

OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

NOTICE OF PROPOSED RULEMAKING

The State Superintendent of Education (“Superintendent”), pursuant to the authority set forth in Sections 3(b)(7), (8), (11), and (15) of the State Education Office Establishment Act of 2000, effective October 21, 2000, (D.C. Law 13-176; D.C. Official Code §§ 38-2602(b)(7), (8), (11) and (15) (2012 Repl. & 2014 Supp.)); the Special Education Quality Improvement Act of 2014, effective March 10, 2015 (D.C. Law 20-196; 61 DCR 12425 (December 5, 2014)); Section 101(b) of the Enhanced Special Education Services Amendment Act of 2014, effective March 10, 2015 (D.C. Law 20-195; 61 DCR 12419 (December 5, 2014)); and the Special Education Student Rights Act of 2014, effective March 10, 2015 (D.C. Law 20-194; 61 DCR 12411 (December 5, 2014)), hereby gives notice of intent to amend and revise Chapter 30 (Education of the Handicapped) of Subtitle E (Original Title 5) of Title 5 (Education) of the District of Columbia Municipal Regulations (“DCMR”) in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

The purpose of the proposed rules is to revise and update the current regulations to conform with and implement recent legislation the Enhanced Special Education Services Amendment Act of 2014, the Special Education Student Rights Act of 2014, and the Special Education Quality Improvement Amendment Act of 2014, all effective March 10, 2015. The purpose of the three laws is to enhance the quality of services, procedural protections, placement and location options, funding and service choices, transfer of rights processes, and public charter school preferences made available to eligible students and their families under the IDEA and Section 504 of the Rehabilitation Act.

The Superintendent gives notice of the intent to take final rulemaking action to adopt the proposed rules in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*. This notice is being circulated throughout the District for a thirty (30) day period, including an opportunity to submit written comments and attend public hearings on these proposals. Two (2) public hearings have been scheduled for August 5, 2015, between 4:00 p.m. until 6:00 p.m.; and August 20, 2015, between 6:00 p.m. until 8:00 p.m. They will take place at the Office of the State Superintendent of Education, 810 1st Street NE, Washington, D.C. 20002, as detailed and under conditions set forth at the end of this Notice.

Chapter 30, EDUCATION OF THE HANDICAPPED, of Title 5, EDUCATION, Subtitle E, ORIGINAL TITLE 5, is proposed to be amended as follows:

The title of Chapter 30 is amended to read as follows:

CHAPTER 30 SPECIAL EDUCATION

Section 3000, SPECIAL EDUCATION POLICY, is amended as follows:

The following definitions in Subsection 3001.1 are amended to read as follows:

3001.1

When used in this chapter, the following terms and phrases shall have the meanings ascribed.

Act (or IDEA) - the Individuals with Disabilities Education Act, approved April 13, 1970, as amended (84 Stat. 175; 20 U.S.C. §§ 1400 *et seq.*), and its implementing regulations.

Charter School (or public charter school) - a publicly funded public school established pursuant to the District of Columbia School Reform Act of 1995, approved April 26, 1996 (110 Stat. 1321; D.C. Official Code §§ 38-1800 *et seq.*), and is not part of the District of Columbia public schools (DCPS).

Child with a disability –

(a) In general, a child with:

- (1) intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, specific learning disabilities, deaf-blindness, or multiple disabilities; and
- (2) who, by reason thereof, needs special education and related services.

(b) The term “child with a disability” for a child aged three (3) through seven (7) includes a child who experiences developmental delay as defined in this subsection.

DCPS - the District of Columbia Public Schools, established by Section 102 of the District of Columbia Public Schools Agency Establishment Act of 2007, effective June 12, 2007 (D.C. Law 17-9; D.C. Official Code § 38-171).

Individualized Education Program (IEP) - a written statement that specifies the special education programs and services to be provided to meet the unique educational needs of a child with a disability, as required under Section 614(d) of IDEA (20 U.S.C. § 1414(d)) and this chapter.

Individualized Family Service Plan (IFSP) – a written plan for providing early intervention services to an infant or toddler with a disability and the infant’s or toddler’s family that:

(a) Is based on the evaluation and assessment of the child and family, described in 34 C.F.R. § 303.321;

- (b) Includes the content of 34 C.F.R. § 303.344,
- (c) Is implemented as soon as possible once parental consent for the early intervention services in the IFSP is obtained, consistent with 34 C.F.R. § 303.420; and
- (d) Is developed in accordance with the IFSP procedures in 34 C.F.R. §§ 303.342, 303.343, and 303.345.

Local Education Agency (LEA) - an educational institution at the local level that exists primarily to operate a publicly funded school or schools providing elementary or secondary education in the District of Columbia, including the District of Columbia Public Schools and a District of Columbia public charter school. The term includes public charter schools that have elected, pursuant to D.C. Official Code § 38-1802.02(19), DCPS to serve as the LEA for purposes of IDEA, with such election subject to the provisions of D.C. Official Code § 38-1802.10(c), requiring an LEA to be its own LEA for purposes of IDEA and the Rehabilitation Act unless waived by the District of Columbia Public Charter School Board.

Section 3001 is amended by adding the following definitions to Subsection 3001.1:

IDEA (or Act) - the Individuals with Disabilities Education Act, approved April 13, 1970, as amended (84 Stat. 175; 20 U.S.C. §§ 1400 *et seq.*) and its implementing regulations.

Infant or toddler with a disability - shall have the same meaning as provided in Section 632(5) of the IDEA (20 U.S.C. § 1432(5)).

Office of the State Superintendent of Education (OSSE) - is the State Education Agency (SEA) for the District of Columbia established by the State Education Office Establishment Act of 2000, effective October 21, 2000 (D.C. Official Code §§ 38-2601 *et seq.*), with all operational authority for state-level functions, except that delegated to the State Board of Education in D.C. Official Code § 38-2652. As described in D.C. Official Code § 38-2601.01, OSSE performs the functions of a state education agency for the District of Columbia under applicable federal law, including grant-making, oversight, and state educational agency functions for standards, assessments, and federal accountability requirements for elementary and secondary education.

Public charter school - means a publicly funded public school established pursuant to the District of Columbia School Reform Act of 1995, approved April 26, 1996 (110 Stat. 1321; D.C. Official Code §§ 38-1800 *et seq.*), and is not part of DCPS.

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

The title of Section 3004 is amended to read as follows:

3004 IDENTIFICATION & REFERRAL FOR INITIAL EVALUATION

Section 3004 is amended by amending Subsection 3004.1 to read as follows:

3004.1 Referral to IEP Team

- (a) A child suspected of having a disability who may need special education and is at least two years, eight months of age and less than twenty-two (22) years of age, shall be referred to an IEP team for an evaluation or assessment.
- (b) A referral for an evaluation or assessment for special education services may be oral or written. An LEA shall document any oral referral within three (3) business days of receipt.

Section 3005, EVALUATION AND REEVALUATION, is amended by amending Subsection 3005.2 to read as follows:

3005.2 Before paragraph (a) of this subsection takes effect, an LEA shall assess or evaluate a student who may have a disability and who may require special education services within one hundred twenty (120) days from the date that the student was referred for an evaluation or assessment, consistent with Federal and local law.

- (a) Beginning July 1, 2017, or upon the inclusion of the fiscal effect of the subsection in an approved budget and financial plan as certified by the District of Columbia Chief Financial Officer and published in the *District of Columbia Register*, whichever occurs later, an LEA shall assess or evaluate a student who may have a disability and who may require special education services within sixty (60) days from the date that the student's parent or guardian provides consent for the evaluation or assessment. The LEA shall make reasonable efforts to obtain parental consent within thirty (30) days from the date the student is referred for an assessment or evaluation.
- (b) The LEA shall document reasonable efforts to obtain parental consent. Reasonable efforts include at least three (3) attempts using at least two (2) of the following modalities:
 - (1) Telephone calls made or attempted and the results of those calls;
 - (2) Correspondence sent to the parents and any responses received; or
 - (3) Visits made to the parents' home or place of employment and the results of those visits.

Section 3009, INDIVIDUALIZED EDUCATION PROGRAM (IEP) DEVELOPMENT, is amended by amending Subsections 3009.3 through 3009.5, adding a new Subsection 3009.6, renumbering and amending Subsection 3009.6, adding a new Subsection 3009.8, and renumbering Subsection 3009. 7, to read as follows:

3009 INDIVIDUALIZED EDUCATION PROGRAM CONTENT

...

- 3009.3 Before Subsection 3009.6 takes effect, the IEP for a child with a disability, beginning not later than the first IEP to be in effect when the child is sixteen (16), and updated annually thereafter, shall include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills and the transition services (including courses of study) needed to assist the child in reaching those goals.
- 3009.4 Before Subsection 3009.6 takes effect, for each child beginning at age sixteen (16) or younger if determined appropriate by the IEP team, the IEP shall include a statement of needed transition services including, if appropriate, a statement of inter-agency responsibilities or any needed linkages, or both, before the child leaves the school setting.
- 3009.5 Before Subsection 3009.6 takes effect, if the IEP team determines that transition services are not needed, the IEP shall include a statement to that effect and the basis upon which the determination was made.
- 3009.6 Beginning July 1, 2016, or upon the inclusion of the fiscal effect of this subsection in an approved budget and financial plan as certified by the District of Columbia Chief Financial Officer and published in the *District of Columbia Register*, whichever occurs later, the first IEP in effect after a child with a disability reaches fourteen (14) years of age shall include transition assessments and services, including:
- (a) Appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills and the transition services needed to assist the child in reaching those goals;
 - (b) A statement of inter-agency responsibilities or any needed linkages before the child leaves the school setting; and
 - (c) If the IEP team determines that transition services are not needed, the IEP shall include a statement to that effect and the basis upon which the determination was made.
- 3009.7 The requirements set out in Subsections 3009.3 and 3009.6 above shall not apply to children with disabilities who are convicted as adults under District or state law and incarcerated in adult prisons whose eligibility under Part B of IDEA will end,

because of their age, before they will be eligible to be released from prison based on consideration of their sentence and eligibility for early release.

3009.8 Not later than one year before a child with a disability's anticipated high school graduation or attainment of a certificate of IEP completion, the IEP team shall identify which adult services might be appropriate for the child and, in consultation with the appropriate District of Columbia agency when feasible, what evaluations should occur to determine the child's eligibility for those services; provided, that nothing in this section shall be construed to impose any obligation on an LEA to conduct evaluations to determine eligibility for adult services.

3009.9 Beginning at least one (1) year before a child with a disability reaches the age of eighteen (18) his or her IEP must include a statement that the child has been informed of his or her rights under Part B of the Act that will transfer to the child on reaching the age of eighteen (18), unless the child has been determined to be incompetent under District law or the child has been certified as unable to provide informed consent pursuant to § 3023.

The title of Section 3011 is amended to read as follows:

3011 LEAST RESTRICTIVE ENVIRONMENT (LRE) & PLACEMENT OUTSIDE OF THE LEA

Section 3011 is amended to read as follows:

3011.1 An LEA shall provide a student with a disability a free and appropriate public education in an appropriate special education placement in accordance with IDEA and local law; provided that an LEA shall not remove a student with a disability from an age-appropriate classroom solely because of modifications that can be made in the general education curriculum. The LEA shall ensure that:

- (a) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled; and
- (b) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

3011.2 If an LEA anticipates that it may be unable to implement a student's IEP or provide a student with an appropriate special education placement in accordance with the IDEA and other applicable laws or regulations, the LEA shall notify OSSE. Subject to its policies for placement review, OSSE shall cooperate with the LEA to provide a placement in a more restrictive setting in conformity with the IDEA, and any other applicable laws or regulations.

- 3011.3 OSSE shall be responsible for paying the costs of education, including special education and related services, of a student with a disability when the student is placed at a nonpublic special education school or program pursuant to this section; provided, that, in conformity with IDEA, OSSE shall not be responsible for paying the cost of education, including special education and related services, of a student with a disability who attends a nonpublic special education school or program if:
- (a) An LEA made a free and appropriate public education available the student; and
 - (b) The student's parent or guardian elected to place the student in a nonpublic special education school or program.

Section 3023, TRANSFER OF RIGHTS, is amended to read as follows:

3023 TRANSFER OF RIGHTS

- 3023.1 In accordance with D.C. Official Code § 46–101 and IDEA, all rights accorded to parents under IDEA and local law governing the delivery of special education transfer to the student at the age of eighteen (18), except as provided in §§ 3023.3 through 3023.12.
- 3023.2 A student who has reached eighteen (18) years of age may receive support from another competent and willing adult to aid the student with educational decision-making. The student's decisional choice shall prevail any time that a disagreement exists between the student and the other adult providing support in this manner.
- 3023.3 A student who has reached the age of eighteen (18) shall be presumed to be competent, and all rights under IDEA and local law governing the delivery of special education shall transfer to the student, unless:
- (a) The student is declared legally incompetent or legally incapacitated by a court of competent jurisdiction and a representative has been appointed by the court to make decisions for the student;
 - (b) The student has been determined, in accordance with § 3023.5, to not have the ability to provide informed consent and another competent adult has been appointed by OSSE to represent the educational interests of that student; or
 - (c) The student has designated, in writing, by power of attorney or similar legal document, another competent adult to be the student's agent to:
 - (1) Make educational decisions;
 - (2) Receive notices; and

- (3) Participate in meetings and all other procedures related to the student's educational program on behalf of the student.

3023.4 A student having transferred rights by a power of attorney or similar legal document to another to be the student's agent in accordance § 3023.3(c), may terminate the power of attorney at any time and assume the right to make decisions regarding his or her education.

3023.5 OSSE shall certify that a student who has reached the age of eighteen (18) is unable to provide informed consent, only after the satisfactory completion of the following:

- (a) Submission to OSSE of the following:
 - (1) A request for certification that the student is unable to provide informed consent completed by the parent or other interested person. The request shall be submitted, on an OSSE approved form to be made available on the OSSE website;
 - (2) Certifications that meet the requirements of § 3023.6 by two (2) qualified professionals, who each possess the qualifications listed in § 3023.8;
 - (3) A copy of the student's birth certificate or other official form of identification indicating the student's date of birth; and
 - (4) A copy of an official form of identification of the parent, family member, or legal guardian requesting certification to become the student's educational representative.
- (b) Written confirmation by OSSE that all submission requirements have been met and that the appointment of an educational representative shall be made by OSSE within a time certain.

3023.6 The professional certifications required in § 3023.5 require the following:

- (a) The professional has conducted a personal examination or interview with the student;
- (b) Based on the professional's knowledge and expertise, the professional determined that the student is unable to provide informed consent as described in § 3023.7;
- (c) The professional has, if appropriate, informed the student of the determination; and

- (d) Confirmation that the professional is not employed by the LEA currently serving the student and does not have a personal conflict of interest such as being related by blood or marriage to the student.

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

- (a) The student is unable to understand the nature, extent, and probable consequences of an educational decision or proposed educational program on a continuing or consistent basis;
- (b) The student is unable to make a rational evaluation of the benefits or disadvantages of an educational decision of proposed educational program as compared with alternative options on a continuing or consistent basis; or,
- (c) The student is unable to communicate such understanding in any meaningful way.

3023.8 The certification procedure requires certifications completed by two different professionals, one (1) meeting the requirements of (a) and one (1) meeting the requirements of (b):

- (a) A professional who is any of the following:
 - (1) Medical doctor licensed in the state where the doctor practices medicine;
 - (2) Physician's assistant whose certification is countersigned by a supervising physician; or
 - (3) Certified nurse practitioner.
- (b) A second professional who is any of the following:
 - (1) Medical doctor licensed in the state where the doctor practices medicine;
 - (2) Licensed psychiatrist;
 - (3) Clinical psychologist; or
 - (4) Licensed clinical social worker.

- 3023.9 Professional certifications may be submitted as early as ninety (90) calendar days prior to the student's eighteenth (18th) birthday but shall not be reviewed by OSSE until all of the requirements of § 3023.5 have been met, and shall not take effect prior to the student's eighteenth (18th) birthday.
- 3023.10 OSSE shall retain submitted certification requests and all supporting documents for at least three (3) years, as follows:
- (a) OSSE shall make information about the certification process and the required form publicly accessible on the OSSE website and in hard copy format;
 - (b) OSSE shall only accept signed copies of the certifications described in this section;
 - (c) OSSE shall provide the applicant with a confirmation of receipt in writing no later than ten (10) business days after receiving all of the submissions required by § 3023.5; and
 - (d) OSSE's written confirmation shall serve as the record of valid certification, and shall include effective dates.
- 3023.11 Upon confirming receipt of the appropriate professional certifications, OSSE shall appoint the parent of the student to act as the student's educational representative. If the parent is unavailable or does not wish to serve as the student's educational representative, OSSE, with consent of the parent or legal guardian seeking the certification, shall appoint another adult relative willing to act as the student's educational representative. If no adult relative is available and competent to serve as the student's educational representative, OSSE, with notice to the parent or legal guardian seeking the certification, shall appoint a person trained as an educational surrogate parent to serve as the student's educational representative.
- 3023.12 The student may challenge the certification of the student or appointment of an educational representative under § 3023.11 at any time. If a challenge is presented, all of the following apply:
- (a) A challenge made under this section shall be made in writing to OSSE, except that OSSE shall assist a student who is unable to provide a written challenge to document a verbal challenge in writing or refer the student to a community organization for assistance;
 - (b) OSSE shall notify the student and current appointed educational representative, if an appointment has been made, of any such challenge in writing no later than two (2) calendar days from the receipt of the challenge; and

- (c) If the certification of a student is challenged by the student, the existing certification is invalidated, and all educational rights transfer back to the student.

3023.12 No later than one (1) year before a child with a disability reaches eighteen (18) years of age, the LEA shall notify the parents and student, in writing, that adult students with disabilities are presumed competent, and that all rights under IDEA will transfer to the student when the student reaches eighteen (18) years of age, unless the student or the family pursues one of the options described in § 3023.3. The notice shall also describe the necessary procedures to exercise the options described in § 3023.3 and notify the parent and student of the provisions of § 3023.2.

Persons desiring to comment on this proposed rulemaking may attend the public hearings scheduled to be held at OSSE, 810 1st St. NE, Washington, D.C., 20002, on August 5, 2015, from 4:00 p.m. until 6:00 p.m. in Conference Room 806 on the 8th floor, and August 20, 2015, from 6:00 p.m. until 8:00 p.m. on the 3rd Floor in the Grand Hall; individuals wishing to testify at the hearing should contact Christie Weaver-Harris, Policy Analyst, at 202-741-0470 by e-mail at Christie.Weaver-Harris@dc.gov. Individuals representing themselves and presenting testimony will be limited to five (5) minutes; individuals representing an organization will be limited to a total presentation time of seven (7) minutes at each public hearing.

Persons may also file comments in writing by email osse.publiccomment@dc.gov or by postal mail or hand delivery to the Office of the State Superintendent of Education, Attn.: Elisabeth Morse re: Special Education Rulemaking, 810 First Street, NE 8th Floor Washington, DC 20002, not later than thirty (30) days after the date of publication of this notice in the *D.C. Register*. Additional copies of this rule are available from the above address and on the Office of the State Superintendent of Education website at www.osse.dc.gov.