

June 1, 2008

Ms. Deborah A. Gist
State Superintendent of Education
Office of the State Superintendent of Education
441 4th Street N.W., Suite 350 North
Washington, D.C. 20001

Dear Ms. Gist:

This letter constitutes my comments on the May 2, 2008, proposed rulemaking regarding home schooling regulations for the District. The May 2 proposed regulations were meant to reflect the work of the home school task force established at the direction of the State Board of Education (“SBOE”) during its March 5, 2008 public hearing. After the significant amount of time and effort invested in the task force meetings, action items, research, and task force draft regulations, it was quite disappointing to see that the May 2 version contradicted the understandings reached by the task force in so many fundamental areas. Moreover, the work of the task force was prematurely ended before it finished its work because the task force representatives of the Office of the State Superintendent of Education (“OSSE”) stated OSSE had to issue its proposed regulations by May 2. As described below, the May 2 regulations unduly burden basic constitutional rights of home schooling families. However, if you make the revisions as described below, I believe that the District’s home school regulations would be a model for the nation and would properly balance the fundamental right of parents to provide, direct, and control the education of their children with the state interest that children receive a thorough, regular education to prepare them for societal obligations.

The SBOE Home Schooling Task Force

The home schooling task force was specifically authorized by the SBOE at its public hearing on March 5. Between March 10 and April 14, the joint task force met on six occasions, including two meetings of the task force’s drafting committee. From the beginning of the task force meetings, every member understood that the purpose of the task force was to study the actual practices of District home schooling families, analyze the regulations of other jurisdictions, and then revise the initial draft regulation to make the District’s home schooling regulation not only constitutional but a model home school regulation that properly protects the constitutional rights of home schooling families while supporting the state interest that children receive a thorough, regular education.

Based on the meetings of the task force and its drafting committee, the task force home school members produced a draft home school regulation to which the OSSE and home school members had reached consensus on the general provisions, home schooling administration, written notification/annual verification/discontinuation, home schooling

program, educational materials and review, qualifications, and definitions. The task force discussed extensively proposed acceptable language for assessments and due process procedures for resolving asserted deficiencies in home schooling programs, as well as umbrella organization provisions such as are found in Maryland and other jurisdictions. No consensus was reached on these latter sections because OSSE advised at the task force meeting on April 14 that there was no time for additional meetings as OSSE intended to finalize its new proposed regulations within a matter of days so that the regulations could be published in the May 2 edition of the D.C. Register. The final draft regulation of the task force was submitted to OSSE on April 18.

I will discuss the specific problems in the May 2 draft regulation provisions and then identify revisions that will cure the deficiencies in the May 2 provisions.

Section 5200 (General Provisions)

Section 5200 of the May 2 proposed regulation largely restates the initial OSSE March draft and omits critical language agreed upon by the task force.

At first and second meetings of the task force, there was lengthy and detailed discussion and agreement on the fundamental principles governing education and the respective interests of home schooling families and the District Government. The reason for addressing the fundamental principles and interests was that these principles and interests would be the standard to analyze and draft the new revised home schooling regulation. The principles and interests were consolidated into three as follows:

- (a) The District of Columbia recognizes that it is the fundamental right of parents to provide and direct the upbringing and education of their children which includes the right to educate their children at home under their direction.
- (b) It is in the District's interest to know that children who reside in the District receive a thorough, regular education that will enable them to function as productive members of society in accordance with the law and pursuant to D.C. Code § 38-202 et seq.
- (c) The District 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. Because the natural family bonds of affection lead parents to act in the best interests of their children, the District respects the private realm of the family and the ability of parents to make the best decisions concerning the education of their children.

The entire task force was in agreement with these principles and interests and that they should be included in the new rules. OSSE legal counsel proposed placing them in a

preamble in the notice of proposed rulemaking while the home school members pointed to other District statutes and regulations that place similar policy/principles in the body of the first section rather than in a preamble. I assume it was an oversight by the OSSE drafters of the May 2 version of section 5200 to include the District Government's state interest (item (b) above) but to omit the two agreed upon interests of home schooling parents and children (items (a) and (c)). Certainly, there is no justification for this omission. These two interests of parents and their children precede and are more fundamental than the state interest and they give the legitimate context and balance for the state's interest and all subsequent provisions. The appropriate place to add the two fundamental interests is Section 5200.3 where the state's interest is listed. Accordingly, Section 5200.3 should be revised to read as follows:

5200.3 The purpose of this chapter is to establish procedures for home schooling in accordance with the District of Columbia's school attendance and reporting laws, the SBOE Act, and the following fundamental interests:

(a) The District of Columbia recognizes that it is the fundamental right of parents to provide and direct the upbringing and education of their children which includes the right to educate their children at home under their direction.

(b) It is in the District's interest to know that children who reside in the District receive a thorough, regular education that will enable them to function as productive members of society in accordance with the law and pursuant to D.C. Code § 38-202 et seq.

(c) The District 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. Because the natural family bonds of affection lead parents to act in the best interests of their children, the District respects the private realm of the family and the ability of parents to make the best decisions concerning the education of their children.

Section 5202 (Written Notification)

The task force agreed, after some discussion, to draft the notification provision to specifically list the information required on a notification form within the regulation rather than leaving the content of the notification form undefined. However, the May 2 notification is essentially the same as the notification provision in the initial March 2008 draft proposed regulation.

Section 5202.1 is constitutionally vague because it purports to allow OSSE to routinely change the substantive content of the notification requirement simply by changing the notification form without any requirement for rulemaking or legislative authorization. The built-in vagueness of this provision will discourage home schooling parents from providing forms of notice that exceed the state's legitimate interest and may lead to litigation over improper attempts by OSSE to require forms of notification that unconstitutionally burden the fundamental right of parents to home school their children.

Equally improper is Section 5202.1(a) which purports to require parents to "consent to the requirements of this chapter" in the notification form. This requirement is patently overreaching and its knowing inclusion would show an unconscionable attempt to coerce parents to waive their constitutional right to challenge any "requirement" which burdens parents' fundamental right to provide, direct, and control the education and upbringing of their children. Clearly, a home schooling regulation may not condition a parent's fundamental right to home school with a waiver of the right to challenge any undue burdening of that fundamental right.

Section 5202.1(b) unconstitutionally burdens the fundamental right of parents to direct their children's education by purporting to require a 15-day prior notice to OSSE before families may home educate. During the task force meetings, the OSSE members repeatedly agreed that OSSE has no authority to "approve" of home school programs or the decision of parents to home school their children. The decision of parents to home school their own children is at the core of the fundamental right of parents to provide, direct, and control the education and upbringing of their children. If fit parents, in exercising their fundamental right to direct the education of their child, decide on a Friday that they will begin to home school their child on the following Monday, OSSE has no right to prohibit that choice through a 15-day prior notification requirement.

Section 5202 should be amended to the language agreed upon by the task force:

5202 WRITTEN NOTIFICATION

5202.1 A parent or legal guardian who chooses to teach his or her child at home shall initially file a signed notice setting forth the name(s), address, age(s), and that the school age minor(s) listed thereon shall attend a home school 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 home school written notification. The written notification shall be submitted to the Home School Office prior to the first date of home instruction.

5202.2 For every year in which a home school program continues the parent or legal guardian shall submit a notice as described in 5202.1 by August 15 of that year.

5202.3 A parent or legal guardian of a child continuing to reside in the District shall verify the discontinuation of home schooling for his or her child by notifying the Home School Office in writing, setting forth the name(s), address, and age(s) of the school age minor(s) who are discontinuing their home school programs. The written notification shall also include, if different, the name and address of the parent or guardian filing the home school written notification.

Section 5203 (Annual Verification and Discontinuation)

As with Section 5202, the joint task force agreed on acceptable language for annual verification and discontinuation and that language is quoted above in the task force draft regulation (renumbered) sections 5202.2 and 5202.3.

Surprisingly, the May 2 OSSE draft largely mimics the OSSE March draft. For the reasons discussed above, it is improper for the May 2 draft Section 5203.1 to require a notification form without enumerating the specific requirements for that form. Further, Section 5203.2 improperly burdens parents' fundamental right to discontinue home schooling when they so choose in the best interests of their own children. OSSE has no right to require a 15-day prior notice before parents may discontinue a home schooling program for one or more of their children.

To remedy the deficiencies, Section 5203 of the May 2 draft should be deleted in its entirety as task force renumbered Sections 5202.2 and 5202.3 above contain constitutionally valid language which was acceptable to the joint task force.

Section 5205 (Educational Materials), 5206 (Review of Educational Materials)

A key point of discussion between home school and OSSE task force members was on the issue of the "Educational Materials" and "Review of Educational Materials" by OSSE. All members of the task force agreed that the home school program should conduct its own form of assessment and that there should be alternative means to fulfill the assessment (e.g., student portfolio, progress reports, nationally standardized tests, report card, or a letter from a certified teacher or degreed education professional). During the task force meeting, OSSE staff agreed that there would be a variety of options available for parents to meet an assessment requirement. This May 2 proposed rule has only one "portfolio" option in Section 5205.1.

Section 5206.1 of the May 2 draft improperly allows OSSE to demand a review of the home schooling assessment without any cause to believe that the home school program is not providing regular and thorough instruction. Absent some cause, home schooling families should not be subject to random "searches" by OSSE. District residents would rightly be outraged if Child and Family Services could randomly demand

an inspection of whether parents were providing proper nutrition to their children without some legitimate cause to believe that there was parental neglect. Similarly, home school families should not be singled out for arbitrarily dictated educational inspections by OSSE absent good cause. The May 2 draft rule provides no restriction (other than limiting inspections to “two reviews during a school year”) on OSSE demanding to inspect the “portfolio” of home schooling materials.

Sections 5205 and 5206 of the May 2 draft should be replaced with the following task force provision:

5205 EDUCATIONAL MATERIALS AND ASSESSMENT

5205.1 Unless otherwise provided, a home school program under this chapter shall monitor and assess its student annually using one of the following methods of assessment: student portfolio, progress reports, nationally standardized test, report card, or a letter from a certified teacher or degreed education professional indicating that a course of study in compliance with this chapter is being provided.

5205.2 The home school program shall maintain a copy of the most recent assessment for at least a period of one year. Upon request from the OSSE, where probable cause exists to believe that the home school program is not in compliance with this chapter, the home school program shall provide a copy of the assessment to the Home Schooling Office of the OSSE.

Section 5208 (Monitoring, Deficiencies, and Compliance)

Section 5208 of the May 2 draft, as worded, is constitutionally defective. This section gives complete and unfettered power to the OSSE to make all determinations regarding whether a homeschooling parent is deficient in “providing a thorough, regular home schooling.” OSSE has repeatedly agreed that it has no right to “approve” of a home education program. If there is an allegation of parental neglect regarding the education of their children, it is not OSSE that has competence to make such a determination but rather such a determination is the province of the Superior Court in accordance with due process of law. District law currently provides that the District Government may bring a complaint for educational neglect against a parent in court. The May 2 proposed rule purports to give OSSE quasi-judicial authority with no specified standards by which it could make a determination of “deficiencies” in a home school program. Such a determination, involving a core constitutional right of parents to provide, direct, and control the education of their children, is entirely outside of the competence of OSSE. Moreover, contrary to the home schooling task force members discussion and proposed language (no agreement was reached because OSSE prematurely ended the task force meetings in its stated desire to quickly issue proposed regulations by May 2), Section 5208 provides no due process of law. For example, there is no due

process protection in the May 2 Section 5208 draft to allow a family to challenge an erroneous OSSE's initial determination of "deficiencies." Absent a judicial determination that a parent is unfit or has committed educational neglect under the existing District neglect statute, OSSE has no authority make a determination on the quality and sufficiency of the home instruction program of parents or to direct parents to cease home schooling.

The home school task force members provided a reasoned approach beginning with parent-OSSE discussions to resolve any allegations of deficiencies, followed by a period with a neutral mediator such as provided by the Superior Court, followed by the right of OSSE to petition a court for redress. OSSE's May 2 draft rule gives arbitrary and unfettered discretion to OSSE and no meaningful due process to home schooling parents.

The May 2 version of Section 5208 should be replaced with the following task force language:

5208 DUE PROCESS RESOLUTION OF ASSERTED DEFICIENCIES

5208.1 If the Home Schooling Office has reason to believe, upon review of the assessment in accordance with section 5205 of this chapter, that a home school program is not delivering a course of study in accordance with section 5204, the Home Schooling Office and home school program shall attempt to arrive at mutually satisfactory resolution through good faith negotiation on the part of both parties during a 30-day period following written notification from the Home Schooling Office of its intent to invoke the due process procedure under this section.

5208.2 If good faith negotiations do not resolve the concerns of the Home Schooling Office conducted pursuant to subsection 5208.1, and prior to taking any further due process action, mediation may be initiated by the Home Schooling Office. The Home Schooling Office and the home school program shall each select a mediator from a list of mediators provided by the mediation and dispute resolution services of the District of Columbia Courts. The selected mediators shall jointly select a third mediator to conduct the mediation to attempt to resolve the concern of the Home Schooling Office.

5208.3 If, after 14 days of mediation, the mediator determines that there are irreconcilable differences between the home school program and the Home Schooling Office, the OSSE may petition a court of competent jurisdiction for further relief.

Conclusion

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As discussed above, the May 2 proposed regulations improperly burden the constitutional rights of District parents to provide, direct, and control the education of their children. I have confidence that you will agree that revisions to the May 2 draft regulation are absolutely necessary and that the revisions proposed above properly balance the core fundamental rights of parents to provide, direct, and control the education of their children with the state's interest that children receive a thorough, regular education which will enable them to function as productive members of society.

I respectfully request the opportunity to meet with you to discuss revisions to the proposed May 2 rules that would lead to the kind of cooperation and good faith dealings that we have come to expect from the partnership begun on March 5 when the State Board of Education directed the establishment of the home school task force.