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October 11, 2022

Dr. Kelly Rudd Safran  
Special Populations & Programs  
Division of Systems and Supports, K-12  
Office of the State Superintendent of Education  
810 First Street, NE  
Washington, DC 20002

**Re: Comments on the Notice of Proposed Rulemaking for 5A DCMR Chapter 25 Students' Right to Home and Hospital Instruction**

Dear Dr. Kelly Rudd Safran:

Thank you for the opportunity to comment on the Notice of Proposed Rulemaking for Chapter 25 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.<sup>1</sup>

We often work with students with health conditions that keep them out of school for a prolonged period or for recurring and intermittent periods. Through our work, we have seen families who are already struggling to deal with a very sick child also struggle to arrange home or hospital instruction. For this reason, we testified in support of the Students' Right to Home or Hospital Instruction Act of 2019 ("the Act").<sup>2</sup>

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<sup>1</sup> 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.

<sup>2</sup> B23-0392, the "Students' Right to Home or Hospital Instruction Act of 2019," Public Hearing Before the Comm. of the Whole, D.C. Council, (Oct. 21, 2019) (testimony of Charles (Buck) Logan, Special Counsel, Children's Law Center), available at: <https://childrenslawcenter.org/wp-content/uploads/2021/07/CLC-Testimony-on-HHIP-Bill-B23-392-Final.pdf>

We are glad that the Office of the State Superintendent of Education (OSSE) has published the present rulemaking to ensure that Local Education Agencies (LEAs) are able to develop their plans to support students who need home and/or hospital instruction (HHI). Our comment is grounded in the experiences of our attorneys, staff, and clients who have struggled to access home and hospital instruction in the past as well as in our understanding of the law requiring the promulgation of these regulations.

We thank OSSE for your hard work on these draft regulations and for your dedication to students in the District, especially to those who face the greatest barriers to education. The suggestions in this comment are meant to ensure that LEAs develop HHI programs that work for students and families. Throughout our comment below, **bold text** represents suggested additions to the drafted language and ~~strikethrough text~~ represents suggested cuts from the drafted language.

## HOME AND HOSPITAL INSTRUCTION FOR STUDENTS WITH DISABILITIES

When a student with an IEP or 504 plan requires HHI, LEAs must consider both these HHI regulations as well as the relevant local and federal special education law, regulations, and policies. Throughout this rulemaking, the drafted language creates confusion regarding HHI requirements for students with Individualized Education Programs (IEPs). Moreover, the corollary regulations in 5A DCMR § 3024 provide little practical guidance for schools. Below we have highlighted several instances in which the present regulations need further clarification regarding how LEAs should proceed when a request for HHI is made for a student with IEP or Section 504 plan.

### Inclusion of References to Section 504 Plans

Outside of the preamble, the draft regulations do not include reference to Section 504 plans. While several sections refer to the Individuals with Disability Education Act (IDEA) or IEPs, the regulations as drafted do not consider the needs of students with Section 504 plans. We encourage OSSE to review the entirety of the rulemaking for opportunities to include 504 plans, we have listed below several instances where we recommend the addition of 504 plans to the draft language.

2501.2(b) For a student with an individualized education program (IEP) **or Section 504 service plan (504 plan)**, ensure that home or hospital instruction is provided in accordance with the IEP **or 504 plan**; and

## 2503 - HOME AND HOSPITAL INSTRUCTION FOR STUDENTS WITH DISABILITIES UNDER THE IDEA AND SECTION 504

2503.2 When a parent makes a request for home or hospital instruction for a student who is suspected of being or is eligible for special education services **or accommodations** under the IDEA **or Section 504**, the LEA shall:  
(a) Provide the parent with notice of the procedural safeguards under the IDEA defined by 34 CFR § 300.504 **or under Section 504 defined by LEA policy**; and<sup>3</sup>

### Unique Concerns for Students with IEPs

Under § 2503 Home and Hospital Instruction for Students with Disabilities under the IDEA, the drafted regulations require that an LEA convene “a placement determination team,” rather than the student’s existing IEP team. We recommend the following amendment:

2503.2(b) Consider whether the request for home or hospital instruction could impact the student’s educational placement in the least restrictive environment, and if so, convene ~~a placement determination~~ **the student’s IEP team** to review and revise the educational placement of the student, as appropriate, and to review and revise the student’s IEP, as appropriate.

A student’s IEP team is the best suited “to review and revise the educational placement of the student, [...], and to review and revise the student’s IEP, [...]” as required by this section and this change is important to ensure that these decisions are not made by LEA administrators who are unfamiliar with the student’s unique needs. Further, convening the IEP team would include both the student’s LEA and school of enrollment if the child is attending a nonpublic school. For students with complex educational needs, the proposed regulations ought to encompass the team who knows the student best.

Under § 2505 Home and Hospital Instruction Approval Process, the language as drafted permits LEAs to deny an application for home or hospital instruction if a

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<sup>3</sup> *Students’ Right to Home or Hospital Instruction Act of 2019*, DC Code § 38–251.09(c) (stating that “Upon submission of an application for home or hospital instruction, the LEA shall require its home or hospital designee to provide the parent with a notice of their rights as they pertain to **IDEA and Section 504**, as appropriate” (emphasis added)).

student's IEP requires HHI as the students least restrictive placement. As written, this does not make sense. If a student's IEP team finds that the least restrictive environment (LRE) is home and hospital instruction, why would the LEA be permitted to deny the application for HHI? Conversely, if the student's IEP team determines that HHI is *not* the student's LRE, the IDEA would not permit the LEA to choose HHI as the student's placement.<sup>4</sup> Assuming that the intention of this section was to preserve a student's right to the least restrictive education environment, we recommend the following edits:

2505.1(c) Deny an application for home or hospital instruction only if the application or a medical certification of need is missing information or otherwise incomplete, or if a student's IEP ~~requires~~ **determines that** home or hospital instruction **as is not** the student's least restrictive environment under IDEA;

Under § 2509 Mediation and Appeals, the drafted regulations enumerate the specific information and documentation that must be included in a written request for an appeal. To ensure that the appeal presents a full picture of the students' situation, we recommend the following addition to § 2509.1:

**(e) Where applicable for students with disabilities, include a copy of the student's IEP or 504 plan.**

Similarly, under § 2510 LEA Reporting, we recommend that HHI data be disaggregated by disability. To ensure this data is included in the annual report to OSSE, we suggest the following addition to § 2510.1(a):

**(a) All parent requests for home or hospital instruction; including student names, USI, and date of request, and whether the student had an IEP or 504 plan.**

## **DUE PROCESS CONCERNS IN MEDIATIONS AND APPEALS**

In several sections of the proposed regulations, the language as drafted creates serious concerns about due process availability for families who have sought HHI for their student. These limitations are particularly concerning given the Act's intent to

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<sup>4</sup> See 34 CFR § 300.114(a)(2).

bolster due process for students and their families.<sup>5</sup> In the following sections, we address several instances in which amendments are necessary to protect the rights of students and to further equity throughout the appeals process.

### Undue Limitations on the Scope of Appeals

Throughout the mediation and appeals sections of the proposed regulations, the drafted language restricts a parent's ability to appeal an LEA's decisions regarding HHI. First and foremost, the regulations as drafted foreclose any appeal of the LEA's written plan for implementation of HHI. This goes above and beyond the text of the legislation. The Act states: "A parent has a right to appeal the approval or denial decision made by the LEA." Contrastingly, § 2509.2 of the proposed regulations state: "the appeal shall be limited to the LEA's decision to approve and shall not include an appeal of the LEA's written plan for implementation of home or hospital instruction." While the Act affirmatively provides parents with a right to appeal an LEA's application decision, the proposed regulations severely limit the right to only the application decision. This limitation is not required by the law and should be removed from the regulations.

Furthermore, in our experience representing students in need of HHI, cases often concern the quality and quantity of instruction, not outcome of the application. For example, a common concern from our HHI cases is that, historically, very few hours have been provided. § 2508.2 of the proposed regulations empowers LEAs "to identify and provide a minimum number of hours per week of direct instruction."<sup>6</sup> If an LEA approves an application for HHI, but the parent feels that the minimum number of hours in the implementation plan is too few, their concerns are not appealable under the regulations as drafted. For students without an IEP or 504 plan, there would be no other recourse or due process available. For these reasons, the limitation created by the proposed regulations significantly undermines a parent's ability to seek due process for their student.

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<sup>5</sup> See D.C. Council, Comm. of the Whole, Report on Bill 23-392, "Students' Right to Home or Hospital Instruction Act of 2020" at 1 (Nov. 17, 2020), *available at*: [https://lms.dccouncil.gov/downloads/LIMS/43042/Committee\\_Report/B23-0392-Committee\\_Report2.pdf](https://lms.dccouncil.gov/downloads/LIMS/43042/Committee_Report/B23-0392-Committee_Report2.pdf) (noting that the legislation arose because "LEAs [were] able to decide - and refuse - whether a student receives home or hospital instruction, regardless of the medical opinions they receive[d], and there [was] no way to appeal the LEA's decision to an independent body.")

<sup>6</sup> Students' Right to Home and Hospital Instruction, 69 D.C. Reg. 011081, 011087 (proposed Sept. 9, 2022) (to be codified at 5A DCMR § 2508.2).

Additionally, the drafted regulations seem to envision a situation in which a parent appeals an approval of their application for HHI. This assumption is made in at least two places: § 2509.2 "...the appeal shall be limited to the LEA's *decision to approve*" and again at § 2509.6(a) "If a parent is *appealing the approval* by the LEA of a request for home or hospital instruction..." (emphasis added). It is hard to imagine a situation in which a parent would appeal the approval of application that they submitted, especially if it is OSSE intention to limit appeals to the decision to approve or deny and to preclude any appeals of HHI implementation plans.

We strongly recommend removing the limitation on scope of allowable appeals in § 2509.2. However, at a minimum, the language must include reference to appeal of a denial of an application for HHI.

§ 2509.2 If a parent appeals a decision by the LEA to approve **or deny** a request for home or hospital instruction, the appeal shall be limited to the LEA's decision to approve **or deny** and shall not include an appeal of the LEA's written plan for implementation of home or hospital instruction.

Similarly, in § 2509.6(a) the proposed regulations must be amended to address cases in which a parent appeals an LEA's denial of HHI. As above, not only is it unlikely that a parent would appeal a decision to approve the application they submitted (assuming they can only appeal the decision, not the implementation plan), but also it does not make sense for a parent to bear the burden of proof in such an appeal, given that the parent would have been the one to submit the medical certification as part of the application process. Furthermore, given that an LEA can only deny an HHI application for failure to submit all necessary documentation, a parent's appeal of a denial would need only provide proof that their application included all the necessary documents. Therefore, the section should be rewritten to better align with the requirements set forth in the Act. Below is one possible option for amended language:

§ 2509.6(a) The parent shall have the burden of proof **on appeal to the appeals**. If a parent is appealing the ~~approval~~ **denial** by the LEA of a request for home or hospital instruction, the parent shall be required to submit evidence **that they provided all necessary parts of the application;** ~~from a qualified health professional in order to rebut the presumption in favor of the medical certification supporting the application;~~



## Undue Limitations on Access to Mediation

In addition to concerns about the scope of available appeals, we have concerns about other due process limitations created by the proposed regulations. First, § 2509.3 specifically enumerates that mediation times “must fall within Monday through Friday, 9:00 am through 05:00 pm.” Given that these mediations are facilitated by OSSE, it may be most efficient for the agency to limit mediations to these traditional business hours. However, codifying these limitations will likely create equity concerns for families who cannot predictably be available during these windows. For example, a parent may not have or be able to afford childcare during this time. A parent may work in a setting that does not allow the requisite flexibility. And, of course, these parents have at least one child with a complex health condition that involved them in the HHI process; such conditions may require full-time care needs or inflexible medical appointment times. By forcing parents to attend a mediation during this window, OSSE may be forcing them to choose between accessing due process and keeping a job that provides the health insurance that their student relies upon.

While these equity concerns are significant on their own, they are further compounded by other language in the proposed regulations regarding mediation. Most seriously, § 2509.4 states that a parent who is unable to participate in the mediation process automatically loses their appeal. This provision takes the equity concerns baked into the scheduling requirement and makes them a limitation on due process. In situations where a family’s work or childcare needs become outcome-determinative in their HHI appeal, due process becomes dependent on access to financial resources. The logical conclusion of this regulatory scheme is that families with greater resources are likely to be more successful in their appeals. We strongly recommend that OSSE remove the codification of mediation times in the draft regulations. While OSSE may articulate a preference for these times, we encourage the agency to explore alternatives for families that need evening or weekend options.

Lastly, to increase family access to due process, we recommend that the regulations afford parents the right to bring legal counsel or an educational advocate with them to mediation and oral argument before the appeals panel. LEAs will have the benefit of legal advice and representation from their general counsel and parents should be given the same opportunity.

## ANTICIPATING IMPLEMENTATION CONCERNS

Beyond the legal concerns noted above, we also have several recommendations that we hope will improve implementation of these regulations. While not all implementation challenges are preventable, we hope that discussion of some foreseeable hurdles will support OSSE in refining the proposed regulations to best serve both families and schools.

### Medical Certification and Recertification

Under § 2505.2, the language as drafted permits LEAs to request “information from the parent concerning the student’s continuing medical need for home or hospital instruction.” The Act permits these requests, and the legislative history acknowledges that “LEAs may need to continue to speak with the medical professionals even after the instruction has begun” and that the Committee wanted “to ensure that a student is only out of school as long as is medically necessary.”<sup>7</sup> However, we have some concerns that the proposed language at § 2505.2 could undermine the required deference to medical opinions and allows LEAs to place undue burdens on families. We recommend that OSSE provide more comprehensive regulatory guidance on when, how, and to what extent an LEA can question the medical opinions underlying an approved HHI program.

Under § 2506.1, we commend OSSE’s efforts to create a broad list of medical professionals who can certify a student’s need for HHI. However, we have two recommendations to strengthen this section. First, regarding behavioral health professionals, we recommend that OSSE replace “licensed mental health counselor or therapist” with “licensed professional counselor” in order to be more consistent with the title used by DC Health and the Board of Professional Counseling.<sup>8</sup> Second, we suggest adding professionals certified nurse-midwife for pregnant students whose perinatal care may not be provided by a physician. We suggest the below changes to the relevant language:

2506.1 A medical certification of need is a written statement, either on a form provided by OSSE or any other form containing this information, signed by a licensed physician, licensed nurse practitioner, licensed clinical

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<sup>7</sup> Report on Bill 23-392, *supra* note 5, at 3.

<sup>8</sup> See DC Health, Licensing Boards, available at: <https://dchealth.dc.gov/service/licensing-boards>



psychologist, **licensed professional counselor**, ~~licensed mental health counselor or therapist~~, **certified nurse-midwife**, or physician's assistant that: [...]

Third, for students who require an extension of their HHI, the regulations must clarify that services are to continue pending the result of the recertification application. § 2507.2 requires that a parent seeking an extension of HHI submit a medical recertification of need at least five calendar days before the extension is to commence. We recommend that this section be strengthened by adding language to ensure that there is no break or stop in HHI services during the review of an application for recertification.

### Service Delivery

For students who are approved to receive HHI, the proposed regulations would benefit from clarifications regarding service delivery. Under § 2508.3, the draft language is inconsistent with the correlative language in the Act. The draft regulations state that an "LEA may adjust the minimum required amount of direct instruction based on the student's schedule and amount of in-school instruction the student is expected to receive."<sup>9</sup> However, the Act limits the ability to adjust minimums only for students "absent on an intermittent or partial basis."<sup>10</sup> This small difference in language ensures that LEAs are only able decrease hours for students who are able to periodically return to their classroom. Given that the regulations as drafted do not allow parents to appeal the substance of an HHI implementation plan, it is extremely important that there be limits on the ways in an LEA can alter or decrease HHI service plans. This important limitation must be added to the regulations.

**2508.3 For eligible students absent on an intermittent or partial basis, the**  
~~The~~ LEA may adjust the minimum required amount of direct instruction based on the student's schedule and amount of in-school instruction the student is expected to receive.

Other potential implementation concerns arise regarding instruction via videotelephony or asynchronous leaning without a parent's consent. § 2508.5(d) as drafted allows an LEA to provide virtual or asynchronous instruction without a parent's

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<sup>9</sup> Students' Right to Home and Hospital Instruction, 69 D.C. Reg. 011081, 011087 (proposed Sept. 9, 2022) (to be codified at 5A DCMR § 2508.3).

<sup>10</sup> DC Code § 38-251.06.

consent “when the LEA determines that safety concerns prevent in-person instruction.”<sup>11</sup> However, the regulations do not define “safety concerns.” Without clear guidance as to what constitutes a safety concern that could trigger this provision, we worry that LEAs will develop inconsistent and overly broad definitions. The legislative history notes that the Committee included the safety provision in acknowledgment of “circumstances such as the COVID-19 pandemic... where it may be unsafe both for the student and the instructor.”<sup>12</sup> However, the proposed regulations do not include this context and, therefore, schools may misinterpret the intent of this provision. OSSE must provide greater clarity by answering possible questions about potential safety concerns:

- How is “safety concern” defined?
- Whose safety is being assessed – the student’s, the instructor’s, or both?
- How is safety risk measured and who makes this assessment?
- When and how will parents be notified of the change?

Additionally, the decision to change instruction from in-person to videotelephony or asynchronous learning – for any reason – must require the LEA to assess whether the student is able to meaningfully benefit from this mode of instruction. As we learned throughout the pandemic, not all students are able to engage meaningfully with instruction via telephonic or video conferencing platforms. Particularly for students with documented disabilities, the LEA must be required to evaluate whether the student’s disability prevents them from engaging with virtual instruction. If so, the LEA should not be able to make this change without parental consent. Again, so long as the proposed regulations prohibit parental appeals of the substance of HHI service plans, the regulations must include safeguards to prevent LEAs from reducing or limiting HHI without parental input or consent.

### Recording Attendance

Another lesson we can learn from pandemic learning is the complication of recording accurate attendance for students receiving instruction outside of the school building. The proposed regulations require certain clarifications to ensure that attendance is recorded accurately for students receiving HHI. § 2508.7 of the proposed regulations instruct LEAs to “count the student as medically excused, except when a

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<sup>11</sup> 69 D.C. Reg., *supra* note 6, at 011088 (to be codified at 5A DCMR § 2508.5(d)).

<sup>12</sup> Report on Bill 23-392, *supra* note 5, at 4.

student is not available for home or hospital instruction, in which event the student may be counted absent.”<sup>13</sup> However, the phrase “is not available for home or hospital instruction” lacks sufficient clarity. If the student is not available due to medical complications, their absence should be considered excused, just as if the student missed a day of instruction at school due to illness. Alternatively, if the student is not available for any reason not excused under the LEA’s absence policy (e.g., a family vacation), the relevant absence could be counted unexcused.

### Additions to Definition Section

We recommend the addition of definitions that will support LEAs in their interpretation and implementation of these regulations. Additional details will allow school staff and families alike to understand what to expect from HHI.

#### **Due deference –**

- This definition must explain the legal concept of due deference in a manner that is accessible to non-lawyers.
- What constitutes “due deference” to medical opinions?
- Is an LEA required to defer to any medical certification signed by a licensed medical professional?
- Under what circumstances could an LEA override a medical certification of need?

#### **Home or hospital instructor –**

- What qualifications do these instructors need to have?
- Are they LEA employees or contractors?
- If the student has an IEP, does this instructor have the capacity to provide specialized instruction?

**Section 504 – Section 504 of the Rehabilitation Act of 1973, approved September 26, 1973 (87 Stat. 394; 29 U.S.C. § 794), and its implementing regulations.<sup>14</sup>**

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<sup>13</sup> 69 D.C. Reg., *supra* note 6, at 011088 (to be codified at 5A DCMR § 2508.7).

<sup>14</sup> Consistent with DC Code § 38-251.01(12).

**Section 504 Plan - a written plan that specifies the accommodations and services provided to a student pursuant to Section 504.<sup>15</sup>**

Additionally, we recommend the following amendment to the definition of “home and hospital instruction program” to ensure consistency with the definition in the Act.

**Home and hospital instruction program** - a program that provides instruction and support to students who have been or are anticipated to be **absent** ~~unable to attend in-school instruction~~, on a continuous, partial, or intermittent basis, from their school of enrollment for ten (10) or more consecutive or cumulative school days during a school year due to a health condition.

Increasing Language Access

DC Law requires that covered entities with major public contact provide oral and written language services to persons with limited or no-English proficiency who seeks to access or participate in services offered by the covered entity.<sup>16</sup> OSSE, District of Columbia Public Charter Schools (DCPCS), and District of Columbia Public Schools (DCPS) are all covered entities under the Language Access Act and the associate regulations.<sup>17</sup> As such, OSSE and LEAs must provide language access to students and families. To comply with the law and to guide LEAs in the development of their HHI programs, the proposed regulations must include references to language access requirements in this context.

2502.2(d) Be published online on the LEA’s website in a reader-friendly format **and into any non-English language spoken by a limited or non-English proficient population pursuant to DC Code §2-1933(a).**

2504.1 A parent seeking home or hospital instruction for a child may submit an oral or written request to the LEA in which the student is enrolled, provided that the LEA shall not grant the request until the parent submits

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<sup>15</sup> Consistent with DC Code § 38-251.01(13).

<sup>16</sup> DC Code §2-1932-33

<sup>17</sup> See 4 DCMR §1206.2(b) (stating that OSSE and DCPCS have been designated by the Language Access Director under the direction of the Director of the Office of Human Rights pursuant to DC Code § 2-1931(3)(C)); see also DC Code § 2-1931(3)(B) (listing DCPS as a covered entity with major public contact).

a written application in accordance with this section. **The LEA shall provide timely language access support to any parent with limited or no-English proficiency pursuant to DC Code §2-1932 and 1933.**

### Additional Non-Regulatory Guidance Needed for LEAs

The Students' Right to Home or Hospital Instruction Amendment Act of 2019 and § 2502.1 of the present regulations require LEAs to adopt and implement written home and hospital instruction program policies beginning in school year 2022-23.<sup>18</sup> However, given that these regulations are not yet final, and SY22-23 is well underway, we strongly encourage OSSE take these and other comments into consideration with a sense of urgency. Additionally, LEAs will need thorough guidance and technical assistance to develop their plans in accordance with the law and the finalized regulations. Specifically, OSSE should provide LEAs with clear and specific guidance regarding the timeline for developing, publishing, and implementing their HHI plans. The delay in promulgating regulations has forced LEAs to start the school year out of compliance with the law. Each day a child misses the opportunity to engage in home or hospital instruction is a missed opportunity for learning and development that they may never get back.

### CONCLUSION

Thank you for the opportunity to provide comment on this proposed rulemaking for Students' Right to Home or Hospital Instruction. We appreciate the effort and time that OSSE has devoted to developing these regulations. We share the same goal of improving the achievement and outcomes of children with serious medical conditions and look forward to further conversations about our comment. If you have questions, or would like to discuss anything, please feel free to reach me directly at [drobinette@childrenslawcenter.org](mailto:drobinette@childrenslawcenter.org).

Sincerely,



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<sup>18</sup> DC Code § 38-251.02(a).