

“Potentially, the Most Restrictive and Burdensome Homeschool Regulations in the United States”

Formal Written Comments from HSLDA to the OSSE Regarding the District of Columbia’s Proposed Homeschool Regulations DCMR 5200

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INTRODUCTION

The proposed contents of Chapter 52 of the District of Columbia Municipal Regulations have many significant flaws. In addition to meeting the desires of the promulgating agency, effective regulations must be rooted in statutory authority, must not breach statutory or constitutional protections of citizens, must be manageable, and must invite compliance. The regulations proposed by the OSSE have challenges in all of these areas.

In a municipal area such as the District of Columbia where there is less distance between citizens and regulatory agencies (compared with a larger municipal area such as states with a larger population and multiple cities, towns, and multiple levels of bureaucracy) trust is an important component of creating tractable and effective regulations.

The OSSE initially released regulations that were unconstitutional in many ways and created a public uproar. In drafting these original regulations the District did little to reach out to homeschoolers to receive input. It was only after the public outcry at the school board meeting in March 15 that the OSSE sought input from homeschoolers.

Unfortunately the results of these six or so meetings between homeschoolers and the OSSE resulted in little actual impact on the final regulations. While the OSSE stated that it desired to craft “model regulations” in the area of homeschooling, the reality is that the proposed regulations are not strongly rooted in statutory authority. These regulations create situations where educational bureaucrats are violating the fundamental constitutional rights of parents, and are unnecessarily broad and difficult to manage. Combined with the drafting process, these regulations have breached the trust between the District’s Government and its citizens.

At a high level these regulations:

- Fail to address privacy concerns adequately
- Create unnecessarily bureaucratic demands
- Create Subjective standards without sufficient protections against arbitrariness
- Are too discretionary
- Fail to balance constitutional rights and state interests
- Fail to afford proper due process

The comments herein attempt to review each of the major and contentious points of the proposed regulations, highlighting the problems and suggesting solutions.

Section 5200.1 GENERAL PROVISIONS

The OSSE in its discussions with parents agreed to include language in the regulation that recognized the fundamental constitutional right of parents to direct the education of their children and that fit parents

must be assumed to be making decisions in the best interest of their children. This language is important because it establishes the interpretive framework for the regulation both for those charged with implementing it as well as courts charged with interpreting it. The District should have no concern about including language that explicitly refers to and recognizes the right of parents along with the interest of the government in promoting regulations. There are many state laws and regulations that include this type of language. This fact was pointed out to the OSSE and they agreed that it was important and appropriate to include this language in the regulation. However, the proposed regulations do not contain any language to this effect. This is a breach of good faith and has seriously damaged the trust between homeschoolers and the OSSE.

Suggestion: Include the language that was agreed to and provided by homeschoolers to the OSSE.

Section 5200.2 PRIVACY

The Proposed regulations merely extend the same privacy protections to parents who homeschool as those parents who enroll their children in the public schools. Parents who do not participate in the public schools should have a higher level of protection for personal information. Opting out of publicly funded education and taking on the responsibility and expense of educating their own children entitles parents and their children to higher levels of protection.

The proposed regulations do not address this issue. There should be no circumstances under which the OSSE is permitted to share any information received from a homeschooling family with third parties unless there is written consent or a court order. This is the level of privacy and protection homeschooling families want and deserve.

Suggestion: Include this language: *“Student records, documents, correspondence and other materials received in accordance with the provisions of this chapter remain the property of the person who submits them and are retained by the District as long as the person is homeschooling in accordance with this chapter. The Agency serving as the custodian of these records whether the OSSE or another agency may not disclose the contents of these records without the express written consent for each particular disclosure requested or without a court order. Upon written request and declaration that the parent is no longer homeschooling in the District and that the child is no longer subject of compulsory attendance laws in the District, the District will deliver its file in its entirety to the person who submitted the file and will not retain any records except such records necessary to indicate that the person complied with this chapter and for what period of time.”*

Section 5200.3 PURPOSE

The purpose of the chapter is set forth here. This would have been an ideal place to incorporate the language regarding parental rights and respect thereof. Further, while it is laudable to suggest that children participating in home education should receive “thorough, regular instruction that will enable them to function as productive members of society in the 21st century”, this is vague language that incorporates a standard that is difficult to measure.

The rest of the regulation does not provide sufficient guidelines (even if the underlying statutes allowed for it) to enable a parent in the district to know what this means. What is a productive member of

society in the 21st century? This term is undefined and as a statement of purpose is both restrictive and overbroad. It is restrictive in that it fails to recognize that there will be other centuries and so restricting the statement to the 21st century will require amendment when the 22d century comes along. It is overbroad in the sense that a functioning member of society in this century is susceptible to many definitions, and thus the failure to so define this term creates problems for those who would administer and interpret the regulation.

Suggestion: Remove reference to becoming a functioning member of society in the 21st century and add the language regarding respect for parental rights in this section. For Example:

1. Parents, as the primary educators of their children, possess the fundamental right and duty to provide, control, and direct their children's education.
2. As a consequence of the fundamental right of parents to direct the upbringing of their children, the custody, care, and nurture of each child reside first and foremost in the parents.
3. Because the natural family bonds of affection lead parents to act in the best interests of their children, there will normally be no reason for the District Government to inject itself into the private realm of the family to question the ability of parents to make the best decisions concerning the education of their children.
4. It is in the interest of the District Government to support parents in their role as primary educators of their children. In cooperation with parents, the District Government has an interest that parents provide an education to prepare their children for societal obligations, including the inculcation of moral standards and elements of good citizenship. The District Government can neither supply nor hinder the parents' primary function and freedom to educate their children in preparing them for these societal obligations.
5. The District Government respects the presumption that parents will provide their children an education which, under the parents' control and direction, best meets each child's individualized needs.
6. The District Government respects the privacy of parents in fulfilling their fundamental right as primary educators of their children, and will not disclose information received from home schooling parents without written consent of a parent or court order.
7. The District Government recognizes the right of a family to be exempt from a requirement of this chapter by reason of bona fide religious training or belief.

Section 5202 WRITTEN NOTIFICATION

This section requires parents to "consent" to this regulation as well as submit in advance their written notice on a form provided by the District.

The District agreed that it would include language that did not require parents to use any particular form, and again unfortunately, and in breach of good faith negotiation, it continues to use language requiring parents to use a form provided by the District.

This would make it possible for a parent who provides the substantive information to the District required by law but not on their form to be found in violation of the regulation. Because the District does not have the authority to approve or disapprove homeschooling, advance notice is useless and can significantly burden the parent's fundamental right to direct the upbringing and education of their children. In some cases parents may need to remove their children from school because of incidents that require immediate response.

Rather than a child being counted as unexcused and potentially truant, a parent should be able to make educational decisions for their children without have to notify the District in advance. The exception of weekends and holidays is a superfluous and unnecessary provision since the District has no administrative requirement other than to file the notice of intent. The need for advance notice is unnecessary and burdensome and should be removed. Finally, a parent should not be required to indicate "consent" to a regulation.

If a regulation is enacted lawfully and in accordance with statutory authority, there is no need for consent since the regulation acts regardless of a citizen's consent. For the OSSE to require consent seems to suggest it is concerned either with the lawfulness of its actions or that the OSSE would like to be able to enforce the regulation as a "contract" in the event that there was a dispute between the parents and the OSSE over interpretation or administration of the regulation. This language is superfluous, vague and inappropriate in a regulation and should be removed.

Suggestion: Use the following language for this section: "A parent or legal guardian who chooses to teach his or her child at home shall annually file a signed notice setting forth the name(s), address, age(s) and that the school age minor(s) listed thereon shall attend a homeschool program that complies with the guidelines contained within this chapter. The written notification shall also include, if different, the name and address of the parent or guardian filing the written homeschool notification."

Section 5203 ANNUAL VERIFICATION

This section requires parents to refile a notification form each year and to inform the district fifteen days in advance of termination of a homeschool program. This regulation in part is not rooted in statutory authority, although it is not inherently unreasonable to request renotification. However, if a parent is required to notify the OSSE upon termination it seems superfluous to require annual renotification. Since the District does not have approval authority such a requirement is extraneous and unnecessary. Likewise (and in the same vein as advance notification above), there is no reasonable explanation as to why a parent must submit advance notification upon termination of a program.

Suggestion: This section should be removed and replaced with a simple one time notification upon commencement or termination of the homeschool program.

Section 5204 HOMESCHOOLING PROGRAM

This section provides a standard for the homeschooling parent to follow of "regular and thorough and of sufficient duration". In itself this section is reasonable and the subjects and other clarifying language are helpful.

Section 5205 and 5206 EDUCATIONAL MATERIALS AND REVIEW OF EDUCATIONAL MATERIALS

These sections provide a mechanism by which the District attempts to insert itself into the review of the homeschooling program. While many states use a portfolio method of evaluation as a component of review this is rarely the only method used. In fact a minority of states require any kind of review of educational material or progress at all. Of those states that do require a review of material or progress, a majority allow multiple options for parents to demonstrate progress or “regular, thorough and sufficient” instruction such as progress reports, letters from educational professionals, and standardized tests.

The command that parents must, at the discretion of the OSSE, produce such materials up to twice per year is not rooted in statutory authority and is overly burdensome. In those states that provide for administrative review of educational progress the vast majority require such review at most annually. In a number of cases the review is once every 2-4 years, as in the public schools. The review also presents other problems. While parents as the instructors are able to determine whether thorough and regular homeschooling is taking place, the review of a portfolio in this context by someone other than the instructor, and particularly one with the discretionary authority to interfere with the parents fundamental right to direct the child’s education and potentially terminate a homeschool program, becomes very problematic.

The standard of “thorough” is a vague standard when applied by someone other than the instructor. Because this standard is so vague, it opens up the door for the application of subjective judgment in the mind of the reviewer, with the potential for significant disputes. That is why a more objective approach or the provision of more options for parents with more specific guidelines is preferred.

However, because the District’s interest is in *knowing* that children the District *are* being educated, this section is unnecessary and ought to be deleted. The US Supreme Court has stated in *Parham v. JR* that fit parents are deemed to be acting in the best interests of their children. Research has shown that parents who homeschool turn out students who perform better on average than public and private school students on standardized measures of achievement. Thus, absent proof to the contrary, homeschoolers in the District should receive the deference the Court orders. In the event that educational neglect is occurring, there is ample evidence that such cases can and are reported to the District’s Child Services Division and necessary steps to correct the problem can best be taken there. Such a police function is not the core competency of the OSSE and would place demands upon it that it is not equipped to serve nor should it serve.

Suggestion: Delete this section or engage in more substantive dialogue with homeschoolers and their advocates to create a more workable solution that has meaningful options for parents.

Section 5207 PARENT OR LEGAL GUARDIAN QUALIFICATIONS

This section requires that parents have a high school diploma in order to homeschool. Because parents have a fundamental right to direct the education of their children, which includes the right to homeschool, this qualification is an unconstitutional burden. Furthermore, research has clearly demonstrated that there is little difference between the academic performance of homeschooled

students taught by parents without high school diplomas and those taught by parents with high school diplomas, suggesting that such a requirement is inappropriate. While a minority of jurisdictions adjust their assessment approaches to correspond with the level of education of the instructor, most states simply do not require any particular qualifications for parents to teach their own children. It is wrong for the District to condition a parent's right to teach their children on having a public or private school diploma. With the increase in the number of homeschool graduates there are a growing number of parents who will not have such a credential yet should be permitted to teach their own children without requesting "permission" from the District.

Suggestion: Remove this section.

Section 5209 MONITORING DEFICIENCIES AND COMPLIANCE

Of all the sections in the proposed regulations, this is the most problematic. In this section the District of Columbia reserves to itself the authority to determine whether or not parents will be permitted to homeschool their children. The proposed regulations place excessive discretion in the hands of educational officials and fail to properly protect the due process rights of parents in the district pursuant to the 14th Amendment to the United States Constitution. Due process demands that an independent neutral party be involved in a final adjudication of the matter and further that parents be explicitly provided a de novo review by judicial authority. While the initial process contemplated in sections 5208.1 through 4 is a good place to start, without this process this part of the regulation fails to provide necessary due process commensurate with a fundamental right protected by the United States Constitution. This section is made problematic because of the subjective nature of the standard that is applied in terms of "thorough, efficient etc..." in section 5200.3. If a more objective standard were applied then there would be less concern. However as written, the OSSE has unchecked discretion to hold a homeschool program hostage and burden parent's fundamental rights to direct the upbringing and education of their children. Because the District does not have statutory authority to approve or disprove a parent's right to home school, the District does not have the authority to create regulations that allow it the unchecked discretion to decide whether or not a parent may homeschool their child. In the event that there is probable cause to believe that a parent is neglecting the education of their children in such a way as to cause harm, the District's child welfare laws are sufficient to provide authority and remedy to the District to protect children. Most States with a review process allow parents the opportunity to remediate the home school program for a period of at least a year, a sort of "probationary period". Granting this amount of discretion to an administrative agency without further judicial or administrative review is unheard of in the United States with regard to homeschool regulation, and would make the District's regulation the most restrictive and onerous in the country.

Suggestion: Remove this section or order further attention from the homeschool working group with direction and involvement from leadership of the OSSE and State School Board. This level of discretion is unacceptable and administrative and judicial review must be provided for in the event that the district intends to create a review process. Many states do not have any kind of review process because they know that educational neglect is best handled under Child Welfare laws and that it is best to leave the educational authority unburdened with this type of oversight responsibility.

HSLDA continues to be available to assist the OSSE and DC State Board with expert advice, information and materials to assist it in arriving at an equitable solution to the current situation that respects the

rights of parents and the interests of the District Government. Thank you for considering these comments.