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Via email: osse.publiccomment@dc.gov

May 21, 2018

Elisabeth Morse
Assistant Superintendent for Policy, Planning, and Charter Schools
Office of the State Superintendent of Education
1050 First St NE, 5th floor
Washington, DC 20002

Re: Comments on the Notice of Proposed Rulemaking about Special Education

Dear Ms. Morse:

Thank you for the opportunity to comment on the Notice of Proposed Rulemaking regarding changes to sections of Chapter 30 of Title 5-A of the regulations, which cover special education . I am submitting these comments on behalf of Children's Law Center (CLC).[1] With more than 100 staff and hundreds of pro bono lawyers, Children's Law Center reaches 1 out of every 9 children in DC's poorest neighborhoods – more than 5,000 children and families each 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.

Thank you for the opportunity to comment on these sections of the regulations and the extended 45-day period for comments. We thank the Office of the State Superintendent of Education (OSSE) for continuing to work on the full revision of the chapter. We hope that OSSE will spend time in the coming months collaborating about the next round of proposed rulemaking with us, other advocates, parents, public charter school leaders in special education, and your Office of General Counsel and Office of Attorney General attorneys who review the regulations. We suggest this because we know that we are suggesting some revisions and clarifications that are similar to some comments you are receiving from a few school leaders. We believe that working

together on some thorny issues in this proposed rulemaking and in other sections that we expect to be revised in the future would be the best way forward.

We thank you and your team members for all the hard work on this proposed rulemaking. We suggest the changes and clarifications below, and have also attached a redline document:

Early Intervention

The Council's *Fiscal Year 2019 Budget Support Act* is moving forward with including the fiscal effect of the Early Intervention expansion to children with a 25% delay in one domain in the approved Budget and Financial Plan, and has a clear start date of July 1, 2018 in the Act. We urge OSSE to update the Final Rulemaking to match the language that will soon be in the DC Code.

Special Education

Child Find, FAPE, Residency, and Enrollment

OSSE as the State Education Agency has the obligation to ensure Child Find, an offer of free appropriate public education (FAPE), and provision of FAPE for all DC residents age 3-22, whether or not the child is enrolled in a DCPS school, a Public Charter School (PCS), or no District school. The District has established DCPS as the geographic LEA "of right" for all DC residents. For that reason, and because OSSE only has authority over District LEAs, in order for the District's policies to accomplish Child Find as per the IDEA, DCPS must have clear responsibility for all DC resident children who are not enrolled in a different District PCS LEA. In the past, DCPS has argued that the student needed to complete the entire registration/enrollment process, which involves a particular DCPS 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.[2] 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 who is not enrolled in a different DC LEA for the current year in order for DCPS to have all special education responsibilities.

OSSE adds additional clarity by using the phrase "custody of the District of Columbia Child and Family Services Agency" when specifying LEAs' duties, and that phrase should be used for Child Find, offers of FAPE, and provision of FAPE. OSSE should also ensure the same clarity for the highly mobile students in the care of the Department of Youth Rehabilitation Services (DYRS), or Court Social Services.

OSSE should be consistent in the wording in all subsections of these special education regulations that touch on student residency with the recently finalized rules in Title 5-A of Chapter 50, which use "residency" and "resident student."[3] In support of such clarity, we have also requested that the term "ward" be included as part of the term "resident" as it is already included in the term's definition in Title 5-A. Clarity surrounding the term "resident" will help against confusion about students placed in psychiatric residential treatment or group homes out of state (whether placed via IDEA, Medicaid, insurance, CFSA, DYRS, or Court Social Services). Although current law and federal guidance is technically clear that they remain the responsibility of the DC LEA, since the student never intends to stay in the other state and is thus not a resident of that other state, this is a technical subject that OSSE should make clearer. In addition, 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 CFSA or DYRS or Court Social Services are highly mobile students in the LEA, even if they are not enrolled.

This proposed rulemaking uses "may be" rather than "are" children with disabilities, in the definition of "Child Find." We agree and so we suggest that "are" be changed to "may be" in all lines about Child Find, to be consistent and because 34 CFR § 300.111(c)(1) specifies that "Child Find" must apply to children who are "suspected" of being children with a disability.

The 2017 Memorandum of Agreement between DC Public Schools, OSSE and DC Department of Corrections (DOC) specifies that DOC must, "in collaboration with DCPS, ensure that the District of Columbia meets its child find obligations under the IDEA regarding the identification of students with disabilities..." This addition would be clear about the requirement in these regulations.

We recommend the following:[4]

3002.1

(a) The LEA shall make a free appropriate public education (FAPE) available to each child with a disability, ages three (3) to twenty-two (22), **even if they are advancing from grade to grade,** who ~~resides in~~ **is a resident of**~~, or is a ward of,~~ the District including:

(1) a ward of the District;

(2) children who are suspended or expelled**; or**

(3) highly mobile children, such as migrant or homeless children **or children in the custody of the District of Columbia Child and Family Services Agency, Department**

of Youth Rehabilitation Services (DYRS), or Court Social Services, ~~even if they are advancing from grade to grade~~.

(b) For DCPS, the responsibility to make FAPE available extends to all children with disabilities between the ages of three (3) and twenty-two (22) years old, who are residents of the District of Columbia but are not enrolled **(as described in 3002.1(c)) for the current school year** in a **District** public charter school LEA, ~~and~~.[5] **DCPS's responsibility also extends to** children with disabilities attending private and religious schools in the District of Columbia, pursuant to the requirements of IDEA.

(c) **For students enrolling for the current school year or u**~~U~~nless otherwise provided in § 3002.9, a public charter school LEA's obligation to determine eligibility for special education services**, offer and make FAPE available,** or to provide special education services on an existing IEP is triggered upon completion of the registration of the student in the Student Information System (SIS) by the school upon receipt of required enrollment forms and letter of enrollment agreement, in accordance with subparagraph (4) in the definition of enrollment in 5A DCMR § 2199.

3002.6 Each LEA and public agency shall implement child find policies and procedures to ensure that:

(a) All children with disabilities between the ages of three (3) and twenty-two (22) years of age enrolled in the LEA, including children with disabilities who are homeless, children who are in the custody of the District of Columbia Child and Family Services Agency or ~~committed to~~ the District of Columbia Youth Rehabilitation Services Agency **or placed by Court Social Services or Department of Corrections**, children who are making progress from grade to grade, and highly mobile children, who ~~are~~**may be** in need of special education and related services, are identified, located, and evaluated, **regardless of the nature or severity of their disabilities**;[6] and ...

3002.7 The District of Columbia Public Schools shall also implement child find policies and procedures to ensure that:

(a) All children with disabilities between three (3) and twenty-two (22) years who are residents of the District of Columbia but are not enrolled in a **District** LEA, **including children with disabilities who are homeless, children who are in the custody of the District of Columbia Child and Family Services Agency or the District of Columbia Youth Rehabilitation Services Agency, and highly mobile children such as those placed by Court Social Services,** and who ~~are~~**may be** in need of special education and related services, are identified, located, and evaluated; and …

In section 3002.9, the proposed regulations are attempting to clarify when an LEA has to make FAPE available (by having an IEP ready and making services available), however it creates more confusion and contradicts correct statements in other parts of the proposal and in the Injunction in *DL v. DC*. Specifically, the lead-in phrase about responsibility for Child Find and FAPE beginning at registration in the Student Information System is incorrect as to DCPS, as discussed in above proposed regulation sections. The lead-in for section 3002.9 should be struck and a new subsection (a) modified to be clear as we suggest.

Secondly, as noted by class counsel for *DL*, "the *DL* Injunction (p. 5) requires that "the transition begins no less than 90 days prior to the child's third birthday" and that "there is no disruption in services between Part C and Part B services (that is, all special education and related services in the child's IEP must commence by the child's third birthday)." If a child's third birthday falls on a weekend or holiday, the *DL* Injunction (p. 5) explains that services should begin on the next school day. To avoid any confusion or unnecessary delays, and to acknowledge that children who qualify for Extended School Year (ESY) services will receive those services, we request that Proposed Section 3002.9(a) be amended."

However, we acknowledge that there is a small group of children who will be enrolled for prekindergarten for the next school year in a PCS and will turn three during that spring and summer. These regulations need to make a decision about who will evaluate, create the IEP, and offer services until the start of the next school year. The most coherent system for this group of children, which will best ensure that children's evaluations are completed before the start of the school year, is to have a centralized early childhood evaluation center complete the evaluations and initial IEP. Currently, that is DCPS's Early Stages Center. Placing the evaluations and IEP development in DCPS will be consistent with the rules about older children, who are DCPS's responsibility if not enrolled in District PCS during the current year. It will ensure the greatest continuity about

the start of evaluations and timely finishing those evaluations for parents and children who are transitioning from Part C or who are age 3 or 4 and not currently attending a PCS. It also solves logistical challenges that most PCS will not have a seat in their prekindergarten program to offer during the current school year, because of enrollment ceilings mandated by the Public Charter School Board and funding. For many or most of these children, the best option for continued services between spring and the start of the school year is the extended IFSP option available under DC's Part C Early Intervention Program, so we recommend including some language that references that possibility.

We recommend the following regulatory language, partially based on wordings in the previous Advanced Notice of Proposed Rulemaking:

3002.9

~~The LEA's obligation to make FAPE available to a child with a disability commences upon completion of the child's registration, in accordance with subparagraph (4) in the definition of enrollment in 5A DCMR § 2199, except that~~:

(a) If a child is enrolling in an LEA for the current school year, the LEA's obligation to make FAPE available to a child with a disability commences upon completion of the child's registration, in accordance with subparagraph (4) in the definition of enrollment in 5A DCMR § 2199, **except DCPS, which is responsible for Child Find, making FAPE available, and provision of FAPE for children who are not enrolled in accordance with 3002.1(a) and (b), 3002.6, and 3002.7.**

(b) For children transitioning from early intervention services under IDEA Part C to special education and related services under IDEA Part B, the LEA shall ensure a smooth and effective transition pursuant to 34 CFR § 300.124, including ensuring that:

(1) **The transition begins no less than 90 days prior to the child's third birthday;**
(2) The LEA participates in transition planning conferences~~, as appropriate~~;

(3) The LEA has developed an IEP by the child's third birthday, including:

A. For public charter school LEAs, the LEA has developed an IEP by the third birthday of any child who is ~~currently~~ enrolled **for the current school year** in the public charter school LEA or **participated in the IEP development and made plans to provide FAPE on the first day of the school year for a child who** has completed the registration process for the upcoming school year; or

B. For DCPS, the LEA has developed an IEP by the third birthday of any child who is a resident of the District of Columbia who is not enrolled in a public charter school LEA **for the current school year**; and

(4) The LEA is implementing the IEP by the child's third birthday **including ensuring the provision of all special education and related services in the child's IEP by the child's third birthday, unless the parent has chosen an extended Individualized Family Services Plan in the Early Intervention Program,** or, if the third birthday occurs on a non-school day ~~**or during the summer**~~, **by the subsequent school day.** ~~**within a timeframe established by the state education agency (SEA), including ensuring the provision of all special education and related services in the child's IEP.**~~ **The "subsequent school day," in the case of a child whose birthday falls during the summer is either the first day of the next academic year or, if the child qualifies for Extended School Year services, it will be the subsequent day of Extended School Year services. Any necessary transportation services, which are related services, shall be provided in accordance with this timeline.**

(c) For all other children not covered by Subsection (a) or (b) transferring between LEAs between school years:

~~(1) The new LEA's obligation to make FAPE available begins on August 1 or the first day of the school year, whichever is earlier; and~~

(1) **The new LEA's obligation to plan for the student's FAPE begins on July 1 and the responsibility to make FAPE**

available and 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;**

(2) The previous LEA's obligation to make FAPE available ends on July 31 or the last day of summer extended school year services, whichever is later; and …

Identification of Children and Triggers to Evaluation

As discussed above, the responsibility and challenge of Child Find is locating *all* children with disabilities. For that reason, meeting that responsibility requires listening to all possible sources about the possibility that the child needs special education and has a disability. One source that should be a referral source is the student themselves, regardless of whether educational rights have transferred due to age. Some children and youth, especially around mental health challenges, may disclose to a school staff member before their parent, and Child Find should be triggered. Also, federal law states that a public agency may refer a child for evaluation. Thus, the proposed regulations, need some changes:

3004.1 The LEA shall treat a referral from the following individuals as a request for initial evaluation in accordance with 34 C.F.R. §300.301(b):

(a) The child's parent;

(b) The child~~, provided that educational rights have transferred to the child~~; ~~and~~

(c) An employee of the LEA the child is enrolled in, who has knowledge of the child; **and**

(d) **A public agency.**

We are pleased to see the list of additional referral sources, such as pediatricians and other district agencies for children under the age of six at section 3004.2 in response to the Injunction in *DL v. DC*. We agree with class counsel in *DL* that "many of the Court's conclusions equally apply to older children. It is not apparent why, for example, the

District would treat a referral from a pediatrician from a five-year-old as an initial evaluation, but would not do so for a six-year-old." We are concerned that it does not make sense to communicate to LEAs that referrals by those sources are only triggers for evaluation for children under the age of six. The concept of Child Find is to identify and evaluate all children with disabilities, not just those for whom a request for evaluations is received from a limited list of sources. The regulations should make it clear, as does established case law, that LEAs are responsible to evaluate when they have information that should cause them to suspect a disability in a child, such as referrals from the sources listed. We recommend the following clarifications:

3004.2 ~~For children under the age of six (6), t~~**T**he LEA shall also treat a referral from the following individuals, as a request for initial evaluation in accordance with 34 C.F.R. § 300.301(b):

(a) Pediatrician or other medical professional, including physicians, hospitals, and other health providers;

(b) Child development facilities, including day care centers, child care centers, **child development homes, prekindergarten programs in community-based organizations,** and early childhood programs;

(c) District agencies and programs, including IDEA Part C programs;

(d) Community and civic organizations;~~ and~~

(e) Advocacy organizations;

(f) **Private and parochial schools; and**

(g) **Other individuals**.

We are concerned that the addition of 3004.3, discussing how to determine if a child is suspected of disability, is confusing. To the extent that OSSE is encouraging LEAs to screen children of all ages as routine practice, we would support that practice. However, we have concerns that this provision inserted after the information about referral sources, will lead LEAs to think that they can screen instead of evaluate after receiving a referral. In addition, consultation with the parent after a referral or after the school begins to suspect disability is already required by the provisions requiring

parental consent to evaluate. We suggest deletion of this provision for now, and revising and revisiting this in the larger extended rulemaking process.

Also, we understand that OSSE's policy under the IDEA is that the LEA shall never delay or deny a timely initial evaluation to conduct screenings or implement pre-referral interventions. Since a timely evaluation under the DC Code and the IDEA does not have exceptions for screening and intervention, the word "unreasonably" must be deleted from section 3004.4.

Thank you for including the provision that requires that the parent be notified when the school receives a referral from an outside referral source. The regulations should be clarified so that parents will be notified of referrals from sources contained in 3004.1 as well, since several sources there are not the parent. Also, a reasonable deadline for that notification should be included.

> 3004.5 The LEA shall notify the parent of receipt of any referral received under § 3004.**1 and .**2. This notification **shall occur within three (3) business days and** shall include information regarding:
>
> (a) The initial evaluation process;
>
> (b) Parental consent requirements
>
> (c) **A model parent consent form**; and
>
> (d) Resources the parent may contact for assistance.

As a last point regarding referrals to evaluate for this proposed rulemaking, we support class counsel in *DL v. DC* in their requests that the regulations contain "the following requirement from the *DL* Injunction (p. 7): '**The District shall * * * upon obtaining consent of the parent or guardian, provide feedback to the referral source regarding the outcome of the referral in a timely manner.**' We again ask that these requirements be included in the regulations."

Requirements about IEPs

We recommend that the regulations make clear that an IEP team should be available throughout the calendar year. Summer evaluations, IEP development, and making an appropriate IEP for the first day of school have been a historical challenge for children and parents. These regulations should be a place to make this existing law clear.

3002.3 (b) The LEA shall ensure that an IEP team is available **throughout the year** to fulfill IEP team responsibilities as required by this chapter.

We agree with the Class Counsel in *DL v. DC* that changes to the proposed regulations are needed at Section 3002.3(d) because 34 C.F.R. 300.323(a) states that "[a]t the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in § 300.320." 34 C.F.R. 300.323(c)(2) states that "Each public agency must ensure that * * * (2) As soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP."

3002.3(d) The LEA shall ensure that special education and related services are provided to an eligible child with a disability in accordance with the child's IEP**, as soon as possible following the development of the IEP, unless the child is transitioning from Part C to Part B services, in which case the timeline is in Section 3002.9(a)(3). At the beginning of each school year, each LEA must have in effect an IEP for each child with a disability.**

Meaningful Educational Progress

In 2017, 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 regulations to disseminate the 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. As a result of *Endrew F.*, the provision in 3002.3(f) is outdated and should be revised. For this proposed rulemaking, we suggest deleting that provision.

~~3002.3(f) The LEA shall make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP.~~

We recommend the following definitions for the future full revision of Chapter 30 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.

"Educational progress" means 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.[7]

Evaluation and Re-Evaluation

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. The section about reasonable efforts to obtain parental consent for evaluation must be revised, because it contradicts provisions in the *Enhanced Special Education Services Act of 2014* [8] and also allows LEAs to wait longer than is reasonable to start trying to contact a parent about consent to evaluate. The *Enhanced Special Education Services Act* requires that reasonable efforts to obtain consent occur within 30 days after a child is referred for evaluation, not within the longer period that is allowed for completing the entire initial evaluation. In addition, allowing an LEA to wait two weeks into their 30 day period to make any attempt to contact the parent about consent to evaluate, almost half of a 30-day calendar month, is too much of that period to be reasonable.

Next, we believe that several common sense additions need to be made to ensure that LEAs are making and documenting attempts to *current* contacts for the parent. The proposed regulations do not contain the "common sense" requirements when the contact method is clearly disconnected or not operable, as referred to in *DL v. DC*. 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 real-life problem for parents and school personnel is that there are several different data systems at schools, and the SEDS database sometimes does 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 checking with the front desk or registration personnel about any updated contacts.

Also, the *Fiscal Year 2019 Budget Support Act* is moving forward with including the fiscal effect of the 60-day initial evaluation deadline in an approved Budget and Financial Plan, and has a clear start date of July 1, 2018. The regulations should be updated to conform to the *Fiscal Year 2019 Budget Support Act*.

3005.2

(a) Beginning July 1, 2017~~8~~, ~~or upon the inclusion of the fiscal effect of the subsection in an approved budget and financial plan as certified by the District of Columbia Chief Financial Officer and published in the *District of Columbia Register*, whichever occurs later,~~ an LEA shall assess or evaluate a student who may have a disability and who may require special education services within sixty (60) days from the date that the student's parent or guardian provides consent for the evaluation or assessment. The LEA shall make reasonable efforts to obtain parental consent within thirty (30) days from the date the student is referred for an assessment or evaluation.

(b) The LEA shall document reasonable efforts to obtain parental consent. Reasonable efforts include at least three (3) documented attempts using at least two (2) of the following modalities on at least three (3) different dates**. Reasonable efforts include common sense regarding phone numbers, email addresses, or street addresses that are inoperable, disconnected, result in returned correspondence, or otherwise do not work, meaning that ineffective attempts to the same failed modality are not**

reasonable to document as attempts. Reasonable efforts include checking with other personnel, such as teachers, registrars, attendance counselors, or front desk staff for updated contacts, as necessary:

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

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

(3) Visits made to the parents' home or place of employment and the results of those visits.

(c) Reasonable efforts for the purposes of obtaining parental consent for initial evaluation shall begin no later than ~~ten(10)~~ **five (5)** business days from the referral date **or of the suspicion that the child may have a disability** and be completed no later than **twenty-five (25) days after the child is referred for assessment or evaluation or the child is otherwise suspected of having a disability and needing evaluation.** ~~five (5) days prior to the deadline for the initial evaluation~~.[9]

A second issue is in section 3005.4: as part of any evaluation, it makes sense to consider relevant information that the LEA has from the parent, any medical provider, relatives, or agencies, not just evaluations for children under the age of 6. We suggest the following changes:

3005.4 As part of an initial evaluation (if appropriate) and as part of any reevaluation, the IEP team, including other qualified professionals, as appropriate, shall: …

(b) Review~~, for children under the age of six (6)~~:

(1) Relevant information provided by any agency, medical professional, service provider, child care provider, early childhood program, or relative who may have relevant information regarding the child; and

(2) **For children under the age of six (6),** IDEA Part C assessments and other related data.

Extended School Year

Thank you for including in this proposed rulemaking the clarifying language that ESY can and should be determined for children in their initial IEPs. 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 for FAPE. 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.[10] Courts have found that predictive data and opinion should be used to decide ESY.[11] 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.[12]

3017.2 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.[13]

In the alternative, we echo the class counsel in DL v. DC "Nonetheless, if the District's ESY standard continues to focus exclusively on "critical skills," we ask that "critical skills" be defined, either in Section 3017.2 or in the definitions section." The definition in the current ESY policy is workable, with the addition of the portion shown in bold below so that children are not denied services because the LEA has not completed needed evaluations or plans: "A critical skill may be an academic skill, such as reading, or a non-academic skill that has educational impact, such as a fine motor skill. Non-academic skills also include social, functional, and behavioral skills that have educational impact. ESY eligibility decisions based on the identification of a critical skill that is related to behavior must reference and build upon the student's behavioral intervention plan (BIP) and functional behavior assessment (FBA) **if such documents have been prepared**."

As commented by *DL v. DC* class counsel, it is not apparent why Proposed Sections 3016.3 through 3016.4 from the Advanced Notice of Proposed Rulemaking (ANPR) in 2017, which relate to ESY services, are not included in the April 2018 NPR and we urge their inclusion in final rulemaking. We include in this clarifications we commented to the ANPR as well. One, that 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. Two, we commended OSSE for adding subsection 3016.4 in last summer's proposal, and urge its inclusion now, specifying that eligibility for ESY should not limit access to summer school that a student may need in order to earn credits. The new regulations should also remind 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.[14]

3017.3 **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.[15]

3017.4 **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.[16] 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:[17]

3017.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.

Public Awareness for Child Find

The piece of the regulations about how both DCPS and Public Charter Schools conduct public awareness needs a small clarification to ensure that PCS inform people about how to request special education services.

3002.8 DCPS shall conduct public awareness activities sufficient to inform parents and the community regarding the availability of special education and related services and the methods available to request those services and programs. District public charter school LEAs shall conduct similar awareness activities to inform parents and community members that interact with the public charter school LEA of the availability of special

education and related services **and the methods available to request such services**.

Gender Inclusion

We recommend, wherever the regulations use a limited set of gender specific pronouns, such as "she or he," "her or him," or "hers or his," that this wording be replaced by a gender neutral pronoun such as "they," "their," or "theirs," or replaced by gender neutral language such as "the child" to demonstrate inclusion of students with nonbinary gender identities.

Miscellaneous Other Suggestions

We have also included a few other recommended clarifications in our redline.

Thank you for your attention to our comments. We will reach out to discuss our suggestion about a collaborative process and about our comments. If you have questions, you can contact me at rmurphy@childrenslawcenter.org or (202) 467-4900 ext. 580.

Sincerely,

Renee Murphy
Supervising Attorney - Policy

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[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 advocate 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 more than 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 children.

[2] 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.").

[3] *See* 5-A DCMR §§ 5001, 5099.

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

[5] We believe the proposed regulations need a simple adjustment to be clear about DCPS's additional responsibility for Child Find for children enrolled in private schools inside the District, since IDEA includes them, regardless of residency, in DCPS's Child Find responsibility.
[6] The last phrase was deleted with the deletion of current 3002.1(d), but is from federal law and should be included. See 20 USC 1412(a)(3)(A).
[7] This proposed definition is loosely based on Massachusetts' definition of "educational progress" at 603 CMR § 28.02(17).
[8] The *Fiscal Year 2019 Budget Support Act* will make the *Enhanced Special Education Services Act* fully effective on July 1, 2018.
[9] Also in our redline, we include a revision at (d) to match the wording in the CFR that "only if" a new LEA is making progress to complete an evaluation is the initial LEA no longer responsible.
[10] *See* Corrected Memorandum Opinion & Findings of Fact and Conclusions of Law, dated June 21, 2016, *D.L. v. DC*, paras. 155-156.
[11] *See Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1027 (10th Cir. 1990).
[12] 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.)
[13] 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.
[14] "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.
[15] Virginia's regulations provided a model for this suggested language. *See* 8 VAC § 20-81-100(J).
[16] *See Reusch v. Fountain*, 872 F.Supp. at 1435.
[17] *See* Conn. Regs. § 10-76d-3(b).