

VIA EMAIL: osse.publiccomment@dc.gov

October 4, 2021

Ms. Christie Weaver-Harris
Policy Manager
Division of Systems and Supports, K-12
Office of the State Superintendent of Education (OSSE)
810 First Street, NE
Washington, DC 20002

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

Dear Ms. Weaver-Harris:

Thank you for the opportunity to comment on the Notice of Proposed Rulemaking a new Chapter 30 (Special Education) of Subtitle A of Title 5 of the District of Columbia Municipal Regulations (DCMR). I write to submit these comments on behalf of Children's Law Center, which fights so every DC child can grow up with a stable family, good health and a quality education. With almost 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.¹ As you know, many of the children we work with are eligible for Special Education. We also represent children and families in DC's foster care system and have specialized knowledge of the challenges they face when navigating the Special Education system. Our comments are grounded in the experiences of our attorneys, staff and clients who interact with the Special Education system regularly.

We previously provided comments on the first proposed rulemaking in late 2019. These new comments are meant to highlight our ongoing concerns with several sections of the rulemaking and again to provide concrete suggestions on these proposed regulations. We have tried to be comprehensive and suggest language to address concerns, but we would be happy to work together over the coming months on wording for any and all sections.

¹ Children's Law Center fights so every child in DC can grow up with a stable 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 almost 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. We multiply this impact by advocating for city-wide solutions that benefit all children.

We would like to ask that OSSE take these and other comments into consideration with a sense of urgency. We understand that this proposed Rulemaking was delayed due to the extenuating circumstances of the COVID-19 pandemic, however our collective experience in the education space post-pandemic has only served to highlight just how important these special education services are for children in the District. The suggestions in this comment are meant to ensure that students not only receive the highest quality FAPE, but that FAPE is made available with as little delay as possible. Each day a child misses the opportunity to engage in FAPE is a missed opportunity for learning and development that they may never get back. We ask that these comments be considered in the shortest possible amount of time.

Finally, there are many places in which OSSE notes that they have reserved the comment for further policy and guidance. We appreciate the acknowledgement that the comment was considered, and we ask that advocates, parents, and students be invited to participate in the process to create these policies and guidance documents. We would like to acknowledge the great work OSSE has done over the past two years to engage the advocate community in creating parent facing documents, websites, policies, and communications in response to the COVID-19 pandemic. We encourage OSSE to continue the dialogue with organizations like Children’s Law Center so that we can work together to ensure that these forthcoming policy and guidance documents are robust, helpful, and easy to use for parents and students.

Incorporating *Andrew F.* early into Chapter 30

In 2017 and again in 2019, CLC requested that OSSE incorporate the language of the Supreme Court’s decision in *Andrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017). In this case, the Supreme Court issued a groundbreaking clarifying decision which defined FAPE as meaningful progress considering the child’s circumstances. Although we note that the Court declined to define meaningful educational progress in their opinion, this rulemaking provides OSSE with an opportunity to add regulatory language to the definition of FAPE in § 3001 to ensure that these regulations comply with the *Andrew F.* definition of FAPE. As such, we suggest amending the definition of FAPE in this section as follows:

“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.**²

Additionally, DC law should define “educational progress” as follows, to actualize the *Andrew F.* decision:

Document educational 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.³

3001 - Provision of Free Appropriate Public Education

Medication and Medical Diagnosis not required for FAPE

Thank you for incorporating our comment which clarifies that a student also does not need to have a medical diagnosis or medical documentation as a condition of access to FAPE or to receive an initial evaluation or reevaluation.

Enrollment and Responsibility for FAPE

In CLC’s 2017 and 2019 comments, we made some suggestions about how to best deal with complex enrollment scenarios when children transfer and change schools during or in between school years and we reiterate these comments below. We again ask that OSSE consider making the language clearer in subsection 3001.2.

3001.2 ~~For the~~ District of Columbia Public Schools (DCPS), ~~the responsibility~~ is responsible for ~~to make~~ making 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 in a public charter school LEA as described in § 3001.3, and children with disabilities attending private and religious schools in the District of Columbia, pursuant to the requirements of IDEA and § 3041 of this Chapter.

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

² Bold means recommended additions, and ~~striketrough~~ recommends deletions.

³ This proposed definition is loosely based on Massachusetts’ definition of “educational progress” at 603 CMR § 28.02(17). We also recommend reviewing the work prepared by our colleagues at DC Appleaseed on the *Andrew F.* case. A copy can be found as an appendix to this comment.

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 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.⁴ 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.

We thank you for amending section 3001.11 to make clear that the LEA's obligation to make FAPE available begins on the new LEA's first day of the school year. To facilitate that FAPE will start on the first day of school, OSSE should put in regulations that the new LEA must 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).

Individualized Education Plan (IEP) development by child's third birthday

Section 3011.11 requires the LEA to implement a child's IEP by their third birthday if they are transitioning from Part C to Part B. To avoid unnecessary administrative delay, we recommend that if a child's third birthday occurs on a non-school day or during the summer, then the IEP should be implemented by the next school day after the child's third birthday.

3001.11 ~~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 5-A DCMR § 2199, except that:~~

⁴ 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.").

~~(a)~~—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:

~~(a1)~~ The LEA participates in transition planning conferences, as appropriate;

~~(b2)~~ The LEA has developed an IEP by the child’s third birthday, including:

~~(1A)~~ For public charter school LEAs, the LEA has developed an IEP by the third birthday of any child who is currently enrolled in the public charter school LEA or has completed the registration process for the upcoming school year; or

~~(2B)~~ For DCPS, the LEA has developed an IEP by the third birthday of any child who ~~is a resident of~~ resides in the District of Columbia who is not enrolled in a public charter school LEA; and

~~(c3)~~ The LEA is implementing the IEP by the child’s third birthday or, if the third birthday occurs on a non-school day or during the summer, *then by the next school day after their third birthday*, including ensuring the provision of all special education and related services in the child’s IEP.

~~(b)~~—~~For all other children not covered by subsection (a) transferring between LEAs between school years the new LEA’s obligation to make FAPE available begins on the new LEA’s first day of the school year; and~~

~~(c)~~—~~If a child is registered in the Student Information System (SIS) for more than one (1) LEA, the most recent date of documented parental consent for enrollment shall determine the LEA that is responsible for making FAPE available to the child.~~

(d) For children enrolling in a new LEA during the annual lottery process or after the end of the 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. The responsibility to plan for the child’s FAPE includes, but it 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 of the first day of the school year.

(e) For children transferring during the school year from an out of District of Columbia school into the District of Columbia, the obligation to provide ABE begins upon submission of the parent signature on an enrollment agreement or enrollment form, 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; DCPS has obligations under this Chapter regardless of enrollment.

(f) 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 public agency or parent makes DCPS aware that the student will likely be soon attending a school in the LEA.

Public Charter School LEA Closures

In CLC's 2017 comments, we requested some modest changes to the section to provide additional clarity for parents and administrators on the public charter school LEA closure process. Notifying parents of students with disabilities with as much lead time as possible will help to ensure that a smooth transition to a new educational environment is achieved. Again, we recommend clarifying the number of days – either calendar or business days - in section a, c, and d for consistency in interpreting this section. Further, providing a copy of the student's IEP to the parent is a critical step in starting to plan for the child's next education setting. We appreciate that OSSE decreased the time from 10 calendar days to five (5) calendar days from a parent's request to receive an IEP, but we also ask that the obligation for LEAs begin sooner. We recommend that the LEA have an obligation to provide the IEPs to parents within 21 calendar days of the official action taken by the chartering authority or the voluntary relinquishment of a charter regardless of whether parents request the IEP independently.

3001.12 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 the chartering authority, as follows:

(a) Within **fourteen (14) calendar days** of the official action taken by the chartering authority to revoke, not renew, or acknowledge the relinquishment of a charter, the LEA shall make and document reasonable efforts to notify:

- (1) The parents of all enrolled children with disabilities, including children with disabilities placed at a nonpublic special education school or program, of the parent's responsibility to enroll the child with a disability in another LEA; and
 - (2) Each nonpublic school where the LEA has placed students to inform the school of the timing and full implications of the closure and the nonpublic school's responsibility to assist the LEA in communications with parents regarding the LEA closure and the parent's 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 reviewing and revising any IEP that has expired or will expire within **thirty (30) calendar days** of the closure of the public charter school. **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 documentation relevant to the provision of special education or related services prior to the last day of school ~~or within five (5) business days of a request by the parent, if earlier,~~ **or within twenty-one (21) calendar days of the official action taken by the chartering authority or voluntary relinquishment;**
 - (d) The LEA shall address or resolve all outstanding child-level findings of noncompliance made by the SEA, a court of competent jurisdiction, or an impartial hearing officer pursuant to the IDEA **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.**

We reiterate our comments from the 2019 proposed rulemaking and respectfully request that you add in a 30-day resolution window for any child-level findings of non-compliance by the SEA. We also ask that OSSE codify that when an LEA closes a child still retains their rights to obtain due process about any right under the IDEA within the statute of limitations. Again, we respectfully request that OSSE considers our recommendation to include section (e) to clarify that parents will be able to pursue any due process claims under the IDEA within the proscribed statute of limitations. We also recommend that once the LEA is closed, OSSE should be the responsible entity to resolve these claims. A child should not be

denied the opportunity to obtain compensation for the denial of FAPE within the two-year statute of limitations because of an LEA's closure.

3002 - Continuum of Alternative Placements

We appreciate the change in terminology of section 3002.3 clarifying the continuum of alternative placements available to students who receive special education services. We also thank you for making section 3002.4 separate and clarifying that LEAs is responsible for providing all supplementary aids and services in regular education classroom.

3003 - Child Find

We again reiterate that it would be helpful in Child Find 3003.1 to define what is meant by a 'practical method'. Although OSSE addressed their decision to not specifically spell out that children in the custody of CFSA, DYRS or placed by Court Social Services are required to be identified through DCPS's child find policies, we kindly request that OSSE reconsider their decision. By naming these specific vulnerable sub populations of student with disabilities, OSSE can make DCPS's obligation child find obligation clearer. Further, DCPS' Child Find obligation requires printed materials to be published so that parents and guardians are aware of the special education services are available. In order to ensure that this important information is being disseminated widely to parents and guardians, we recommend that the contact information for the Parent Training and Information Center be included in the Child Find materials. During these past 18 months as parents of students with special education needs have navigated virtual learning during the pandemic, we have seen the positive impact that community partners and information sources to ensure their student is receiving FAPE. By providing the information for the District's parent training and information center on the child find materials, OSSE can facilitate that connection for parents who may need additional support in navigating the process.

3003.2 The DCPS 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 public charter school LEA, **including children in the custody of CFSA, committed to DYRS or placed by Court Social Services** and who are in need of special education and related services, are identified, located, and evaluated;
- (b) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services;

- (c) With regard to children under the age of six (6) years old, DCPS shall:
 - (1) Maintain, and update at least annually, a list of primary referral sources, including physicians, hospitals, and other health providers; day care centers, child care centers, and early childhood programs; District departments and agencies; community and civic organizations; and advocacy organizations; and
 - (A) Contact primary referral sources at least once a month until a referral relationship is established and then every three (3) months thereafter;
 - (B) Develop a system to track frequency and type (in person, email, phone, etc.) of contacts with the primary referral sources described in subsection (c)(1) to ensure that outreach occurs on a regular basis; and
 - (C) Develop, publish, and distribute printed materials for primary referral sources to inform them of the preschool special education and related services available from DCPS, the benefits and cost-free nature of these services, and how to make a referral;
 - (2) Develop and publish printed materials for parents and guardians to provide information regarding preschool special education and related services available from DCPS, the benefits and cost-free nature of these services, and how to obtain the services. These materials shall be:
 - (A) Written at an appropriate reading level and translated into multiple languages as required by local law **and includes the contact information for the local Parent Training and Information Center**; and
 - (B) Distributed to all primary referral sources described in subsection (c)(1), all DCPS and public charter schools, District of Columbia Public Libraries, Economic Security Administration (ESA) Service Centers, District of Columbia Parks and Recreation facilities, and other locations designed to reach as many parents or guardians of

preschool children who may be eligible for special education and related services as possible; and

(C) Are publicly posted in DCPS school buildings

- (3) Ensure that appropriate DCPS outreach staff (e.g., the Child Find Field Coordinators) contact primary referral sources or a staff member in the primary referral source's office who are instrumental in making referrals at least once a month until a referral relationship is established and then every three (3) months thereafter. The initial meeting shall be face-to-face whenever possible when pursuing referrals from new referral sources and then less frequently thereafter, using the method of contact preferred by the referral sources (e.g., e-mail, texting, or telephone calls).

We also recommend that 3003.4 is updated to ensure that it captures highly mobile children and those in the custody of CFSA and DYRS as well as children who are in prekindergarten programs or community-based organization prekindergarten located in the District.

3003.4 DCPS is responsible for conducting child find activities for resident children who are homeschooled as well as resident and nonresident parentally-placed private school children over three (3) years of age attending religious and other private elementary and secondary schools located in the District, **as well as children who are in prekindergarten programs or community based organization prekindergarten located in the District** and may not require enrollment in DCPS prior to evaluation or development of an IEP.

3004 - Request for Initial Evaluation

In order to ensure the best educational outcomes, children with disabilities should be evaluated and receiving services as quickly as possible. Since children who are in the care of CFSA and other District agencies are highly mobile, and CFSA is likely to make referrals for evaluation, we recommend explicitly adding CFSA as a district agency or program whose referral will be treated as a request for initial evaluation. Although OSSE has chosen to reserve this comment since they are technically covered under c, we reiterate the importance of explicitly naming CFSA as a referral source in response to Children's Law Center's knowledge of the specific needs of this highly mobile population.

3004.2 For children under the age of six (6), the LEA shall also treat a referral from the following sources, as a request for initial evaluation in accordance with 34 CFR § 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, and early childhood programs;
- (c) District agencies and programs, including IDEA Part C programs **and CFSA**;
- (d) Community and civic organizations; and
- (e) Advocacy organizations.

We reiterate the same comments as before regarding section 300.4. Along with the notice requirement for the LEA to notify the parent of a receipt of any referral received under section 3004.2, we suggest that the LEA shall also include a consent to evaluate along with the procedural safeguards notice. In our experience, providing the consent to evaluate with instructions on how to submit along with the receipt of referral notification would streamline the evaluation request process and prevent delay of the initial evaluation.

3004.4 The LEA shall notify the parent of receipt of any referral received under § 3004.2. This notification shall include information regarding:

- (a) The initial evaluation process;
- (b) Parental consent requirements; and
- (b) Resources the parent may contact for assistance; and**
- (c) This notification shall also include a consent to evaluate that the parent can sign and return.**

3005 - Initial Evaluation Process

Thank you for making some changes to section 3005 to make the initial evaluation process clearer. As you know, when executing the initial evaluation process for a child with a suspected disability, time is of the essence. Ensuring the child is evaluated as quickly as possible will likely yield the best educational outcomes for that student as well as strengthen

parent-LEA trust. Although we acknowledge the difficulties created by the COVID-19 pandemic over the past year and a half, we know ensuring a timely initial evaluation and clear expectations for parents is needed. We remain concerned that the general definition of “reasonable efforts”⁵ 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. We ask that in 3005.4 that LEAs commence making reasonable efforts to obtain consent no less than five business days from the referral date. Here are our suggestions to ensure that parent consent is recognized timely:

3005.4 An LEA shall:

- (a) 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 initial evaluation, and begin such efforts no less than ~~ten (10)~~ five (5) business days from the referral date
- (b) The initial evaluation timeline in this section does not apply to the LEA if:
 - (1) The LEA has made and documented reasonable efforts under this Section and the parent of a child repeatedly fails or refuses to produce the child for the evaluation; or
 - (2) The child enrolls in a new LEA after the initial evaluation process timeline has begun, but before an eligibility determination has been made by the child’s previous LEA, provided that the new LEA is making sufficient progress to ensure prompt completion of the evaluation, and the parent and new LEA agree to a specific time when the evaluation will be completed, not to exceed an additional thirty (30) days.

3006 - Evaluation Procedures

Again, for clarity and consistency we recommend removing mentions of reevaluations to section 3006 and creating a new section in 3006 that specifically states that the IEP team shall review evaluations and information provided by parents, classroom-based assessments and observations and observations by teachers and related service providers.

⁵ Please see our comments below about what should be required for reasonable efforts in general.

3006.2 As part of an initial evaluation, ~~if appropriate, and as part of any reevaluation,~~ the IEP team and other qualified professionals, as appropriate, shall:

- (a) Review existing evaluation data on the child, including:
 - (1) Evaluations and information provided by the parents of the child;
 - (2) Current classroom-based assessments and observations; and
 - (3) Observations by teachers and related service providers; and
- (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) IDEA Part C assessments and other related data.
- (c) On the basis of that review, and input from the child's parent, identify what additional data, if any, are needed to determine:
 - (1) Whether the child has a particular category of disability under this chapter or, in the case of a reevaluation of a child, whether the child continues to have such a disability;
 - (2) The present levels of performance and educational needs of the child;
 - (3) Whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and
 - (4) Whether any additions or modifications to the special education and related services, **including changing the child's IEP goals**, are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

3007.x As part of an ~~initial evaluation, if appropriate, and as part of any reevaluation,~~ the IEP team and other qualified professionals, as appropriate, shall:

- (a) Review existing evaluation data on the child, including:
 - (1) Evaluations and information provided by the parents of the child;
 - (2) Current classroom-based assessments and observations; and
 - (3) Observations by teachers and related service providers; and ...

Evaluations conducted under non-standard conditions

Sometimes evaluations must be administered under non-standard conditions. Therefore, we recommend that if the assessment was not conducted under standard conditions, that a rationale be provided as to why the assessment was not conducted under these standard conditions. Our colleagues at School Justice Project have represented students who were evaluated while incarcerated, and we agree with their comments on this issue. We would also recommend that in 3006.7(f)(5) that students are assessed not only for the social and emotional needs, but that trauma is also specifically mentioned.

3006.7 The LEA shall ensure that:

- (a) A variety of assessment tools and strategies are used to gather relevant functional, developmental, and academic information about the child, including information provided by the parent that may assist in determining:
 - (1) Whether the child is a child with a disability under this chapter; and
 - (2) The content of the child's IEP, including information related to enabling the child to be involved and progress in the general education curriculum;
- (b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient;
- (c) Tests are selected and administered to ensure that, if the child has impaired sensory, manual or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflect impaired sensory, manual or speaking skills (unless those skills are the factors that the test purports to measure);

- (d) Each assessment report shall include the following:
- (1) The date of assessment and the date of the report;
 - (2) A description of the child's performance in each area assessed, including specific strengths and weaknesses;
 - (3) Information relevant to determinations under § 3006.2;
 - (4) Instructional implications for the child's participation in the general curriculum;
 - (5) 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 a rationale as to why the assessment was not conducted under standard conditions**; and
 - (6) The signature and title of the qualified examiner(s) who administered the assessment procedure and who wrote the report.
- (e) No single procedure is used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child;
- (f) 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 **including trauma**;
 - (6) General intelligence (including cognitive ability and adaptive behavior);

(7) Communication needs; and

(8) Motor abilities

- (g) In evaluating each child with a disability, the evaluation is sufficiently comprehensive to identify all of the child's special education and service needs, whether or not commonly linked to the disability category in which the child has been classified;
- (h) The IEP team uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors; and
- (i) The IEP team uses assessment tools and strategies that provide information that directly assists persons in determining the educational needs of the child.

We appreciate OSSE's addition of the new 3006.8 which states that if medical services or a medical evaluation by a licensed physician is a necessary part of the evaluation process, then the LEA will arrange for those services and ensure that receiving the services are not contingent on health insurance coverage and free of charge.

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.⁶ 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.⁷ These assessments can provide existing data

⁶ 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")

⁷ 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

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.

3007 – Reevaluation

The LEA needs a deadline to complete any re-evaluations when requested by a parent or teacher or when warranted. We suggest a 45-day deadline, as with initial evaluations.

- 3007.1 The LEA shall conduct a reevaluation of each child with a disability to determine continued eligibility for special education in accordance with the requirements of this chapter at least once every three (3) years, unless the parent and LEA agree or if:
- (a) The LEA determines that the child’s educational or related service needs, including improved academic achievement and functional performance, warrant a reevaluation; or
 - (b) The child’s parent or teacher requests a reevaluation.
 - (c) **Reevaluation under (a) or (b) must be completed within 45 days.**

3008 - Individualized Education Program Team

We reiterate our previous concerns about parents being notified that IEP team members are unable to join mere moments before the meeting is set to occur. This means that parents lose the opportunity to ask meaningful questions and obtain important information about their child’s progress in real time and in the context of the larger discussion. In order to ensure a parent has enough time to receive any information they may need prior to the IEP team meeting where the team member will be absent, we request that the member submit, in writing their planned absence five (5) business days prior to the meeting.

- 3008.4 A mandatory IEP Team member may be excused from attending an IEP Team meeting, in whole or in part, under the following circumstances:
- (a) The member’s area of the curriculum or related services is not being modified or discussed in the meeting and the parent and the LEA agree, in writing, that the attendance of the member is not necessary; or

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.

- (b) The meeting involves a modification to or discussion of the member's area of the curriculum or related services, and all of the following occur:
 - (1) **The member provides written notice of a planned absence five (5) business days prior to the meeting;**
 - (2) The parent and the LEA consent to the excusal in writing;
 - (3) The member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting; and
 - (4) The written input includes educational and behavioral strengths and needs of the child as related to the IEP Team member's area of curriculum or related services.

3009 – Parent Participation in IEP Team Meetings

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). Again, we reiterate our suggestions for OSSE to capture the cooperative spirit for meeting scheduling below:

- 3009.1 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 and documenting all 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.~~
 - (b) Schedule the meeting at a mutually agreed on time and place, it is understood that schools may have to be flexible about meeting on different days of the week or different times of the day; and**

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

3009.2 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)~~ **fifteen (15)** business days before the meeting, unless the parent agrees to a meeting date within ~~five (5)~~ **fifteen (15)** business days of the initial contact.

Receipt of documents five days prior to meetings

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.

3009.4 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, 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.**

Alternative means of participation

We again recommend noting that parents can participate through these alternate means if they so choose. We would amend the language of 3009.6 to read:

3009.6 The IEP Team meeting may be conducted without the parent in attendance or participating by other means if the LEA:

- (a) Is unable to convince the parent to attend or participate;
- (b) The LEA has a record of its reasonable efforts, as defined in this chapter, to arrange a mutually agreed on time and place consistent with § 3009.1; and
- (c) The parent was offered at least two meeting options on different dates or different times; or
- (d) **Receives notice from the parent that they voluntarily elect to participate by other means as provided in 3009.5.**

3010 – Eligibility Determination

Section 504 of the Rehabilitation Act

Children’s Law Center clients continue to face barriers when trying to get 504 plans into place and when trying to have 504 plans faithfully implemented. 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. We reiterate that while the reference to Section 504 in the proposed regulations in section 3010.7 is helpful, the LEA’s responsibility under Section 504 should be more explicit.

3010.7 A determination by the IEP team that a child is a child with a disability but that the child does not require special education services under this chapter does not preclude a child’s eligibility for services or protections under the Rehabilitation Act. **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.**

3011 - Disability Categories

We appreciate that these proposed regulations update important terminology and create consistency across categories.

Again, we reiterate our comments about the Developmental Delay category. We strongly urge OSSE to consider DC should exercise the option under federal law that children

can be eligible in this category until age 9.⁸ 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.⁹ 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:¹⁰

3011.4 **Developmental Delay.** In determining eligibility on the basis of developmental delay, the following shall apply:

- (a) Developmental delay shall mean 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;

- (b) The IEP Team shall consider assessments and child data related to whether the child experiences severe developmental delays of at least two (2) years below his or her chronological age or at least two (2) standard deviations below the mean, as measured by appropriate standardized diagnostic instruments and procedures in the following areas:
 - (1) Physical development;

 - (2) Language and communication development;

⁸ See 20 U.S.C. § 1401(3)(B).

⁹ Order in *DL v. District of Columbia* (Case No. 05-1437), dated May 18, 2016, paragraph 14.

¹⁰ 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>.

- (3) Cognitive development;
 - (4) Adaptive development; or
 - (5) Social or emotional development;
- (c) The IEP Team may consider and use as the basis for its determination any other sources of existing data indicating eligibility for developmental delay, including medical documentation if available;
 - (d) The IEP Team shall confirm that the child-level data demonstrates that the child's educational performance has been adversely affected by the suspected disability and not any of the inappropriate determinant factors as listed in § 3010.2; and
 - (e) 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 the child's ~~eightth (8th)~~ **tenth (10th)** birthday.

We appreciate OSSE's effort to ensure that Eligibility Criteria for the Disability Categories section of these proposed regulations tries to standardize the language for each disability. We also appreciate OSSE changing the language in this section to so that medical evidence and a medical diagnosis is may be considered if available. Again, we reiterate our previous concerns about IEP teams failing to honor information provided by physicians. The language in the regulation could be strengthened by saying the medical documentation and medical diagnosis evidence shall be considered instead of may be considered.

Also, 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:

3012 – Related Services

We appreciate that subsection 3012.1 has been rewritten to capture that the discussion of related services and special education flow together for the benefit of the student's ability to access special education.

We again recommend a few wording changes to make the definitions of these services as clear as possible. The Occupational Therapy definition should include services to improve or habilitate sensory integration and modulation.¹¹

- 3012.8 Occupational therapy as a related service is a service provided by a qualified occupational therapist that includes:
- (a) Improving, developing, or restoring functions impaired or lost through illness, injury, or deprivation;
 - (b) Improving ability to perform tasks for independent functioning if functions are impaired or lost;
 - (c) **Improving or habilitating sensory integration and modulation; and**
 - (d) Preventing, through early intervention, initial or further impairment or loss of function.

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.¹² 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).¹³

- 3012.17 Speech-language pathology services as a related service includes:
- (a) Identification of children with speech or language impairments;
 - (b) Diagnosis and appraisal of specific speech or language impairments;

¹¹ 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

¹² 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.

¹³ 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§ion=Treatment>.

- (c) Referral for medical or other professional attention necessary for the habilitation of speech or language impairments;
- (d) Provision of speech and language services for the habilitation or prevention of communicative impairments; ~~and~~
- (e) Provision of speech and language services to habilitate feeding and oral motor impairments at school; and**
- (e) Counseling and guidance of parents, children, and teachers regarding speech and language impairments **and related communication assistive technology.**

3015 – Extended School Year Services

Now more than ever, students returning to the classroom after a year and a half of disrupted instruction, ESY services may be an important tool for IEP teams to ensure students with disabilities access FAPE. Unfortunately, many of the recommendations we previously made in this section were not accepted by OSSE in this current proposed rulemaking. We again reiterate that continue OSSE’s criteria for extended school year (ESY) are too narrow to capture all children who need consistent services. Three months of data on student progress even before the pandemic was difficult to obtain 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.¹⁴ Courts have found that predictive data and opinion should be used to decide ESY.¹⁵ 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.¹⁶ 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

¹⁴ See Corrected Memorandum Opinion & Findings of Fact and Conclusions of Law, dated June 21, 2016, *D.L. v. DC*, paras. 155-156.

¹⁵ See *Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1027 (10th Cir. 1990).

¹⁶ 872 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.)

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.

3015.2 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.¹⁷**

¹⁷ 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.

We appreciate OSSE's modification of 3015.4 to clarify that LEAs may not limit ESY services only to the summer months.

In subsection 3015.5, we again request that these regulations go further and explicitly state 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.¹⁸

3015.5 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.**

3016 – Parental Consent for Initial Provision of Services

We appreciate OSSE's consideration of our comments in subsection 3016.2. The proposed modified language signals that parents can exercise their due process rights spelled out in the procedural safeguards section.

3020 – Individualized Education Program in Effect

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. We appreciate that OSSE has modified some of the

¹⁸ "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.

timelines in this section. However, we recommend some additional modifications of timelines for this section as written below.

OSSE also needs to make it clear to DC LEAs that comparable services mean implementing the previous IEP (the same, or equivalent).¹⁹ 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.”²⁰

3020.1 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

3020.2 For students who enroll in an LEA after the start of the LEA’s school year, as soon as possible but no later than five (5) school days ~~of~~ after enrollment, the LEA shall send a written request for the child’s educational records to the child’s previous LEA, including a request for all documentation pertaining to the referral for or provision of special education or related services to the child, that are not maintained in the District of Columbia special education system of record or the Statewide longitudinal education database including, but not limited to, disciplinary actions, course completion and credit accrual.

3020.3 The LEA shall respond to a request for educational records of a previously enrolled child by providing such records as soon as possible but no later than ~~ten (10)~~ **five (5)** business days of the receipt of the request, even if the provision of such records necessitates the physical transfer of paper records.²²

3020.4 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 ~~five (5)~~ **two (2)** business days of receipt.²³

¹⁹ See 71 Fed. Reg. 46,681 (August 14, 2006).

²⁰ OSERS Highly Mobile Guidance, p. 4.

²¹ Wording pulled from 34 CFR § 300.323.

²² See 5 CCR § 3024, Cal. Educ. Code 56043.

²³ 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.

- 3020.5 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 as follows:
- (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 mean ~~comparable to those described in the child's existing IEP from the prior LEA~~ **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 thank you for amending 3020.6 in the previous proposed rulemaking to recognize that denying services to a child because the previous LEA or school fails to provide records will result in a denial of FAPE to the child, which will be bad for both the school and the child. The new text in 3020.6 makes it clear that 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. However, this section could be clarified further by specifying that the school should provide what services it can, based on consultation, and then evaluate and determine eligibility.²⁴

- 3020.6 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 and documenting 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.** If the LEA suspects that the child is a child with a disability, the LEA shall fulfill its Child Find responsibilities under § 3003 to evaluate the student to determine eligibility.

²⁴ Georgia provides clear guidance to its schools stating these responsibilities. See Georgia Superintendent of Education, Special Education Rules Implementation Manual (2012).

3020.7 For students who enroll in the LEA after the start of the LEA’s school year, the LEA shall, upon enrollment, **ensure the child receives comparable services as required in 3020.5** and 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**.

The timelines for evaluation for transfers are still extremely long when compared to the immediate need for students to access special education services upon transferring from an LEA outside of the distance. As the previous proposed Rulemaking stated, LEAs are given an incredibly long time in order to get services into place for these students. 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.”²⁵ We urge OSSE to adopt the expedited 30-day evaluation timeframe and an expedited IEP development timing for DC’s mobile students.

3020.8 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 as follows:

- (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) Make and document reasonable efforts, as defined in this chapter, to obtain parental consent within fifteen (15) calendar days from the date on which the child is referred for an evaluation;
 - (2) Conduct an evaluation and determine eligibility within **thirty (30)** ~~sixty (60)~~ calendar days in accordance with this Chapter; and

²⁵ OSERS Highly Mobile Guidance, p. 3.

- (3) Develop an IEP within fifteen (15) calendar days of the eligibility determination.

We appreciate the proposed language change in 3020.10 which makes it clear that LEAs are responsible to provide comparable services to students if the IEP is expired or will expire within thirty (30) calendar days of the child's enrollment.

3020.10 The LEA may not adopt an existing IEP that is expired or will expire within thirty (30) calendar days of the child's enrollment. **However, the LEA is obligated to provide FAPE in the form of comparable services consistent with § 3020.5**

We appreciate the modification of 3020.11 which clarifies the LEAs responsibilities upon receipt of an expired IEP and a requirement to provide comparable services while the new IEP is being developed. However, we again recommend specifying the timelines in which the LEA shall request appropriate records, provide comparable services and conduct the evaluations.

3020.11 Upon receipt of an expired IEP, the LEA shall presume that the child remains a child with a disability and provide FAPE in the form of comparable services consistent with § 3020.5 unless it has record or documentation of a formal exit from special education, as follows:

- (a) The LEA shall request appropriate records, provide comparable services **as soon as possible, but no later than five (5) school days, unless the child has an expired IEP that requires a full-time special classroom, a special school or residential, in which case within ten (10) school days of the child's expired IEP, IFSP, or services plan;** , and conduct an evaluation **within thirty (30) calendar days** to ensure that the child receives appropriate services;
- (b) The LEA shall adhere to the procedures and timelines set forth in this chapter to determine whether the child continues to be a child with a disability and, if necessary, to develop an IEP for the child; and
- (c) If the child's IEP Team determines that the child is no longer eligible for services, the LEA shall complete all procedural and documentation requirements before ceasing the provision of comparable services and exiting the child from special education pursuant to § 3028.

3022 Placement Determination

We thank you for taking some of our comments into consideration for section 3021. However, we reiterate that proposed regulations at subsection 3021.1(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.²⁶ We appreciate that you have taken our comment into consideration and modified some parts of 3022.1 and 3022.4.

Our suggested regulation is:²⁷

3022.1 The LEA shall ensure that the determination of the appropriate educational placement for a child with a disability is:

- (a) Based on ~~the child’s current level of need as~~ **totality of the child’s unique needs, including those** as documented in the child’s IEP.

....

3023 and 3024 – Homebound Services and Hospital Instruction (Not Required for FAPE) and (Required for FAPE)

The proposed regulations set forth some general requirements concerning “home and hospital” instruction for a child with a disability (when it is required for FAPE and when it is not). These sections are unchanged from the existing regulations. We recommend that this rulemaking plan for the implementation of the Students’ Right to Home or Hospital Instruction Act of 2020²⁸ that was fully funded in the Fiscal Year 2022 Budget Support Act of 2021.²⁹ This law requires that OSSE “promulgate regulations to implement the provisions of [the] Act” no later than 120 days following the applicability date of the Act. By our calculations, this means these regulations must be set by January 29, 2022.³⁰ We strongly

²⁶ 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).

²⁷ **Bold** means recommended additions, and ~~strikethrough~~ recommended deletions.

²⁸ Students’ Right to Home or Hospital Instruction Act of 2020, D.C. CODE §38-251.01 *et seq.* (2021).

²⁹ Fiscal Year 2022 Budget Support Act of 2021, D.C. Act 24-176, Title VII, Subtitle I § 7201

³⁰ See Students’ Right to Home or Hospital Instruction Act of 2020, D.C. CODE §38-251.10 (2021). The Act requiring that OSSE promulgate regulations no later than 120 days after the applicability date of the Act. Further, the Act notes that it shall apply upon the date of inclusion of its fiscal effect in an approved budget. The FY22 budget goes into effect on Oct. 1, 2021. As such, 120 days following the effective date of the FY22 budget is January 29, 2022.

recommend that OSSE use the present rulemaking process to promulgate regulations that are will meet the requirements of the Students' Right to Home and Hospital Instruction Act.

Specifically, the Act requires that OSSE promulgate regulations to define what constitutes a completed application for home or hospital instruction and medical certification of need in addition to "any other regulations that may be necessary to ensure due deference to the medical opinions set forth in the medical certification of need [..]"³¹ The Act also requires OSSE to "administer an appeals and medication process for the denial of an application for home or hospital instruction."³² As such, regulations will be necessary to implement this requirement. These regulations should outline transparent mediation and appeal processes for students who are denied HHI, as required by the Act. Moreover, in appeals concerning the denial of eligibility, the student should receive HHI pending the outcome of the appeal.

Beyond the explicit requirements of the Act, we recommend that OSSE establish more specific requirements to ensure students receive HHI when it is needed. For example, an LEA should also have to provide a copy of their HHI policy to a parent when a student has been absent for 10 days or longer due to a health condition. The regulations should also establish timelines and minimum instruction hours that LEAs should follow in implementing their HHI programs. We recommend requiring that LEAs provide at least five (5) hours per week of direct home or hospital instruction for students in K through grade 5 and at least 2.5 hours per week core subject instruction for students in grades 6-12. This would bring the District in line with school districts in Virginia, Maryland and other states.

3025 – Placement Outside the LEA

CLC appreciates OSSE's modification of the text to standardize terminology in this section with the DC Code. 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 have been changed, since DC Code has supremacy over OSSE regulations and policies.

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.³³ Judges have found that, given the unique needs of particular students, placement can include the particular school that a student

³¹ Students' Right to Home or Hospital Instruction Act of 2020, D.C. CODE §38-251.03(a)(5) (2021)

³² *Id.*, at D.C. CODE §38-251.05(a)

³³ DC Code § 38-2561.02(c) (private school facilities are called placements, not location assignments, "service locations" or "location of services").

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.³⁴

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

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 third? 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.³⁵ 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

³⁴ 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.

³⁵ 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).

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.³⁶ 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.³⁷

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 decided 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

³⁶ See DC Code § 38-2561.03(a) (stating that the SEA shall cooperate with LEA).

³⁷ 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).

We reiterate our previous comment for subsection 3025.8. 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 suggest eliminating it.

- 3025.8 The SEA shall not issue a location assignment for a nonpublic special education school or program that:
- (a) Is unable to implement the child’s IEP or meet the unique needs of the child;
 - (b) Does not hold a current certificate of approval, issued by the SEA in accordance with D.C. Official Code § 38-2561.07 and applicable regulations, to serve children with disabilities from the District;
 - (c) Holds a current certificate of approval but is not authorized to serve the child’s age, grade, or disability;
 - ~~(d) Requires all children to attend extended school year programming regardless of need or as a condition of enrollment; or~~
 - (e) Requires all children to attend programming that is offered outside the time frame of the regular instructional day and is not included in the school or program’s per diem educational rate approved by the SEA.

We appreciate that OSSE has taken part of our comment into consideration when modifying 3025.16 about Psychiatric Residential Treatment Facilities (PRTF). However, we remain concerned that obtaining the parental consent will create delays provision of the placement. The LEA may ask a parent to go through the Department of Behavioral Health (DBH), Department of Health Care Finance (DHCF), or their health insurance, 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. Ultimately our goal is to prevent the regulatory language from delaying or obstructing the child’s placement, so we suggest³⁸:

- 3025.16 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**

³⁸ See 34 CFR 300.154(d)(2)(i).

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 again request that OSSE consider modifying Subsection 3025.21(2) so that the notice includes information about the lottery and about the Parent Training and Information Center, Ombudsman for Public Education, and Student Advocate.

3025.21 During the school year in which a child with a disability placed in a nonpublic school will exceed the maximum age or grade for children served by the LEA as specified in its charter, the LEA shall:

- (1) Provide written notification to the parent of their responsibility to enroll the child at another LEA; ~~and~~
- (2) Provide such notification before December 31 of the school year; **and**
- (3) **Notice shall include information about the Lottery process, contact information for the Parent Training and Information Center, the Ombudsman for Public Education and the Office of the Student Advocate.**

3026 – Secondary Transition

Since the last proposed rulemaking, Children’s Law Center clients have continued to have trouble accessing post-secondary transition planning services. We appreciate that OSSE has made substantial progress modifying this section to go above and beyond the protections offered to these students by federal law.³⁹ However, there are still several subsections that could be modified to strengthen the collaboration between LEAs and DDS.

³⁹ See Proposed 5A DCMR §§ 3026.1 (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 § 3026.4(a), which requires the LEA to obtain information about specific transition services from a service

We again ask that some clarifying language be added to proposed subsection 3026.8, 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. 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 is key to have those evaluations done while the student is still in school so that the student can transition smoothly to the adult program. In our experience, it is almost impossible to connect students with the evaluations they need to continue into adult services through RSA, DDS, and DBH once they have graduated. If students do not get these evaluations prior to graduation, then it is likely they will not be able to access these important adult services. 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.

3026.8 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; ~~provided, that nothing in this Section shall be construed to impose any obligation on an LEA to conduct evaluations to determine eligibility for adult 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.**

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 3026.4 be amended as follows:

3026.4 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

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.

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, as follows:...

3027 - IEP Certificate of Completion

Children's Law Center remains concerned that the content areas that are identified in subsections 3027.1 and 3027.2 may still 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.⁴⁰ 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; ...⁴¹

⁴⁰ See NCSET Information Brief, Volume 4, Issue1 (2005) at <http://www.ncset.org/publications/viewdesc.asp?id=1928>.

⁴¹ 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.

Maryland students who receive this certificate are also provided an “Exit Document” that describes the student’s skills.⁴² Therefore, we recommend that subsection 3027.1 be amended to as follows:

- 3027.1 The LEA shall develop and maintain 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 3027.2 be amended as follows:

- 3027.2 If an LEA does not develop and publish a uniform IEP Certificate of Completion policy by July 1, 2020, the following requirements shall apply:

⁴² 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).

- (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 3027.2, 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 3027.2. 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.

3029 – System of Record

We recommend that the 3029 specifically proscribe that the LEA record in the system of record beginning and end dates for when students receive special education services and related services.

3029.2 The LEA shall update a student's record or upload appropriate documentation in designated State-level special education data systems **including the start and end date of special education services and related services** no later than five (5) business days after a change.

3031 – Paraprofessionals

Children's Law Center was extremely concerned to learn that the entire section on Paraprofessionals has been reserved in this proposed rulemaking. Although we understand that there are workforce concerns which OSSE has highlighted in this preamble, completely reserving this section and in essence having no standards for paraprofessionals and their training is unacceptable. For many of our clients, paraprofessionals are an integral part their ability to access FAPE. These individuals perform incredibly important tasks, from

medication management, behavioral and communication support, and learning life skills. Parents and students deserve to have paraprofessionals that are well trained and able to support the student properly.

Now more than ever, we are expecting that students are returning to the school building carrying over a year and a half of pandemic related stress, trauma, and anxieties. We are extremely concerned that without well trained paraprofessionals, students with disabilities will experience higher than normal instances of restraint and seclusion and that untrained paraprofessionals may cause harm to students when performing holds or calming dysregulated students. Simply striking this section without sharing with parents, students, and advocates what the policy or guidance might look like is very worrisome. We respectfully request that 3031 remains in place or is paired down using the following suggestions until a more robust policy or guidance can be issued.

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.⁴³

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.⁴⁴ OSSE should also consider adding details to the supervision requirement because of the difficulty of the work, such as a set 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

⁴³ See 22 Pa. Code § 14.105(a); Ga. Comp. Rules & Regs. § 502-2.18(2);

⁴⁴ Minnesota Statute § 125A.08(c); Ga. Comp. R & Regs. § 505-3-.07.

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.

3035 – Educational Surrogate Parent

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 appreciate OSSE accepting our comments to modify the language in section 3099 to define an Educational surrogate parent.

We remain concerned about the provision in 3003.5 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.⁴⁵ 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.

3005.5 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:~~

(a) Despite documented reasonable efforts to do so, the LEA cannot determine the whereabouts of the parent of the child (as parent is defined in 3099). ~~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.~~

⁴⁵ 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.

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 thank you for updating the language in 3035.6 which now explicitly states that the education decisionmaker has the authority to make decisions about the provision of FAPE. In terms of adding concrete deadlines to the process to ensure swift appointment of educational surrogates, we suggest the following:

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~~**in** the custody of CFSA, the surrogate parent alternatively may be appointed by the judge overseeing the child's case.

3035.8 An educational surrogate parent appointed by a judge overseeing the case of a child in the custody of CFSA 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**.

3035.9 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.~~

3039 - Independent Evaluations

There we no changes to the proposed rulemaking in section 3039 this time, and we reiterate some of the comments we shared previously. Many Children's Law Center clients rely on 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.⁴⁶

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 timelier 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.

3042 – Classroom Observations

⁴⁶ 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).

We thank you for accepting our comment to modify the language in 3042.2 to track the Code exactly. However, we recommend the language in 3042.3 is changed as well:

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.

Further, to gather the most complete picture of a student’s classroom needs our experience has demonstrated that it is often important to observe a student in more than one classroom setting and at more than one time of day. Therefore, we recommend modifying 3042.4 to allow for a more complete observation of the student.

3042.4 The parent, or the parent’s designee, shall be allowed to view the child’s instruction in the setting where it ordinarily occurs or the setting where the child’s instruction will occur if the child were to attend the proposed program **across multiple settings and multiple times of the day.**

3045 – Restraint

CLC appreciates the inclusion of the section on seclusion and restraint into this rulemaking, but we have serious concerns about how the potential health and safety consequences of these regulations as written. Due to a lack of available data the extent of the improper use of seclusion and restraint in the District is unknown and we are concerned that LEAs may be using the practice of seclusion and or restraint to manage classroom behavior and prevent classroom disruptions.⁴⁷ Subjecting students to seclusion and or restraints can create trauma for the student and lead to their injury and even death.⁴⁸

We support the comments provided by our colleagues at the Juvenile and Special Education Law Clinic at UDC and Disability Rights DC which urge that seclusion and restraint only be utilized as a method of last resort and only when there is imminent danger of serious physical harm to self or others.⁴⁹ Additionally, we are glad to see that that these

⁴⁷ See Disability Rights DC. *Need for Oversight and Restriction of the Seclusion and Restraint of District Youth Attending DC Public Schools*. (Oct. 2019). Retrieved from: <http://www.uls-dc.org/media/1185/2019-seclusion-restraint-report.pdf>.

⁴⁸ See Hannah Fry. *After autistic boy dies during school restraint, 3 educators charged with manslaughter*. (November 13, 2019) Los Angeles Times. Retrieved from <https://www.latimes.com/california/story/2019-11-13/autistic-boy-dies-school-restraint-educators-charged-manslaughter>.

⁴⁹ See Disability Rights DC. *Need for Oversight and Restriction of the Seclusion and Restraint of District Youth Attending DC Public Schools*. (Oct. 2019). Retrieved from: <http://www.uls-dc.org/media/1185/2019-seclusion-restraint-report.pdf>.

regulations eliminate seclusion and restraint as a planned intervention for any particular student.

Regarding the use of chemical restraints, we are concerned that the provided exception will swallow the rule. We are particularly concerned about this outcome in the case of forced injections. A forced injection should constitute a restraint, but a school administrator or staff member with less familiarity with this new law could read the provision to allow forced injection. To safeguard students' civil and human right to bodily autonomy, CLC recommends that OSSE to modify the relevant to prevent forced injections of students.

3045.3 The LEA shall not use any form of chemical restraints. A drug ordered by a licensed physician as part of ongoing medical treatment plan or determined by a licensed physician to be medically necessary is not considered a chemical restraint, **if voluntarily taken.**

Regarding physical restraint, we appreciate that OSSE removed §3045.4(b), which allowed for the use of restraints when it is included in the child's IEP to address specific behaviors under defined circumstances, and provided that such use by appropriate staff was consistent with implementing the child's IEP. CLC reiterates our belief that restraints should only be utilized as a method of last resort and only when there is imminent danger of serious physical harm to self or others. Moreover, we commend OSSE's decision to incorporate our previously recommended edits to §3045.9.

Finally, we urge OSSE to consider that not all students who are subject to restraint and seclusion techniques have special education needs. In fact, during the 2011-2012 school year it was reported that 28% of students subject to physical restraint were not receiving Special Education services.⁵⁰ We recommend that procedures on restraint and seclusion for students not in special education also be included in the upcoming Chapter 25 rulemaking to address their use on the non-special education population.

3050 – Impartial Due Process

We have suggested two changes to section 3050. Thank you for accepting our suggestion to inform the parent in writing regarding the "availability of mediation and any free or low-cost legal services and other relevant services available."

The second change we requested was not accepted but we reiterate it here. OSSE should completely remove or substantially modify subsection 3050.4, 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

⁵⁰ *Id.*

proposed provision is problematic for several 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 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. As a part of the five (5) day disclosure submitted before a due process hearing, ~~the submitting attorney parties, LEAs and LEA staff, contracted evaluators and services providers~~ **must** shall disclose any financial interest, of which he or she is aware, of any participant in the proceeding in a nonpublic provider or service that may be at issue in that due process hearing.

3053 – Resolution Meetings

In order to continue the spirit of collaboration with parents throughout the entire proposed rulemaking, we recommend modifying 3053.1 to require that resolution meetings be held at a mutually convenient time and a mutually convenient location to maximize parental participation.

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 and** meet all of the following standards:

- (a) The parent and the LEA shall determine the relevant members of the IEP Team to attend the resolution meeting.

- (b) The meeting shall include a LEA representative who has decision-making authority on behalf of the LEA.
- (c) The meeting may not include an attorney of the LEA unless the parent is accompanied by an attorney.
- (d) The purpose of the meeting shall be for the parent of the child to discuss the due process complaint and the facts that form the basis of the due process complaint, so that the LEA has an opportunity to resolve the due process complaint.

3053.5 If the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts, as defined in this chapter, have been made and documented, the LEA may, at the conclusion of the thirty (30) calendar-day resolution period, request that an impartial hearing officer dismiss the parent's due process complaint, as follows:

- (a) **For the purposes of 3053.3, a parent's failure to participate shall be defined as a parent's failure to respond to all requests by the LEA to schedule the resolution meeting.**
- (b) Any such request shall include evidence of the LEA's reasonable efforts to convene a resolution meeting with the parent;
- (c) The LEA's reasonable efforts shall be documented using the procedures in this chapter; and
- (d) The parent shall have an opportunity to respond to the request and related evidence prior to the hearing officer rules on the request.

As a separate matter, as it is currently drafted, subsection 3053.7 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."⁵¹

3053.7 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.

⁵¹ See 34 CFR § 300.510(e).

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

3099 – Definitions

Definition of Child Level Data

CLC recommends that OSSE include a non-exhaustive list of what qualifies as Child Level Data in the definitions section. Child Level Data is not defined in IDEA nor is it defined in this proposed rulemaking.

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.⁵² 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.⁵³ 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.

Definition of Enrollment

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:~~

⁵² 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").

⁵³ Maine’s regulations provide a possible model for the definition.
<http://www.maine.gov/doe/specialed/laws/chapter101.pdf>, pp. 4-5.

...

- (a) **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.**

Minor Clarifications

3017.5 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.

3020.8 If a child transfers from an LEA outside of the District of Columbia, the new LEA shall determine whether it is necessary to conduct an evaluation to determine the child's eligibility under this chapter, as follows:

- (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; or
- (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) Make and document reasonable efforts, as defined in this chapter, to obtain parental consent within fifteen (15) calendar days from the date on which the child is referred for an **initial** evaluation;
- (2) Conduct an evaluation and determine eligibility within sixty (60) calendar days within sixty (60) days from the date that the student's parent or guardian provides consent for the evaluation or assessment; and
- (3) Develop an IEP within fifteen (15) calendar days of the eligibility determination.

3023.3 If a child with a disability requires homebound or hospital instruction services for an extended period of time because of a medical or mental **health** condition, the LEA shall convene an IEP team meeting is convened to modify the placement and IEP of a child with a disability, if warranted.

3031.2 Instructional support services designated in a child's IEP shall be provided by ~~an~~ paraprofessional who meets the employment requirements of the LEA and possesses the education, training, or experience required to instruct children with disabilities in the content areas identified in the child's IEP, verified by:...

3044.4 The LEA shall determine on a case-by-case basis whether a pattern of removal **constitutes** a change in placement and shall document each such determination.

Conclusion

Thank you for the opportunity to provide comment on this proposed rulemaking for a new Chapter 30. Since the last proposed rulemaking, we recognize that the DC education community has faced myriad new challenges, especially regarding the provision of specialized instruction and related services. We know that this project was a major rewrite and appreciate the effort and time that OSSE has devoted to clarifying and strengthening these regulations. We share the same goal of improving the achievement and outcomes of children with disabilities and look forward to further conversations about these comments.

If you have questions, or would like to discuss anything, please feel free to reach me directly at drobinette@childrenslawcenter.org.