. 65 v. Risen*, 2013 WL 3224439, 11 (N.D. Ill. 2013) (parents' attempt to initiate the evaluation process was enough to start the clock to complete an IEP meeting within 60 days); *Anello v. Indian River Sch. Dist.*, 355 Fed. Appx. 594 (3d Cir. 2009) (reaffirming the idea that a parental request for evaluation equates implicit consent).

[27] Please see our comments below about what should be required for reasonable efforts in general.

[28] U.S. Department of Education, Office of Special Education and Rehabilitative Services (July 19, 2013). Letter to State Director of Special Education regarding ensuring high-quality education for highly mobile children, p.3. Available at: https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/12-0392dclhighlymobile.pdf (hereinafter, "OSERS Highly Mobile Guidance")

[29] The *South Capitol Street Memorial Amendment Act of 2012*, DC Act 19-344, codified in relevant part at DC Code §§ 2-1515.04 and 4-1301.02, required that all youth who come in contact with DYRS or CFSA receive a behavioral health screening and, if necessary, an assessment within 30 days of initial contact. The results of these screenings and assessments should be provided to schools (unless for some reason the educational decision-maker objects). Having this data provided by CFSA or DYRS should make it easier for the schools to complete any needed evaluations. In many cases, the schools will also have access to additional evaluations performed by the court's Child Guidance Clinic or Youth Forensics Services Division, pursuant to court order.

[30] DC Act 20-486, codified at DC Code § 38-2571.03.

[31] *See* DC Code § 38-2571.03(3).

[32] In the alternative, if OSSE does not take our suggestion, the requirement for new assessments could be a presumption that the LEA could overcome for good reason. At the very least, the LEA should be required to provide Prior Written Notice to the parent when it determines that re-evaluation does not require new assessments, and the regulations should be clear that reevaluation is not solely to determine whether the child is a child with a disability, but also to determine present levels, educational needs, and any needed additions or modifications. Currently, SEDS does not generate a PWN in that circumstance, so LEAs are consistently routinely violating the requirement that comes from 34 CFR 300.305(d) to notify the parent of the decision and the right to request assessments.

[33] Current DCMR does not contain this qualifier that the LEA determines when reevaluation was warranted, and it is possible that a hearing officer will ultimately make that determination, so we recommend removing this.

[34] Emotional Disability is the preferred terminology, and we suggest that OSSE adopt it.

[35] *See* OSEP Memorandum to State Directors of Special Education, Preschool/619 Coordinators, *Eligibility Determinations for Children Suspected of Having a Visual Impairment Including Blindness under the Individuals with Disabilities Act*, May 22, 2017, page 2.

[36] *See* 20 U.S.C. § 1401(3)(B).

[37] Order in *DL v. District of Columbia* (Case No. 05-1437), dated May 18, 2016, paragraph 14.

[38] Studies have shown that in states that have adopted a broad definition of developmental delay the small number of additional children found eligible for special education "simply were identified at younger ages than they otherwise would have been and that the impact on the overall number of children eventually served would be negligible." DEC (April 2009) *Developmental Delay as an Eligibility Category,* A concept paper for the Division of Early Childhood of the Council for Exceptional Children, p. 2. Available at http://www.dec-sped.org/position-statements.

[39] *See, e.g., Doe v. Cape Elizabeth Sch. Dist*., 832 F. 3d 69 (1st Cir. 2016), *citing Venus Indep. Sch. Dist. v. Daniel S. ex rel. Ron S*., No. CIV.A. 301CV1746P, 2002 WL 550455, at *11 (N.D. Tex. Apr. 11, 2002) (observing that

"need" under the IDEA is not "strictly limited to academics, but also includes behavioral progress and the acquisition of appropriate social skills as well as academic achievement"); *Mary P. v. Ill. State Bd. of Ed.,* 23 IDELR 1064,1068 (N.D. Ill 1996); *M.H. v. N.Y.C. Dep't of Educ.,* 685 F.3d at 224 *(quoting Gagliardo v. Arlington Cent. Sch. Dist.,* 489 F.3d 105, 107-08 (2d Cir. 2007)). *See also* Robert A. Garda, Jr., Untangling Eligibility Requirements Under the Individuals with Disabilities Act, 69 Mo. L. Rev. 441, 499 (2004) (observing that "attendance and behavior are educational performance that must be addressed despite good academic performance" under the need inquiry because "[t]hey are not merely means to the end of academic achievement, but are themselves educational ends").

[40] Maine's regulations provide a possible model for the definition. http://www.maine.gov/doe/specialed/laws/chapter101.pdf, pp. 4-5.

[41] *See* 34 CFR § 300.9, Comments, 71 Fed. Reg. 56551 (2006). In addition, note that the school is required to start developing the IEP "within 30 days of the determination that the child needs special education and related services," regardless of whether or not the parent has given any broad consent to services. 34 C.F.R. § 300.323(c)(1).

[42] *See, e.g., Colbert County Board of Education v. B.R.T.*, 2008 WL 11305871, 6 (N.D. Ala. 2008) ("After a suitable IEP is developed, but before it can be implemented, the parent of the child must give informed consent. 20 U.S.C. § 1414(a)(1)(D)(i)(II)"). *See also M.M. v. Lafayette Sch. Dist.,*767 F.3d 842, 852 (9th Cir. 2014) (finding that the school's failure to provide the child's parents with the information beyond the IEP contencts, data from the child's Response-to-Intervention ("RTI") data "prevented [the parents] from giving informed parental consent for both the initial evaluation and the services C.M. would receive."). *Accord Hudson v. Pittsburgh United Sch. Dist.*, 850 F.3d 996, 1008 (9th Cir. 2017) ("The School District failed to disclose assessments, treatment plans, and progress notes kept by Lincoln, which deprived L.J.'s mother of her right to informed consent"); *Plainville Bd. of Educ. V. R.N. ex rel. H.*, 2012 WL 1094640 (D. Conn. 2012) (finding that providing the parents "with only general information" was "insufficient to satisfy the informed consent requirement").

[43] American Occupational Therapy Association. (2015) *Fact Sheet: Addressing Sensory Integration and Sensory Processing Disorders Across the Lifespan*, AOTA: Bethesda, Maryland. https://www.aota.org/~/media/Corporate/Files/AboutOT/Professionals/WhatIsOT/CY/Fact-Sheets/FactSheet_SensoryIntegration.pdf

[44] 34 CFR § 300.300(d)(3).

[45] American Occupational Therapy Association. (2015) *Fact Sheet: Addressing Sensory Integration and Sensory Processing Disorders Across the Lifespan*, AOTA: Bethesda, Maryland. https://www.aota.org/~/media/Corporate/Files/AboutOT/Professionals/WhatIsOT/CY/Fact-Sheets/FactSheet_SensoryIntegration.pdf

[46] As a note, we appreciate that the proposed regulations make clear at 3014.3 and.4 that the assistive technology device should not have to be provided by the parent and that it can go into the home or community to meet the child's needs.

[47] *See Rockville Centre Union Free School Dist.*, 34 IDELR 76 (NY SEA 2000) (ordering district to evaluate effect of oral motor delays on child with disability's eating at school mealtime); *In re Student with a Disability*, 53 IDELR 247 (NY SEA 2009) (affirming IEP that contained goals for oral-motor skills and chewing addressed during speech-language therapy). See also, *Letter to Williamson*, 211 IDELR 419 (OSEP 1986). *See also,* American Speech Hearing Association, *Pediatric Dysphagia Practice Portal*, section on Treatment, available at http://www.asha.org/PRPSpecificTopic.aspx?folderid=8589934965&section=Treatment.

[48] *See* Corrected Memorandum Opinion & Findings of Fact and Conclusions of Law, dated June 21, 2016, *D.L. v. DC*, paras. 155-156.

[49] *See Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1027 (10th Cir. 1990).

[50] 872 F.Supp. 1421, 1435 (D. Md. 1994). *See Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1027 (10th Cir. 1990) (indicating that additional factors such as the educational structure at home, child's rate of progress, and child's vocational needs are ESY considerations.)
[51] This is modelled after Maryland's regulations, COMAR § 13A.05.01.08(B)(2), and the vocational factor from Delaware, 13 DE Admin. Code § 923.6.5.4. The list of disabilities is based on Pennsylvania law, 22 Pa. Code § 14.132.
[52] Virginia's regulations provided a model for this suggested language. *See* 8 VAC § 20-81-100(J).
[53] "Least restrictive environment requirements do apply when an IEP is developed for extended school year services." *Letter to Myers* (August 30, 1989), 213 EHLR 255.
[54] *See Reusch v. Fountain*, 872 F.Supp. at 1435.
[55] *See* Conn. Regs. § 10-76d-3(b).
[56] *See* COMAR § 13A.03.05; 14 Del. Admin. Code § 930; Reg. Conn. State Agencies § 10-76d-15; 8 NYCRR § 200.6(h)(8)(i); N.J.A.C. § 6A:16-10.2.
[57] *See* CVR § 22-000-006-2363.11(a)
[58] *See* 71 Fed. Reg. 46,681 (August 14, 2006).
[59] OSERS Highly Mobile Guidance, p. 4.
[60] Wording pulled from 34 CFR § 300.323.
[61] Three business days is a reasonable amount of time to send a request for records, similar to the three days that the DC Council gave schools to document an oral referral.
[62] *See* 5 CCR § 3024, Cal. Educ. Code 56043.
[63] The deadline to upload in two days in the existing policy, and we do not see a reason it should take 10 days to upload documentation. In fact, the longer an LEA waits to upload something, the better chance they will just forget altogether.
[64] Georgia provides clear guidance to its schools stating these responsibilities. *See* Georgia Superintendent of Education, Special Education Rules Implementation Manual (2012).
[65] 20 USC § 1414(d)(2)(C)(i)(II)
[66] OSERS Highly Mobile Guidance, p. 3.
[67] *See* Proposed 5A DCMR §§ 3027.1 (b) & (c) which requires the IEP to include a statement of the agency's responsibilities to link the child to services before they leave the school setting and, where applicable, an articulation of the basis for determining that a child does not need an IEP. Note that it would be even further protective if the DCMR required that determination to be reviewed annually. *See* also Proposed 5A DCMR § 3027.4(a), which requires the LEA to obtain information about specific transition services from a service providing agency when the agency make the LEA aware that it cannot attend the IEP meeting. However, this subsection does not require the LEA to share that information with the student or team.
[68] *See* Proposed 5A DCMR §§ 3027.5 and 3027.6. We note that it would be helpful for the graduation plan to also address how the child with a disability will complete community service requirements.
[69] *See* Proposed 5A DCMR § 3027.1 (a)(i).
[70] *See* http://www.ossesecondarytransition.org/.
[71] *See* NCSET Information Brief, Volume 4, Issue1 (2005) at http://www.ncset.org/publications/viewdesc.asp?id=1928.
[72] Center for Technology and Education. John Hopkins University School of Education. http://olms.cte.jhu.edu/olms2/179191; *See also* COMAR 13A.03.02.09D.
[73] Center for Technology and Education. John Hopkins University School of Education. http://olms.cte.jhu.edu/olms2/179191; *See also* COMAR 13A.03.02.09D(2).
[74] http://www.nadtc.org/wp-content/uploads/634712454477172250_Competencies_for_the_Pra.pdf. Easter Seals Project Action, Association of Travel Instruction (www.travelinstruction.org), , Consortium for the Educational Advancement of Travel Instruction (http://www.nadtc.org/resources-

publications/transportation-education-curriculum/)and National Aging and Disability Transportation Center (http://www.nadtc.org/resources-publications/transportation-education-curriculum/) provide wealth of information pertaining to the qualifications, demonstrative skills, training, and certificates that travel trainers should possess.

[75] *See* 22 Pa. Code§ 14.105(a); Ga. Comp. Rules & Regs. § 502-2.18(2);

[76] Minnesota Statute § 125A.08(c); Ga. Comp. R & Regs. § 505-3-.07.

[77] *See* R.I. Admin. Code § 21-2-54:E 300.502(b)(2). Massachusetts requires filing within 5 days if the LEA does not want to fund the IEE. *See* 603 CMR § 28.04(5)(d).

[78] OSSE (2016). State of Discipline: 2015-2016 School Year, p. 34. Retrieved from https://osse.dc.gov/sites/default/files/dc/sites/osse/page_content/attachments/2015-16%20OSSE%20Discipline%20Report%20Updated%20Jan%206%202017.pdf

[79] U.S. Department of Education, Office of Special Education and Rehabilitative Services. (August 1, 2016). Dear Colleague Letter on Ensuring Equity and Providing Behavioral Supports to Students with Disabilities. Retrieved from https://www2.ed.gov/policy/gen/guid/school-discipline/files/dcl-on-pbis-in-ieps--08-01-2016.pdf

[80] *See* Haw. Admin. Rules (HAR) § 8-61-13; 22 Pa. Code § 14.143.

[81] 34 CFR § 300.530(d)(5).

[82] 34 CFR § 300.531.

[83] Proposed § 3043.8; *see also* 34 CFR § 300.530(g).

[84] "Controlled substance" as found in D.C. Code § 48-901.02; "Illegal drugs" as found in D.C. Code § 48-1001; "Serious bodily injury" as found in D.C. Code § 38-271.01(11A); "Weapon" should be the same as the term "dangerous weapon" at 18 USC § 930(2)(g).

[85] 34 CFR § 300.530(h).

[86] Proposed § 3043.10; *see* 34 CFR § 300.530(e)(1).

[87] 34 CFR § 300.530(e)(3).

[88] We realize this proposed provision came from federal regulations, but OSSE can be more protective of the parent's and children's rights than federal regulations. Given the concern that an LEA might choose not to move forward with evaluation, mandating that the LEA contact OSSE and CFSA in the situation where a foster child's parent cannot be found is more protective.

[89] *See* 34 CFR § 300.512(b).

[90] *See* 34 CFR § 300.510.

[91] *See* 34 CFR § 300.510(e).

[92] Per the above comments, 3054.3 and 3054.4 are both sections which pertain to the Dispute Resolution Process. As such, they should be included in proposed section 3053, not proposed section 3054.

[93] *Id*.

[94] *See* 34 CFR § 300.517.

[95] 34 CFR § 300.516(b).

[96] This proposed definition is loosely based on Massachusetts' definition of "educational progress" at 603 CMR § 28.02(17).