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Via email: osse.publiccomment@dc.gov

August 20, 2015

Elisabeth Morse
Deputy Assistant Superintendent for Policy, Planning, and Charter
Office of the State Superintendent of Education
810 First Street, NE 8th Floor
Washington, DC 20002

Re: Comments on Special Education Rulemaking published July 24, 2015

Dear Ms. Morse:

Thank you for the opportunity to comment on the proposed rulemaking that was published in the District of Columbia (DC) Register on July 24, 2015 regarding Special Education. I am submitting these comments on behalf of Children's Law Center (CLC).ⁱ In the last year, CLC provided services to more than 5,000 low-income children and families, with a focus on abused and neglected children and on those with special health and education needs. Our comments are based on our experience representing these children and families. Nearly all the children we represent are enrolled in DC public schools and many receive special education services.

Children's Law Center appreciates the Office of the State Superintendent of Education's (OSSE) commitment to timely implementing the special education reform legislation passed by the DC Council last fall, specifically the Enhanced Special Education Services Amendment Act of 2014, the Special Education Student Rights Act of 2014, and the Special Education Quality Improvement Amendment Act of 2014.

We understand that OSSE is planning additional rulemakings to implement other sections of the new statutes as well as to revise other sections of the current special education regulations. In particular, we look forward to seeing OSSE's proposed rulemaking for the expansion of the Part C Strong Start program in advance of the statutory October 1, 2015 deadline.

The recommendations below are intended to strengthen and clarify this proposed rulemaking.

Referrals for Evaluations and Evaluation Timeline

Allowing referrals to be oral and reducing the evaluation timeline to 60 days was intended to hasten the delivery of services. Additional clarity in the regulations about parent referrals and documentation would help accomplish this goal. This is particularly important because parents often do not know the professional or legal terminology and thus may attempt to initiate the process in many different ways. All parental requests for assistance and references to special education, disability, or IEPs should be treated as a referral. We recommend that requests be documented in the Special Education Data System (SEDS) in order to ensure referrals and timelines are tracked appropriately. OSSE should also require the LEA to provide a written acknowledgement to a parent at the time of documentation, along with a copy of any needed consent form.ⁱⁱ These changes will get parents and schools working together promptly on the special education referral.

Additionally, we have found in our practice that, even though the Individuals with Disabilities Education Improvement Act (IDEA) does not specify that a parent must sign a specific LEA-provided consent form, some professionals or LEAs insist that consent is not valid until on the form from the Special Education Data System. We suggest that OSSE make clear in these regulations that parental consent does not have to be on a specific form. Instead, consent may be provided in a parent's initial written referral for evaluations or may be included in any other correspondence from the parent.

Here are specific revisions to the proposed regulations that we suggest:ⁱⁱⁱ

3004.1 (b) A referral for an evaluation or assessment for special education services may be oral or written, **and requires no specific terminology**. An LEA shall document any oral referral within three (3) business days of receipt. **The LEA shall provide a copy of an acknowledgement letter to the parent within three business days of any referral, along with a consent for evaluations form if the referral did not include a parental consent for evaluation. Documentation of the referral and the letter to the parent will be in the Special Education Data System.**

3005.2 ... (a) Beginning July 1, 2017, 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. **Varying forms of parental consent will be considered valid, including consent provided in a written referral or any other correspondence.**

(b) The LEA shall document reasonable efforts to obtain parental consent. Reasonable efforts include **making one attempt within three (3) business days of receipt of the referral as specified in § 3004.1(b) and making** at least three (3) attempts using at least two (2) of the following modalities: ...

Transition Planning in Individualized Education Programs

Helping students connect their current schooling with their goals for life after high school is crucial for all students with disabilities. As such, OSSE should only allow an IEP team to put a statement that transition services are not needed in the IEP of a student in seventh grade or earlier. IDEA requires LEAs to use transition services to improve the child's academic and functional achievement to "facilitate the child's movement from school to post-school activities."^{iv} We cannot imagine a transition-age student who does not need his or her IEP to include transition goals and services about life after high school, since everything from postsecondary or vocational education to adult services to even community participation is a possible post-school activity for which transition services are designed.^v Having a required transition plan for all students in eighth grade or higher implements the intent of the legislation, ensuring that teams begin planning courses of study and other services by the eighth-grade IEP. Also, the IDEA's implementing regulation at Title 34, Code of Federal Regulations § 300.320(b) requires that all IEPs made in the year prior to and after a student's sixteenth birthday include transition goals and services, without exception. To reconcile the Federal and local statutes, we urge OSSE to delete proposed §§ 3009.5 and limit 3009.6(c) to only students in or before seventh grade.

Secondly, OSSE should require that students have the necessary evaluations completed before they graduate. In order to access adult services (e.g., RSA, DDS, DBH, MetroAccess) and also for accommodations on admissions tests or in college, students aging out of special education need to have recent evaluations proving need. The evaluations must be done while the student is still in school so that the student can transition smoothly to the adult program without gaps in services. 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. In addition, the evaluations needed for adult services are often necessary to understand and plan for the child's educational needs. Too often in our practice, we have encountered adult students who have gone many years without the formal assessments necessary to understand their current educational and transition needs, some as long as a decade. We recommend that a plan for how, when, and by whom the needed evaluations will be completed be a required part of the transition goals and services in the IEP.

In addition, we believe that it is necessary and feasible for IEP teams to include participating agencies in this process and thus must make efforts to include the appropriate District of Columbia agency in this planning.^{vi} If, despite efforts, the LEA has been unable to gain the participation of the appropriate DC agency, OSSE should at least require that the plan

be sent to the appropriate agency.

The following revision will accomplish our recommendations:

- 3009.8 Not later than one year before a child with a disability's anticipated high school graduation or attainment of a certificate of IEP completion, the IEP team shall identify which adult services (**including, but not limited to, post-secondary schooling or testing accommodations, MetroAccess, and/or services provided by DDS, DDA, RSA, and/or DBH**) might be appropriate for the child and, in consultation with the appropriate District of Columbia agency when feasible, what evaluations should occur to determine the child's eligibility for those services; provided, that nothing in this section shall be construed to impose any obligation on an LEA to conduct evaluations **that are needed solely** to determine eligibility for adult services.
- (a) **When feasible, in this section, means that reasonable efforts to gain the participation of the appropriate adult services agency have been made by the LEA. Reasonable efforts include at least three (3) attempts by telephone, electronic correspondence, or mail to gain the participation of the other DC agency, and may be combined with efforts to gain IEP meeting participation.**
- (b) **The IEP team shall include a plan in the student's IEP transition services for how, when, and by whom the needed evaluations will be conducted. If the appropriate adult services agency did not participate, the LEA shall send a copy of the plan to that appropriate agency.**

Transfer of Rights

We commend OSSE's early issuance of proposed regulations to implement the full continuum of options for adult students and their families about who will make educational decisions. We have a few suggestions to clarify the rights of students to execute powers of attorney and to make the process of certification that a student cannot provide informed consent more feasible for families and students.

Adult Student's Right to a Utilize a Power of Attorney

Although DC law presumes capacity, including about decisions to delegate rights to an agent, we have experienced difficulties with LEAs respecting the wishes of adult students who have executed powers of attorney.^{vii} As a result, LEAs should be directed to rely on a power of attorney until the student revokes it in writing or until notified that a court has revoked, terminated, or superseded the power of attorney.^{viii} Because a power of attorney (or other similar legal document) is written, the revocation of that legal document should also be in writing. As a practical matter, the LEA will be able to place a written revocation in the student's file more easily and with fewer potential questions. We suggest:

- 3023.4 A student having transferred rights by a power of attorney or similar legal document to another to be the student's agent in accordance § 3023.3(c), may

terminate the power of attorney **in writing** at any time and assume the right to make decisions regarding his or her education. **A local educational agency shall rely on a student's power of attorney until notified that power of attorney is revoked, terminated, or superseded by court order or by the adult student.**^{ix}

Process for Certification that a Student is Unable to Provide Informed Consent for Educational Decisions

OSSE has proposed a thoughtful and generally practical process for certification that a student cannot provide informed consent for educational decisions and appointing a representative. Balancing protections for students and the need for a workable system for parents, LEAs, professionals, and OSSE is complicated. We have several suggestions to improve this balance.

Some changes are necessary to make this process less burdensome for parents, especially parents of limited means. OSSE should create a form for the required professional certifications, because the content required under these regulations is complicated.^x Parents should have the option to use the OSSE-approved certification form, but not be required to use it. In addition, providing copies of birth certificates and IDs seems unnecessarily burdensome on parents. Many parents do not have easy access to copy machines. Also, this requirement will disproportionately burden parents of limited means. We recommend that OSSE verify the student's birthdate in the SEDS or other existing student data systems and verify through documents in SEDS who the IDEA parent of the student is. For those reasons, we propose the following revisions:

- 3023.5 OSSE shall certify that a student who has reached the age of eighteen (18) is unable to provide informed consent **for educational decisions**, only after the satisfactory completion of the following:
- (a) Submission to OSSE of the following:
 - (1) A request for certification that the student is unable to provide informed consent **for educational decisions** completed by the parent or other interested person. The request shall be submitted, on an OSSE approved form to be made available on the OSSE website **and in hard copy**;
 - (2) Certifications that meet the requirements of § 3023.6 by two (2) qualified professionals, who each possess the qualifications listed in § 3023.8. **The certifications may be on an OSSE approved form to be made available on the OSSE website**;
 - ~~(3) A copy of the student's birth certificate or other official form of identification indicating the student's date of birth; and~~
 - ~~(4) A copy of an official form of identification of the parent, family member, or legal guardian requesting certification to become the student's educational representative.~~

- (b) Written confirmation by OSSE that all submission requirements have been met and that appointment of an educational representative shall be made by OSSE within ~~a time certain~~ **ten (10) business days**.^{xi}

In addition, what the certifying professionals will need to determine about the adult student's abilities should track more closely to existing DC law about incapacity for informed consent. The proposed § 3023.7(b) "rational evaluation" standard appears quite subjective and likely would be inconsistently applied by professionals. We believe a good model for this section of the regulations is the District's Health-Care Decisions Act, D.C. Code §§ 21-2201 to -2213. We have included below a standard based in that law^{xii} with some tailoring to the context of educational decisions. Existing interpretations of that law can then be utilized by the professionals to guide their certifications. Alternatively, because proposed § 3023.7(b) appears to be a subjective standard, we suggest removing that subsection and revising the subsection about inability to communicate as below.

3023.7 A student shall be deemed unable to provide informed consent if two (2) qualified professionals each determine one (1) or more of the following:

- (a) The student is unable to appreciate the nature and implications of an educational decision or a proposed educational program on a continuing or consistent basis; or,**
- (b) The student is unable to communicate educational decisions in an unambiguous manner.**

Proposed § 3023.11 also needs some clarification. Reminding readers that "parent" is defined earlier in the chapter provides clarity, which will be particularly helpful for foster children. If the certification process begins after the child is already 18, the person who was the IDEA parent, should be the first choice for appointment and will help ensure continuity of the support for the student. In addition, since it would be impossible to obtain the consent of an absent parent to appointment of another adult relative, OSSE should strike that line. We also suggest that OSSE ensure that parents, students, and the LEA are notified.

3023.11 Upon confirming receipt of the appropriate professional certifications, OSSE shall appoint the parent of the student (**see definition of parent at § 3001.1**) to act as the student's educational representative. **For a student who has already attained the age of eighteen (18), parent means whomever acted as the parent for purposes of special education before age eighteen (18).** If the parent is unavailable or does not wish to serve as the student's educational representative, OSSE, ~~with consent of the parent or legal guardian seeking the certification,~~ shall appoint another adult relative willing to act as the student's educational representative. If no adult relative is available and competent to serve as the student's educational representative, OSSE, with notice to the parent **and student** ~~or legal guardian seeking the certification,~~ shall appoint a person trained as an educational surrogate parent to serve as the student's educational

representative. **OSSE shall send prompt notice of the appointment to the representative, parent, student, and LEA.**

Although OSSE's currently proposed certification system includes some protections for students, we urge additional provisions to ensure that students know their rights. We believe that students should receive a notice from OSSE, because notice from the certifying professionals will not encompass information about how to challenge the professional's opinion. It is not realistic to expect the certifying medical professionals to explain current, accurate information about OSSE's process. To provide opportunity for students who may not read well to dispute the certification, verbal notification is also needed. The teacher, who knows the student well, is the logical person to inform the student that someone else has been appointed to make educational decisions and his or her right to challenge. We envision that in practice, teachers would assist students with written challenges, as appropriate. In addition, we anticipate that writing or calling OSSE with a challenge would be intimidating for students, such that OSSE should reduce an oral challenge to writing rather than directing the student elsewhere for help. Students will benefit from OSSE also referring them to a community organization, so we encourage keeping that as an additional option. We also believe that OSSE should notify the LEA as well as the parent and the student, when an appointment of an educational representative is invalidated.

We suggest the following to strengthen protections for students:

- 3023.12 **The student must be informed, verbally by the student's special education teacher and in an easily-understood writing by OSSE, of the certification and his/her right to challenge the certification.** The student may challenge the certification of the student or appointment of an educational representative under § 3023.11 at any time. If a challenge is presented, all of the following apply:
- (a) A challenge made under this section shall be made in writing to OSSE, except that OSSE shall assist a student who is unable to provide a written challenge to document a verbal challenge in writing ~~or~~ **and may** refer the student to a community organization for assistance;
 - (b) OSSE shall notify the student, **the student's LEA**, and current appointed educational representative, if an appointment has been made, of any such challenge **and the invalidation of the certification of inability to provide informed consent for educational decisions** in writing no later than two (2) calendar days from the receipt of the challenge; and

Clarifications

To track how the Code of Federal Regulations lists the disabling conditions under the IDEA, we suggest the following change in proposed § 3001.1:

- Child with a disability –
 - In general, a child with:

- (1) intellectual disabilities, hearing impairments (~~including deafness~~), **deafness**, speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, specific learning disabilities, deaf-blindness, or multiple disabilities; and...

To be sure to include all elements of the definition of Individualized Education Program in the Code of Federal Regulations, we suggest adding a reference to 34 CFR § 300.320 to OSSE’s definition of IEP at proposed § 3001.1.

To parallel how “IDEA (The Act)” is defined, we suggest:

Rehabilitation Act - means the Rehabilitation Act of 1973, approved September 26, 1973 (87 Stat. 355; 29 U.S. C. §§ 701 *et seq.*), **and its implementing regulations.**

Although we are sure that additional clarifications and changes will be made in future rulemakings revising Rule 3019 of the regulations about special education in public charter schools, some clarification is needed in the proposed definition of Local Education Agency. Reference to DC Code § 38-1802.02(19) should be removed because it is currently repealed, and replaced with a description. We believe that the proposed definition below captures what OSSE likely intended:

Local Education Agency (LEA) – an educational institution at the local level that exists primarily to operate a publicly funded school or schools providing elementary and secondary education in the District of Columbia, including a District of Columbia Public School and a District of Columbia public charter school; **provided, however, that until August 1, 2017, the term does not include a public charter school that, prior to March 10, 2015, have elected, pursuant to D.C. Official Code § 38-1802.02(19), DCPS to serve as that public charter school’s LEA for the purposes of IDEA. After August 1, 2017, the term does not include a District of Columbia public charter school for which the Public Charter School Board has waived the application of , with such election subject to the provisions of D.C. Official Code § 38-1802.10(c).requiring an LEA to be its own LEA for the purposes of IDEA and the Rehabilitation Act unless waived by the District of Columbia Public Charter School Board.**

Under DC law, a guardian is appointed to take care of non-financial decisions and needs for incapacitated adults, so we suggest this revision:^{xiii}

- 3023.3 (a) The student is declared legally incompetent or legally incapacitated by a court of competent jurisdiction and a **guardian or** representative has been appointed by the court to make decisions for the student;

We suggest clarifying that each certifying professional include a current, valid license number on the certification, as an addition to proposed § 3023.6. Also, because of how social workers are licensed in the District of Columbia, we suggest this revision at proposed § 3023.8(b)(4), "Licensed **independent** clinical social worker."^{xiv}

We also note that in the proposed rulemaking, two sections are numbered 3023.12. The second proposed § 3023.12 is similar to, but more comprehensive than, proposed § 3009.9. We suggest either making § 3009.9 and the second proposed § 3023.12 identical, or removing proposed § 3009.9.

Additional Special Education Enhancements in the New Statutes

Because only some sections of the three new special education statutes are addressed in this rulemaking, we urge OSSE to move quickly to issue regulatory guidance for LEAs, parents, and students about the other new provisions in the statutes. The provisions in the statutes that need clarification include parent and parent-designee classroom observations, documents in advance of meetings so that parents may meaningfully participate, notices for change of placement and service location that provide parents with meaningful information, and the shift in the burden of persuasion in due process hearings. Some of our parents have already encountered difficulties with their right to classroom observations, including not being allowed to observe any classrooms in a proposed placement location. This spring, after the statutes went into effect, schools were often unaware of requirements to provide documents to parents in advance of meetings and the timeline for IEPs to be provided after meetings. In addition, we look forward to OSSE's implementation of the Enhancement Fund to bring innovative new programs, collaborations, and capacity-building efforts to the District's special education students.

Conclusion

Thank you for the opportunity to comment on these proposed regulations, and we urge OSSE to adopt our suggested revisions. If you have any questions, please do not hesitate to contact me at (202) 750-7529 or rmurphy@childrenslawcenter.org.

Respectfully,



Renee Murphy
Senior Policy Attorney

Cc: Amy Maisterra, Assistant Superintendent of Elementary, Secondary & Specialized Education

ⁱ 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 8 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.

ⁱⁱ LEAs currently inconsistently send the Acknowledgement of Referral letter that exists in SEDS to parents with whom we work.

ⁱⁱⁱ **Bold** indices proposed additions and ~~striketrough~~ indicates proposed deletions.

^{iv} 34 CFR § 300.43(a)(1).

^v *See id.*

^{vi} The LEA efforts to include the adult services agency in evaluation planning efforts could be combined with the efforts already required of LEAs to attempt to gain adult agency participation in IEP meetings. *See* 5 DCMR § E3003.6(e)

^{vii} *See* DC Code § 21–2002(d).

^{viii} This suggestion is drawn from the Virginia certification of inability to provide informed consent for educational decisions regulations and guidance. Virginia also requires revocations in writing and that they be recorded in the student’s files.

http://www.doe.virginia.gov/special_ed/regulations/state/transfer_rights_students_disabilities.pdf, at 16.

^{ix} This language is modelled after the Virginia processes. *See* 8 VAC 20-81-180(C)(2).

^x The DC Superior Court Probate Division has created a form for the examiner’s certifications under DC Code § 21-2011(11) that may be useful. Last accessed on August 19, 2015 at http://www.dccourts.gov/internet/documents/ReportofExaminer%28int%29_public.pdf

^{xi} We propose this deadline for consistency with the ten business day deadline for OSSE confirmation of the certifications in proposed § 3023.10(c).

^{xii} *See* DC Code § 21-2202(5).

^{xiii} *See* DC Code §§ 21-2041, -2044.

^{xiv} *See* DC Code §§ 3-1208.01 – 1208.05.