



Avis E Buchanan
Director

Rudolph Acree, Jr.
Deputy Director

October 1, 2021

Office of the State Superintendent of Education
Attn: Christie Weaver-Harris
1050 First Street NE, 5th Floor
Washington, DC 20002

Dear Ms. Christie Weaver-Harris:

The Public Defender Service for the District of Columbia (PDS) is submitting comments for the Office of the State Superintendent of Education's proposed amendments to Chapter 30 of Title 5-A in the District of Columbia Municipal Regulations (currently found at 5-E DCMR §3000-3036) governing the education of students with disabilities. PDS appreciates the opportunity to comment on the proposed amendments and would welcome the opportunity to meet with OSSE in the future in order to discuss these or other amendments.

Special education attorneys in PDS's Civil Legal Services Division represent the parents of juvenile clients in administrative proceedings before the Student Hearing Office, the Office of Administrative Hearings, and the Family Division of Superior Court. We advocate for special education services and appropriate school placements for justice-involved youth who are detained or are in the community. Our practice is exclusively on behalf of youth with disabilities who are involved in the criminal or juvenile legal systems and for this reason our advocacy brings us into regular contact with all of the various agencies that have a role in these legal systems.

On a policy level, PDS is particularly interested in ways to improve the educational outcomes of those students with disabilities who are involved in the juvenile and criminal legal systems and the delivery of educational services in correctional settings. To that end, PDS's recommended changes are directed toward including provisions that more directly address the circumstances and needs of students with disabilities who are confined in correctional facilities or who are in the community but who have experienced disruptions in educational placement as a result of contact with a legal system.

PDS enthusiastically supports many of the proposed amendments including those that change eligibility for special education through the end of the school year in which a child turns 22 (3001.4), do not require a child to have a medical diagnosis or medical documentation to access FAPE (3001.10), and allow IEP teams to find a child eligible based on multiple disabilities

(3010.4). Taken together, these proposed amendments provide children and their parents with greater and more efficient access to special education services, and make common sense reforms.

PDS has concerns, however, about the sections identified below and offers the following proposed changes and reasoning in support of those changes. As noted at the outset of this letter, PDS's concerns and the changes we recommend are informed by the need to improve educational outcomes of students with disabilities who are involved in the juvenile and criminal legal systems and to improve the delivery of those services to ensure their educational success.

3001.7

3001.7 The LEA's responsibility to make FAPE available extends to any child with a disability who is in the custody of the District of Columbia Child and Family Services Agency (CFSA) or the Department of Youth Rehabilitation Services (DYRS)¹, who is suspended or expelled by the LEA, and highly mobile children enrolled in the LEA such as migrant or homeless children.

PDS recommends adding the underlined language above. To the extent that this regulation sets out the scope of a LEA's responsibility to provide FAPE, it should be a comprehensive statement that covers all eligible children with disabilities regardless of their custodial status and regardless of which District agency is charged with assuming control of the custody and welfare of the child. As currently drafted, the regulation is an incomplete statement of the scope of a LEA's FAPE responsibilities.

3001.13

3001.13 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, except if a child is in a detention facility, the LEA in that facility becomes responsible for providing FAPE upon placement in the facility, and parental consent is not required.

PDS recommends adding the underlined language above. This regulation as proposed does not adequately address the frequent disruption of FAPE when students with disabilities are detained. To avoid this disruption, the LEA for the facility at which the student is detained should be the LEA responsible for FAPE. Another way to address this problem is to permit dual enrollment to ensure disruption does not occur and there is continuing accountability for delivery of

¹ Except where the text is bolded, underlined text represents proposed additions by PDS. Text that is both underlined and bolded signifies changes that OSSE has already proposed for amendments to Chapter 30.

FAPE. By permitting detained students to remain dually enrolled in both the sending school and the receiving school at the facility, students will be able to easily transition back to the sending school upon release from the facility and continue their education. This would also allow both schools to collaborate and ensure that the students receive FAPE. While this dual enrollment principle may seem at odds with established convention, it is aimed specifically at addressing long-standing issues for detained students: disruption, delayed enrollment, delayed development of IEP's, missing records and other foundational steps that outside of the correctional setting proceed unimpeded but inside a correctional setting stand as obstacles to timely delivery of services.

3005.3

3005.3 After providing prior written notice, the LEA shall obtain consent from the parent of the child before proceeding with the initial evaluation. ~~The consent form shall contain:~~

~~(a) — Information about the purpose of the evaluation process;~~

~~(b) — The types of child-level data being assessed; and~~

~~(c) — Any additional assessments needed.~~

PDS recommends reinserting the deleted language. The consent form should include the above information to ensure that parents are adequately informed about the testing that is ordered for their children. Inclusion of this language is not a redundancy but instead advances the procedural protections of the parent and ensures that parents make informed educational decisions with the maximum degree of information and understanding. Parents should have this information available to them at the time they are executing the consent to ensure they fully understand what consent they are giving and the scope of that consent. For example, a parent may consent to a psychological evaluation but not a speech evaluation. A general consent form does not allow the parent to accurately describe the evaluations that he or she consents to have administered. To be valid, the consent must be informed; informed consent means the LEA has provided the parent necessary information, such as the assessment plan, and given the parent an opportunity to ask questions about the type of assessments the evaluator believes are appropriate. If the parent believes that certain test instruments are not appropriate for their child, under the proposed amendments, there would be no way to document that consent is not being given for a particular test instrument.

3008.2

3008.2 The IEP Team for each child with a disability includes the following additional IEP Team participants, as appropriate:

- (a) Related services personnel;
- (b) A Part C representative may be appropriate if a child was previously served under Part C of IDEA. If appropriate, an invitation to the initial IEP Team meeting shall, with the consent of the parent, be sent to the Part C service coordinator or other representatives of the Part C system to assist with the smooth transition of services;
- (c) A secondary transition representative ~~may~~ shall be appropriate if the IEP Team will discuss secondary transition. If appropriate and in compliance with this Section, the LEA shall invite, with parental consent, a representative of any participating agency that is likely to be responsible for providing or paying for transition services.
- (d) The child, as follows:
 - (1) If the child has reached fourteen (14) years of age, or younger if deemed appropriate by the child's IEP Team;
 - (2) The LEA shall invite the child with a disability to attend the child's IEP Team meeting if a purpose of the meeting is the consideration of the postsecondary goals for the child and the transition services needed to assist the child in reaching those goals; and
 - (3) If the child does not attend the IEP Team meeting involving the consideration of the postsecondary goals and transition services, the LEA shall take other steps to ensure that the child's preferences and interests are considered; and
- (e) Other individuals, as follows:
 - (1) ~~At the discretion~~ With the consent of the parent ~~or the agency LEA~~, other individuals who have knowledge or special expertise regarding the child, including related services personnel, as appropriate; and
 - (2) The determination of the knowledge or special expertise of any individual described in this Section shall be made by the party (parent or LEA) who invited the individual to be a member of the IEP Team.

- (3) The LEA must invite the transition representative to the IEP Meeting to discuss transition services for students 14 years old or older.

PDS recommends adding the underlined language above requiring parental consent for participation in IEP meetings. Parents should have to provide consent before other individuals can attend IEP meeting because the information disclosed and the topics discussed at IEP meetings are often highly sensitive and would otherwise remain confidential. Many evaluations that are reviewed contain extremely personal family information and parents should have a voice in choosing who has access to this information. In order to comply with the Family Educational Rights and Privacy Act (FERPA), the participation of any individuals in an IEP meeting who are not involved in the delivery of instruction, the implementation of modifications or accommodations, or related services provided in the IEP should require consent of the parent.

PDS also recommends adding the underlined language regarding transition services. Transition services are crucial to ensure the success of the student as they progress in the academic setting and ultimately into the community. While transition services are vital to all students, they are even more essential for students with disabilities who are or were involved in the criminal legal system. Given that transition services are an essential support mechanism, the LEA should be required to invite a representative to the meeting.

3015.4

- 3015.4 The LEA shall not limit extended school year services to particular categories of disability or unilaterally limit the type, amount, or duration of these services, **including that the LEA shall not limit provision of extended school year services to only the summer or to periods during which the LEA provides summer school programming.** Extended school year services (ESY) should be provided in combination with existing summer school programs, if such programs are available. Extended school year services should also be made available during winter and spring break and during after school hours.

The LEA should take a 360-degree approach to the availability and value of extended school year services to ensure that students with disabilities have such services throughout the school year. Student need for extended year services is not limited to summer and may be needed during winter or spring breaks. For this reason, the availability of such services should be adapted to meet students' year-round educational needs. Our suggestion about ESY being provided with existing

summer school programming is due to our experience with students on the high school diploma track being forced to choose between ESY services and the ability to earn credits during the summer.

3017 INDIVIDUALIZED EDUCATION PROGRAM DEVELOPMENT

3017.1 The LEA shall ensure that the IEP Team completes its development of the initial IEP for a child with a disability within thirty (30) days of a determination that a child is eligible for special education and related services.

3017.2 The LEA shall provide school staff and related service providers with access to the completed IEP no later than five (5) business days after the ~~date of the IEP Team meeting to develop the IEP.~~ **IEP is finalized.**

PDS recommends adding the following language: if the IEP is not completed by the 5th business day after the IEP meeting, the LEA shall provide staff and related service providers with the latest available draft of the IEP.

Often the IEP document is not finalized for days or weeks after the IEP meeting because of the need to gather more documentation or seek input from other IEP team members. If the IEP is not required to be provided to school staff and related service providers until it is finalized, it is frequently the case that students do not receive services for a significant period of time. We recommend that at least a draft IEP be provided to school staff and related service providers by the 5th business day after the IEP meeting in order to enable students to begin receiving FAPE within a reasonable period of time. This mirrors the language in 3009.8(a) regarding parental receipt of a completed IEP.

3017.8

3017.8 An IEP shall include:

- (a) A statement of the child's present levels of academic achievement and functional performance, including:
 - (1) How the child's disability affects the child's involvement and progress in the general education curriculum; or
 - (2) For preschool children, as appropriate, how the disability affects the child's participation in developmentally appropriate activities and environments;

- (b) A statement of measurable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved and make **meaningful educational**—progress in the general education curriculum **that is appropriate** appropriately ambitious in light of the child's circumstances, and meet each of the child's other educational needs that result from the child's disability, including a description of:
 - (1) How the child's progress toward meeting the annual goals will be measured; and
 - (2) When periodic reports on the child's progress toward meeting the annual goals will be provided;
- (c) A description of challenging benchmarks or short-term objectives for children with disabilities who take alternate assessments aligned to alternate achievement standards;
- (d) A statement of the special education and related services and supplementary aids and services, including assistive technology, to be provided to the child, and a statement of the program modifications or supports for LEA personnel that will be provided to enable the child to do all of the following:
 - (1) Advance appropriately toward attaining the annual goals;
 - (2) Be involved in and make ~~meaningful educational~~ progress in the general education curriculum, and to participate in other nonacademic activities and extracurricular; and
 - (3) Be educated and participate with other children with disabilities and children without disabilities in the activities described in this Section;
- (e) An explanation of the extent, if any, to which the child will not participate with children without disabilities in the general education environment and in the activities described in Subsection (d);
- (f) A statement of any individual appropriate accommodations necessary to measure the academic achievement and functional performance of the child on statewide assessments or, if the IEP Team determines that the child shall take an alternate assessment, a statement of why the child cannot participate in the regular assessment and why the particular alternate assessment selected is appropriate for the child; and

- (g) The projected date for the initial provision of services and modifications designated, and the anticipated frequency, location, and duration of those services and modifications.

PDS recommends adding the underlined language above.

Endrew F. v. Douglas Cty Sch. Dist. RE-1, 137 S. Ct. 988, 994 (2017), changed the standard by which school districts provide FAPE to a child with a disability. Before *Endrew F.* the school district only had to show that the IEP was reasonably calculated to enable the child to make de minimis educational progress. Following *Endrew F.*, the IEP must be developed to allow the child to make progress appropriate in light of his or her circumstances. Thus, we are requesting the addition of “appropriately ambitious” and the retention of “meaningful education” in the sections noted. The Court in *Endrew F.* explained: “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Importantly, the Court made clear that “the essential function of an IEP is to set out a plan for pursuing academic and functional advancement [and] [t]his reflects the broad purpose of the IDEA, which was enacted “in response to Congress’ perception that a majority of handicapped children in the United States ‘were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to “drop out.” It is based on this articulated statutory purpose and policy that we believe the requested changes are warranted.

3023 HOMEBOUND SERVICES AND HOSPITAL INSTRUCTION (~~NOT REQUIRED FOR FAPE~~)

PDS proposes that OSSE strike the language: “not required for FAPE” from the title of section 3023. When a student with a disability is home for more than 10 consecutive school days, an IEP meeting is necessary to discuss changing the child’s placement and revising the services in the IEP, if warranted. Homebound services and hospital instruction are required to ensure FAPE is provided.

- 3023.1 Homebound services and hospital instruction are education services that an LEA may provide to a child with a disability who is unable to attend school due to an illness or injury.
- 3023.2 Unless the IEP team has otherwise determined that a child with a disability requires home instruction under § 3024 in order to receive FAPE, the LEA shall provide

homebound services and hospital instruction to children with disabilities to the same extent that it provides such services to children without disabilities.

Additional Section to Address Detained Students

PDS also proposes that OSSE add the following new regulation.

This additional regulation would make clear that the IDEA places a duty on all relevant stakeholders in the District’s educational and juvenile legal systems to provide access to special education and related services to confined children with disabilities. The U.S. Department of Education explained that “[e]very agency at any level of government that is involved in the provision of special education and related services to students in correctional facilities must ensure the provision of FAPE, even if other agencies share that responsibility.”² PDS believes that OSSE regulations should make a robust and explicit commitment to serving this population given their critical need for educational and related services. The recent educational deprivations experienced by confined youth at YSC and the Department of Corrections during the COVID-19 pandemic put into sharp focus the need for a more robust regulatory statement of commitment to serving this population—with the ultimate goal of implementing better delivery of educational services and better coordination among stakeholder agencies. This proposed regulation provides such a statement that makes clear that regardless of the child’s status within the facility, they are entitled to continue to receive FAPE and related services. Further, delivery of educational services to children with disabilities who are confined should not be delayed because of administrative delay in accessing their educational records. The delivery of special educational services should be done in the most integrated setting appropriate to the needs of the child with disabilities. What this regulation is intended to memorialize is that agencies responsible for the delivery of educational services to confined children with disabilities are not exempt from the obligations imposed by the IDEA and that children with disabilities who are confined are legally entitled to the full measure of educational rights and services notwithstanding the fact those rights and services are provided in the context of a correctional environment. The stakeholder agencies and governing regulations should affirmatively express this commitment and statutory duty by both word and deed. PDS believes that the current regime of regulations does not adequately make this commitment to confined youth.

(a) Pursuant to 20 U.S.C. § 1412(a)(1), 34 C.F.R. § 300.2(b)(1)(iv) and (2) and 34 C.F.R. § 300.101, all LEAs must ensure that all students with disabilities who are residents or wards of the District have FAPE available to them.

(b) Students with disabilities in correctional facilities are entitled to receive FAPE and related services as determined by their IEP regardless of whether a student with a disability is placed in a restricted correctional environment for safety reasons.

² Dear Colleague Letter on the Individuals with Disabilities Education Act for Students with Disabilities in Correctional Facilities, Office of Special Educ. And Rehabilitative Serv., U.S. Dep’t of Educ. 2 (Dec. 5, 2014), *available at*: <https://sites.ed.gov/idea/files/idea-letter.pdf>.

(c) To ensure that students with disabilities in District of Columbia correctional facilities continue to receive FAPE, District of Columbia agencies must have policies and procedures to ensure that the relevant records of students with disabilities who move to, and from, correctional facilities are transferred and transmitted as expeditiously as possible to facilitate the student's transition to or from the correctional facility.

(d) No student with a disability otherwise eligible for FAPE and related services under the IDEA shall be denied the opportunity to participate in or benefit from the educational services available because of their incarceration in a correctional facility.

(e) All educational services, programs, and activities must be provided in the most integrated setting appropriate to meet the needs of the individual with disabilities.

(f) District of Columbia agencies responsible for providing FAPE to incarcerated students must make reasonable modifications to their policies, practices, or procedures when necessary to avoid discrimination on the basis of disability.

(g) Notwithstanding other legal obligations to provide FAPE, the District of Columbia Department of Youth Rehabilitation Services (DYRS) shall make FAPE available for youth committed to DYRS and housed at the New Beginnings Youth Development Center.

Discovery Proposal

Discovery should be available to ensure that parents and students have a meaningful opportunity to prove that a LEA has not met its obligation to provide FAPE, eligibility, or the appropriate remedy. Under the current due process impartial hearing procedures available to parents and students, there is a decided imbalance in access to witnesses and critically important information. The LEA not only controls the flow of most, if not all, of the key evidence and relevant information, but their staff actually creates the information that is essential to disposition of the issues. Allowing formal discovery mitigates the structural advantages that school districts have in their interactions with most parents, particularly parents who lack the economic, social, and educational resources that are necessary to understand the complexities of their child's IEP and to participate in an adversarial administrative proceeding. Second, allowing discovery furthers Congress's intent to redress the unconstitutional discrimination, exclusion, and miseducation of children with disabilities by ensuring a fair process by which parents may vindicate these critically important rights. The vital importance of the rights at stake warrant the availability of discovery to ensure full and equal access to relevant evidence. A number of other jurisdictions

afford parents discovery rights in administrative due process hearings under the IDEA.³ Making discovery available in impartial due process hearings is a procedural protection commensurate with the rights at stake. Access to subpoenas is necessary because frequently if not always, school staff cannot be compelled to appear for testimony by parents.

We recommend the following language:

(1) The Hearing Officer may compel or limit discovery prior to the hearing and/or prehearing conference, including issuing an order expediting the timing of discovery.

(2) Within the discretion of the hearing officer, the following methods of discovery are available to the parties upon the filing of a request for due process:

- (a) depositions;
- (b) written interrogatories;
- (c) requests for admissions;
- (d) production of documents or things; and
- (e) permission to observe educational programs.

(3) The time for responding to requests for production, requests for admission, and interrogatories is 20 calendar days from the date the discovery requests are served on the receiving party or such other time as set by the hearing officer.

(4) The hearing officer shall set a date by which discovery must be completed and establish a calendar so that discovery does not delay the hearing.

(5) The hearing officer may limit or compel discovery as necessary to balance the need for reasonable discovery with the need to not unduly delay the hearing.

(6) Any party may move for the hearing officer to issue a subpoena to require a witness to appear at the due process hearing and a nonparty to provide documents prior to the due process hearing. Any request that a hearing officer issue a subpoena should include a copy of the proposed subpoena. A request for a subpoena shall be filed no later than ten calendar days prior to the due process hearing. Any person, including a party, who is at least eighteen (18) years of age, may serve a subpoena. Service of a subpoena for a witness to appear at a hearing shall be made by personally delivering the subpoena to the witness. The service requirements of a subpoena shall be construed consistent with the requirements set forth in D.C. Mun. Regs. Tit. 1, §2824.9 (2020)

(7) If a person or entity disobeys a subpoena, a hearing officer may order compliance with the subpoena. If a person subject to the order fails to comply, a party may apply to the Superior

³ See Perry A. Zirkel, *State Laws for Due Process Hearings Under the Individuals with Disabilities Education Act*, 38 J. Nat'l Ass'n Admin. L. Judiciary 3, (2018).

Court of the District of Columbia for an order to show cause why that person should not be held in civil contempt.

The proposed regulation authorizing discovery is modeled on Mont. Admin. R. 10.16.3513. The language in the proposed discovery regulation authorizing the issuance of subpoenas is modeled on the provisions found in the sections in the rules and regulations of the District of Office of Administrative Hearings that permits issuance and enforcement of subpoenas, D.C. Mun. Regs. Tit. 1, §§2824-2814. (2020)

Additional Regulation: Expedited Hearings

The ability of a hearing officer to conduct expedited hearings under the current regulations is constrained and limited. Hearing officers should be afforded the discretion to order expedited hearings in instances where a party demonstrates good cause. This formulation would confer on the hearing officer an appropriate degree of discretion while imposing a requirement that the party seeking an expedited hearing provide a sufficient justification for such action. Expedited hearings are an appropriate exercise of judicial authority. Examples of the need for an expedited hearing include the mental health needs or status of a student, the unique availability of a possible placement or service that might not be available to the student unless the issues are decided in an expeditious manner. The opportunity for an expedited hearing and the ability of a judicial officer to order one as a matter of discretion are deeply rooted procedural features of all adjudicatory forums.

Expedited Due Process Hearings.

- (a) A hearing officer may grant a request for an expedited due process hearing upon a showing of good cause.
- (b) An expedited due process request shall set forth the factual basis for the request and explain why the student or the LEA would be prejudiced if an expedited due process hearing was not conducted.
- (c) A party opposing a request for an expedited hearing may file a memorandum in opposition no later than three business days after being served the request.
- (d) The hearing officer shall issue a ruling on the request within five business days of receipt of the request for an expedited due process hearing.
- (e) The Hearing Officer shall conduct the expedited due process hearing within 7 school days after determining good cause exists and shall render a decision in the matter within 3 school days after the close of the hearing.

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Sincerely,

Robert Hornstein, Esq.
Chief, Civil Legal Services Division of the Public Defender Service

Sabrina A. Bazemore, Esq.
Special Education Attorney

Nina Isaacson, Esq.
Special Education Attorney

Nakisha Winston, Esq.
Special Education Attorney