

THE OFFICE OF CONTRACTING AND PROCUREMENT**NOTICE OF EMERGENCY AND PROPOSED RULEMAKING**

The Chief Procurement Officer of the District of Columbia (CPO), pursuant to authority granted by sections 202, 204 and 321 of the District of Columbia Procurement Practices Act of 1985, as amended, effective February 21, 1986 (D.C. Law 6-85; D.C. Official Code §§2-302.02, 2-302.04 and 2-303.21 (2006 Repl.)) (PPA), Mayor's Order 2002-207 (dated December 18, 2002) and Mayor's Order 2009-42 (dated March 25, 2009), hereby gives notice of the adoption of the following emergency rules and of the intent to adopt final rulemaking to amend Chapter 18 of Title 27 of the District of Columbia Municipal Regulations (Contracts and Procurements).

The rules amend sections 1800-1803 of Chapter 18 concerning small purchase procedures. The rules authorize the use of small purchase procurement procedures only for procurements not exceeding \$100,000 for all departments, agencies, instrumentalities, and employees under the procurement authority of the Office of Contracting and Procurement (OCP), including the Office of the Chief Technology Officer and the Metropolitan Police Department.

Without these emergency rules, OCP will not be able to follow Mayor's Order 2009-42 (dated March 25, 2009). Adoption of these emergency rules to amend Chapter 18 is thus necessary for the immediate preservation of the public safety or welfare, in accordance with District law as codified at D.C. Official Code §2-505(c) (2001). These emergency rules will remain in effect for up to one hundred twenty (120) days from the date of adoption or upon publication of a Notice of Final Rulemaking in the *D.C. Register*, whichever occurs first. The CPO gives notice of intent to take final rulemaking action in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*. The CPO will submit the rules to the Council of the District of Columbia for a sixty (60) day period of review pursuant to subsection 205(b) of the PPA (D.C. Official Code §2-302.05(b)), and will not take final rulemaking action until completion of the 60-day review period or Council approval of the rules by resolution before the end of the review period.

CHAPTER 18**SMALL PURCHASE AND OTHER SIMPLIFIED PURCHASE PROCEDURES**

Sections 1800 - 1803 are amended to read as follows:

1800 USE OF SMALL PURCHASE PROCEDURES

- 1800.1 The small purchase procedures set forth in this chapter may only be used for the procurement of supplies, services and other items when the total of the procurement does not exceed one hundred thousand dollars (\$100,000) in accordance with §321 of the District of Columbia Procurement Practices Act of 1985, as amended, effective February 27, 1998 (D.C. Law 12-50; D.C. Official Code § 2-303.21 (2006 Repl.)) (Act) and Mayor's Order 2009-42 (dated March 25, 2009).
- 1800.2 A contracting officer shall not use small purchase procedures when the

requirement can be met by using a requirements contract, an indefinite quantity contract, a federal supply schedule, the D.C. Supply Schedule or other required source of supply as set forth in chapter 21 of title 27 DCMR.

- 1800.3 A contracting officer shall not use small purchase procedures when the procurement requirement is initially estimated to exceed one hundred thousand dollars (\$100,000), even though the resulting award does not exceed one hundred thousand dollars (\$100,000).
- 1800.4 A contracting officer shall not split a procurement totaling more than one hundred thousand dollars (\$100,000) into several purchases that are less than the limit in order to permit the use of small purchase procedures.
- 1800.5 A contracting officer shall use the small purchase procedure that is most suitable, efficient and economical based on the circumstances of each procurement.

1801 NON-COMPETITIVE SMALL PURCHASES

- 1801.1 A contracting officer may make a procurement for an amount of five thousand dollars (\$5,000) or less without obtaining competitive quotations.
- 1801.2 A contracting officer shall distribute non-competitive small purchases equitably among suppliers.

1802 COMPETITIVE SMALL PURCHASES

- 1802.1 Except as provided in §1802.2, in order to promote competition to the maximum extent practicable, and to ensure that the purchase is in the best interest of the District government, considering price and other factors (including the administrative cost of the purchase), a contracting officer shall solicit quotations as follows:
- (a) For each procurement of goods and services in an amount greater than five thousand dollars (\$5,000) and less than or equal to twenty-five thousand dollars (\$25,000), the contracting officer shall obtain at least three (3) oral quotations from vendors for the goods and services to be purchased;
 - (b) For each procurement of goods and services for more than twenty-five thousand dollars (\$25,000) and less than or equal to one hundred thousand dollars (\$100,000), the contracting officer shall obtain at least three (3) written quotations from vendors for the goods and services to be purchased; and
 - (c) The contracting officer shall, unless the award is to take into consideration factors other than price or price-related factors, award the contract to the vendor providing the lowest priced quotation for the goods or services solicited.
- 1802.2 If the contracting officer determines that it is impractical under the circumstances to obtain the number of quotations required under §1802.1 due to time constraints, lack of available sources, or other factors set forth in §1802.4, or if the contracting officer, despite a good faith effort, is unable to obtain the required number of quotations, the contracting officer may obtain quotations from fewer vendors than required in §1802.1. The contracting officer must document his or her attempts to

obtain the required number of quotations.

1802.3 If the contracting officer determines that the best interest of the District or other factors set forth in §1802.4 indicate that quotations should be obtained from more than the number of sources required under §1802.1, the contracting officer shall obtain additional quotations.

1802.4 In determining whether or not to obtain quotations from more or fewer vendors than required in §1802.1, the contracting officer shall consider the following factors:

- (a) The nature of the item or service to be purchased and whether it is highly competitive and readily available in several makes or brands, or if it is relatively non-competitive;
- (b) Information obtained in making recent purchases of the same or similar item;
- (c) The urgency of the proposed purchase;
- (d) The dollar value of the proposed purchase; and
- (e) Past experience concerning specific contractor prices.

1802.5 For procurements in excess of the amounts specified in §1801, a contracting officer may award a small purchase solicitation on a sole source basis when the contracting officer determines that one of the conditions in section 305(a) of the Act is satisfied, in accordance with chapter 17 of title 27 DCMR.

1802.6 A contracting officer may orally solicit quotations for procurements valued at twenty-five thousand dollars (\$25,000) or less. However, a contracting officer shall use a written solicitation in the following circumstances:

- (a) When the contracting officer determines that obtaining oral quotations is not considered economical or practical; or
- (b) When extensive specifications are involved.

1802.7 A contracting officer shall, to the greatest extent practicable under the circumstances, maximize competition for small purchases and shall not limit solicitations to suppliers of well known and widely distributed makes or brands, or solicit on a personal preference basis.

1803 DETERMINATION OF REASONABLE PRICE AND AWARD

1803.1 The contracting officer shall determine that the price to be paid to the successful offeror is fair and reasonable.

1803.2 When only one (1) response is received to a request for competitive quotations, or the price variance between multiple responses is so great that it reflects a lack of adequate competition, the contracting officer shall include a statement in the contract file giving the basis for the determination of a fair and reasonable price.

1803.3 The determination that a proposed price is fair and reasonable may be based on the following:

- (a) Competitive quotations;
 - (b) Comparison of the proposed price with (i) prices found reasonable on previous purchases, (ii) current price lists; (iii) catalogs, (iv) advertisements or (v) similar items;
 - (c) Value analysis;
 - (d) The contracting officer's personal knowledge of the item being purchased; or
 - (e) Any other reasonable basis.
- 1803.4 The contracting officer shall establish and maintain records of oral and written price quotations and include the record in the purchase file. The records shall consist of the names of suppliers contacted and the prices and other terms and conditions quoted by each.
- 1803.5 The contracting officer's records of solicitations shall include, at a minimum, notes of abstracts to show prices, delivery, references to printed price lists used, the vendor or vendors contacted, and other pertinent data.
- 1803.6 The contracting officer shall retain records supporting small purchases for a minimum of three (3) years.

All persons desiring to comment on the subject matter of this proposed rulemaking should file comments, in writing, no later than thirty (30) days after the date of publication of this notice in the *D.C. Register*. Hand-delivered comments should be delivered, and mailed comments should be postmarked, no later than thirty (30) days after publication of this notice in the *D.C. Register*. Comments should be delivered or mailed to the Chief Procurement Officer, Office of Contracting and Procurement, 441 Fourth Street, N.W., Suite 700 South, Washington, D.C. 20001. Copies of the proposed rules may be obtained from the above address.

DEPARTMENT OF HEALTH CARE FINANCE

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Director of the Department of Health Care Finance, pursuant to the authority set forth in An Act to enable the District of Columbia to receive federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes, approved December 27, 1967 (81 Stat.774; D.C. Official Code § 1-307.02) and the Department of Health Care Finance Establishment Act of 2007, effective February 27, 2008 (D.C. Law 17-109; D.C. Official Code § 7-771.05(6)), hereby gives notice of the adoption, on an emergency basis, of a new Section 995 of Title 29 of the District of Columbia Municipal Regulations (“DCMR”), entitled “Medicaid Physician and Specialty Rate Methodology.” This rule will establish a new rate methodology that would increase Medicaid reimbursement for physician and specialty services.

Immediate action is mandated based upon changes required by the FY 2009 Budget Support Act of 2008, which requires the Department of Health Care Finance (“DHCF”) to raise its fee schedule to meet Medicare rates for physician and specialty services. The Medicaid Program projects total annual expenditures of \$11.34 million as a result of the proposed change in the fee schedule for physician and specialty services. Emergency action is necessary for the immediate preservation of the health, safety, and welfare of Medicaid beneficiaries who are in need of physician and specialty services. The District’s Medicaid Program has been unable to attract physicians with medical specialties because of low reimbursement rates. Many Medicaid beneficiaries, despite the opportunities that accompany the program, cannot be treated because of the insufficient number of physician providers participating in the District’s Medicaid Program. By taking emergency action, this proposed rule will ensure appropriate and needed compensation to current physician providers, encourage new provider participation, and allow Medicaid beneficiaries access to needed medical services.

The District of Columbia Medicaid Program also is modifying the State Plan for Medicaid Assistance (“State Plan”) to reflect these changes. Each State Plan Amendment (“SPA”) must be approved by the Council of the District of Columbia (“Council”) and the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (“CMS”). The Council approved the SPA on August 15, 2008 by PR 17-937. This emergency rule was adopted on March 26, 2009, and will become effective on April 1, 2009 if the corresponding SPA has been approved by CMS with an effective date of April 1, 2009, or the effective date established by CMS in its approval of the corresponding SPA. If approved, the DHCF will publish a notice which sets forth the effective date of the rule. This emergency rule will remain in effect for up to one hundred twenty (120) days or until July 24, 2009, unless superseded by publication of a Notice of Final Rulemaking in the *D.C. Register*, whichever comes first.

The Director also gives notice of the intent to take final rulemaking action to adopt this proposed rule not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

Chapter 9 of Title 29 of the DCMR is amended by adding a new Section 995 to read as follows:

**995 MEDICAID PHYSICIAN AND SPECIALTY SERVICES RATE
 METHODODOLOGY**

- 995.1 Medicaid reimbursement rates for fee-for-service physician and specialist services shall be consistent with the rates paid by the Medicare Program as set forth in this section.
- 995.2 For services where the physician and specialist service procedure code falls within the Medicare (Title XVIII) fee schedule, payment shall be the lesser of the Medicare rate or the providers' actual charges to the general public.
- 995.3 For services where the procedure code does not fall within the Medicare fee schedule, an alternative method, as set forth in § 995.4, shall be used to establish the Medicaid reimbursement rate.
- 995.4 When making a determination to establish the Medicaid reimbursement rate using an alternative method for physician and specialty services, in addition to using professional judgment, the following factors may be considered:
- (a) Practitioner fees;
 - (b) Fee schedules from other states;
 - (c) Similar procedures with established fees; or
 - (d) Private insurance payments.
- 995.5 Beginning Fiscal Year 2010, and annually thereafter, all rates for physician and specialty services shall be updated on January 1st pursuant to the rate schedules in effect on the first day of the District of Columbia fiscal year or October 1st.
- 995.6 All physician and specialty services reimbursement rates shall be located on the Department of Health Care Finance website.

Comments on this proposed rule shall be submitted, in writing, to Julie Hudman, Ph.D., Director, Department of Health Care Finance, 825 North Capitol Street, NW, 5th Floor, Washington, DC 20002, within thirty (30) days from the date of publication of this notice in the *D.C. Register*. Additional copies of this proposed rule may be obtained from the above address.

D.C. DEPARTMENT OF HUMAN RESOURCES

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Director, Department of Human Resources (DCHR), with the concurrence of the City Administrator, pursuant to Mayor's Order 2008-92, dated June 26, 2008, and in accordance with Title I of the Child and Youth, Safety and Health Omnibus Amendment Act of 2004 (Act), effective April 13, 2005 (D.C. Law 15-353; D.C. Official Code § 1-620.31 *et seq.*) (2006 Repl. and 2008 Supp.), hereby gives notice of the adoption of the following emergency rules. **These rules amend subsection 3902.2 of Chapter 39, Testing for the Presence of Controlled Substances and Alcohol, of Title 6 of the District of Columbia Municipal Regulations (DCMR)**, on the subject of *covered agencies*, to add the District Department of the Environment, Natural Resources Administration, Fisheries and Wildlife Division, Fisheries Management Branch, Aquatic Resource Education Center, to the list of agencies covered under the Act. These emergency rules are necessary for the immediate preservation of the peace, safety, and welfare of the District government in general, and the protection of the children and youth covered by the Act in particular; and to ensure that employees (and new hires) in the specified organizational unit within the DDOE who are now covered by the requirements of the Act can be immediately subjected to the pertinent testing under the Act. For the aforementioned reason, action was taken on April 8, 2009 to adopt the following rules on an emergency basis effective April 8, 2009. These rules shall remain in effect for up to one hundred twenty (120) days from April 8, 2009, unless earlier superseded by another rulemaking notice.

The Director, DCHR, with the concurrence of the City Administrator, pursuant to Mayor's Order 2008-92, dated June 26, 2008, and in accordance with Title I of the Act, hereby gives notice of the intent to adopt the following rules in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*. **These rules would amend section 3902.2 of Chapter 39, Testing for the Presence of Controlled Substances and Alcohol, of Title 6 of the DCMR**, on the subject of *covered agencies*, to add the District Department of the Environment, Natural Resources Administration, Fisheries and Wildlife Division, Fisheries Management Branch, Aquatic Resource Education Center, to the list of agencies covered under the Act. Upon adoption, these rules will amend Chapter 39, Testing for the Presence of Controlled Substances and Alcohol, of Title 6 of the DCMR, published at 47 DCR 7931 (September 29, 2000), and amended at 52 DCR 6662 (July 15, 2005) and 55 DCR 8871 (August 15, 2008).

CHAPTER 39

TESTING FOR THE PRESENCE OF CONTROLLED
SUBSTANCES AND ALCOHOL

Chapter 39 of Title 6 of the District of Columbia Municipal Regulations is amended as follows:

Section 3902.2 is amended to read as follows:

3902.2 The following subordinate agencies shall be covered under the Program, on the basis that each one of these agencies, as a whole or certain components thereof, has safety-sensitive positions:

- (a) Department of Human Services;
- (b) Department of Health;
- (c) Department of Parks and Recreation;
- (d) Fire and Emergency Medical Services Department;
- (e) Metropolitan Police Department;
- (f) Traffic Safety Administration within the District Department of Transportation;
- (g) Office of the State Superintendent of Education;
- (h) Department of Youth Rehabilitation Services;
- (i) Department of Employment Services;
- (j) Department of Mental Health;
- (k) Child and Family Services Agency;
- (l) Department of Disability Services;
- (m) District Department of the Environment, Natural Resources Administration, Fisheries and Wildlife Division, Fisheries Management Branch, Aquatic Resource Education Center;
- (n) D.C. Public Schools; and
- (o) Any other subordinate or independent District government agency subject to these regulations, including an agency which, as a result of a permanent or a temporary change to its mission such as may be caused by reorganization or any other similar reason, come to have safety-sensitive positions.

New sections 3902.3 and 3902.4 are added to read as follows:

3902.3 While not listed in section 3902.2 of this section, the provisions of sections 3901 through 3910 of this chapter shall apply to independent agencies covered by this chapter, such as the D.C. Public Library, that have safety-sensitive positions as that term is defined in the Act.

3902.4 The D.C. Department of Human Resources may execute a Memorandum of Understanding to conduct drug and alcohol testing under the Act for an independent agency with safety-sensitive positions.

Comments on these proposed regulations should be submitted, in writing, to Ms. Brender L. Gregory, Director, DCHR, 441 4th Street, NW, Suite 300 South, Washington, D.C. 20001, within thirty (30) days of the date of the publication of this notice. Additional copies of these proposed rules are available from the above address.

D.C. DEPARTMENT OF HUMAN RESOURCES

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Director of the D.C. Department of Human Resources, with the concurrence of the City Administrator, pursuant to Mayor's Order 2008-92, dated June 26, 2008 and Mayor's Order 2007-95, dated April 18, 2007; and in accordance with the provisions of Title II of the Child and Youth, Safety and Health Omnibus Amendment Act of 2004 (Act), effective April 13, 2005 (D.C. Law 15-353; D.C. Official Code § 4-1501.01 *et seq.*) (2008 Repl.), hereby gives notice of the adoption of the following emergency rules. The Act established criminal background and traffic record checks requirements for District government employees providing direct services to children or youth in District government agencies considered "*covered child or youth services providers.*" **The main purpose of these emergency rules is to amend section 414.2 of Chapter 4, Organization for Personnel Management, of Title 6 of the District of Columbia Municipal Regulations (DCMR),** to add the District Department of the Environment (DDOE), Natural Resources Administration, Fisheries and Wildlife Division, Fisheries Management Branch, Aquatic Resource Education Center, to the list of agencies covered under the Act. Additionally, section 407 of the chapter, on *suitability actions initiated or taken by personnel authorities*, has been amended to clearly state that the personnel authority (not the employing agency) shall take the action terminating an employee who fails a criminal background check pursuant to the Act; and section 419 of the chapter, on the *review and determination process for employees covered under the Act*, has been amended to, among other things, clarify the process for the termination of employees who fail a criminal background check pursuant to the Act. These emergency rules are necessary for the immediate preservation of the peace, safety, and welfare of the District government in general, and the protection of the children and youth covered by the Act in particular; and to ensure that employees (and new hires) in the specified organizational unit within the DDOE who are now covered by the requirements of the Act can be immediately subjected to the pertinent checks under the Act. Finally, in addition to the amendments to sections 414.2, 407, and 419 of the chapter, other amendments, mostly non-substantive and unrelated to the Act, are being made to sections 400, 404, 406, and 408 of the chapter. For the aforementioned reason, action was taken on April 8, 2009 to adopt the following rules on an emergency basis effective April 8, 2009. These rules shall remain in effect for up to one hundred twenty (120) days from April 8, 2009, unless earlier superseded by another rulemaking notice.

The Director, DCHR, with the concurrence of the City Administrator, pursuant to Mayor's Order 2008-92, dated June 26, 2008 and Mayor's Order 2007-95, dated April 18, 2007, and in accordance with the Act, hereby gives notice of the intent to adopt the following rules in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*. The Act established criminal background and traffic record checks requirements for District government employees providing direct services to children or youth in District government agencies considered "*covered child or youth services providers.*" **The main purpose of these rules is to amend section 414.2 of Chapter 4, Organization for Personnel Management, of Title 6 of the DCMR,** to add the organizational component within the DDOE described above to the list of agencies covered under the Act.

Additionally, section 407 of the chapter, on *suitability actions initiated or taken by personnel authorities*, has been amended to clearly state that the personnel authority (not the employing agency) shall take the action terminating an employee who fails a criminal background check pursuant to the Act; and section 419 of the chapter, on the *review and determination process for employees covered under the Act*, has been amended to, among other things, clarify the process for the termination of employees who fail a criminal background check pursuant to the Act. Finally, in addition to the amendments to sections 414.2, 407, and 419 of the chapter, other amendments, mostly non-substantive and unrelated to the Act, are being made to sections 400, 404, 406, and 408 of the chapter. Upon adoption, these rules will amend Chapter 4, Organization for Personnel Management, of Title 6 of the DCMR, published at 32 DCR 75 (January 4, 1985) and amended at 33 DCR 4447 (July 25, 1986), 51 DCR 928 (January 23, 2004), 51 DCR 11591 (December 24, 2004), 52 DCR 6646 (July 15, 2005), 55 DCR 724 (January 25, 2008), and 55 DCR 8870 (August 15, 2008).

CHAPTER 4

ORGANIZATION FOR PERSONNEL MANAGEMENT

Chapter 4 of Title 6 of the District of Columbia Municipal Regulations is amended as follows:

Section 400 is amended to read as follows:

- 400.1 The Director of the D.C. Department of Human Resources (DCHR) is authorized to grant variations from the letter of the D.C. personnel regulations issued under the authority of the Mayor pursuant to section 404 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (CMPA), effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-604.04), whenever there are practical difficulties and unnecessary hardships in complying with the strict letter of the regulations.
- 400.2 The Director of the DCHR shall be authorized to grant a variation as specified in section 400.1 of this section if:
- (a) Such a variation is within the spirit of the regulations;
 - (b) The efficiency of the District government is being protected and promoted; and
 - (c) The integrity of the Career, Legal, Excepted, Management Supervisory, or Executive Services, as applicable, is being protected and promoted.
- 400.3 Whenever a variation is granted, the Director of the DCHR shall publish in the District Personnel Manual (or any other procedural manual or manuals developed) an issuance showing the following:

- (a) The particular practical difficulty or hardship involved;
- (b) The variation being permitted, the difference from the requirements of the regulations, and to whom it applies;
- (c) The specific circumstances which protect or promote the efficiency of the District government and the integrity of a particular service or services; and
- (d) The steps that will be taken to limit the application of the variation only to the duration of the conditions that gave rise to it.

400.4 Like variations shall be granted whenever like conditions exist.

Section 404.2 is amended to read as follows:

404.2 Persons being considered for employment in the Executive Service under the authority of sections 1051 through 1063 of the CMPA (D.C. Official Code §§ 1-610.51 through 1-610.63) shall be subject to pre-employment inquiries and background investigations as prescribed by the Director, DCHR, or in the case of the Director of the DCHR him or herself, as prescribed by the Mayor.

Sections 406.3, 406.4, and 406.6 are amended to read as follows:

406.3 The Director of the DCHR shall develop procedures to set forth the policies, standards, and criteria for background investigations pursuant to this section, and publish the procedures in the District Personnel Manual (or any other procedural manual or manuals developed).

406.4 As specified in the procedures developed by the Director of the DCHR, each subordinate agency head shall be required to inform the DCHR of the results of background investigations conducted pursuant to this section.

406.6 Notwithstanding the provisions of section 406.2 of this chapter, the Director of the DCHR shall conduct background investigations for cases described in section 406.5 (a) of this section.

The heading of section 407 is changed from "Suitability Actions Against Employees Initiated by Personnel Authorities" and the section amended to read as follows:

407 SUITABILITY ACTIONS AGAINST EMPLOYEES INITIATED OR TAKEN BY THE D.C. DEPARTMENT OF HUMAN RESOURCES AND INDEPENDENT PERSONNEL AUTHORITIES

407.1 The D.C. Department of Human Resources (DCHR) and independent personnel authorities covered by this chapter shall initiate, or initiate and take, suitability action against District government employees pursuant to this section and chapter when:

- (a) The DCHR or independent personnel, as applicable, make a determination that the employee provided a material false statement; engaged in deception or fraud in his or her examination or appointment with the District government; or engaged in the falsification of official personnel records;
- (b) Derogatory information about the employee, of a nature that constitutes an immediate hazard to the agency, the employee concerned, to other employees, or to the detriment of the public health, safety, or welfare, is disclosed by a credible source or independently discovered by the DCHR, independent personnel authority, or the employing agency;
- (c) Derogatory information about an employee, of a nature that will impact the employee's suitability to continue performing the duties of his or her position, is disclosed by a credible source or independently discovered by the personnel authority or employing agency; or
- (d) A determination is made to terminate the employment of an employee subject to the provisions on criminal background checks for the protection of children and youth contained in sections 412 through 425 of this chapter because the employee has failed a criminal background check.

407.2 In the circumstances described in section 407.1 (a) through (c) of this section, the DCHR or independent personnel authority shall:

- (a) Require that the employing agency remove the employee from District government service;
- (b) In addition to requiring the employee's removal, require that the employing agency cancel any reinstatement eligibility, as applicable; or
- (c) In addition to the actions in accordance with subsection 407.2 (a) and (b) of this section, deny the employee examination for and appointment to a position in the particular agency for a period of not more than three (3) years from the date of the determination of unsuitability.

407.3 In the circumstance described in section 407.1 (d) of this section, the DCHR or independent personnel authority shall not only propose the administrative action to remove an employee who fails the criminal background check, as applicable, but shall also issue the final administrative decision on the removal action. The provisions in subsection 407.2 (b) and (c) of this section shall also apply to an employee terminated pursuant to section 407.1 (d) of this section.

407.4 If a determination is made that the suitability violation does not rise to the standard described in section 407.1 (a) of this section, the DCHR or independent personnel authority may require that the employing agency take an administrative action against the employee that is less than removal.

- 407.5 The DCHR or independent personnel authority, as appropriate, shall determine the specific duration of any punitive period imposed under section 407.2 (c) of this section.
- 407.6 Subordinate agencies shall refer any case with circumstances as described in section 407.1 (a) through (c) of this section to the Director of the DCHR.
- 407.7 The DCHR or independent personnel authority shall ensure that any suitability action taken against an employee pursuant to section 407.1 of this section is based on information or documentation that is accurate, timely, relevant, and complete.
- 407.8 Before taking any of the actions listed in sections 407.2 and 407.4 of this section, the employee shall be given an opportunity to explain the derogatory information, in writing, within fifteen (15) days of being notified thereof, to allow the appointee to provide information that would explain any discrepancies, omissions, or misinformation, or mitigating circumstances that may exist which are unknown to the personnel authority or the employing agency.
- 407.9 The review and determination process set forth in section 419 of this chapter shall be followed before taking action under section 407.1 (d) of this section to terminate an employee because he or she failed a criminal background check for the protection of children and youth.
- 407.10 Any suitability disqualification action against a subordinate agency head shall be taken by the Mayor (or his or her designee).

Section 408.2 is amended to read as follows:

- 408.2 A subordinate agency head (or his or her designee) delegated personnel authority pursuant to sections 403.5 or 406 of this chapter, shall provide the Director of the DCHR information to document the results of each suitability investigation conducted by the subordinate agency. Unless otherwise specified, the information shall be provided prior to the effective date of appointment of a selectee or appointee.

Section 414.2 is amended to read as follows:

- 414.2 The following subordinate agencies shall be considered covered child or youth services providers subject to the criminal background check and traffic record check provisions of the Act and these regulations.
- (a) Department of Human Services;
 - (b) Department of Health;
 - (c) Department of Parks and Recreation;

- (d) Fire and Emergency Medical Services Department (FEMSD);
- (e) Metropolitan Police Department (MPD);
- (f) Traffic Safety Administration, within the District Department of Transportation;
- (g) Office of the State Superintendent of Education;
- (h) Department of Youth Rehabilitation Services;
- (i) Department of Employment Services;
- (j) Department of Mental Health;
- (k) Child and Family Services Agency;
- (l) Department of Disability Services;
- (m) District Department of the Environment, Natural Resources Administration, Fisheries and Wildlife Division, Fisheries Management Branch, Aquatic Resource Education Center;
- (n) D.C. Public Schools; and
- (o) Any other subordinate agency subject to these regulations which, as a result of a permanent or temporary change to its mission such as may be caused by reorganization or any other similar reason shall become a covered child or youth services provider subject to the criminal background check and traffic record check provisions in the Act.

New sections 414.3 and 414.4 are added to read as follows:

- 414.3 While not listed in section 414.2 of this section, the provisions of sections 412 through 425 of this chapter shall apply to independent agencies covered by this chapter, such as the D.C. Public Library, which as part of their mission, provide the types of direct services to children and youth, or for the benefit of children and youth, encompassed in the duties and responsibilities listed in section 416 of this chapter. Such independent agencies shall be considered covered child or youth services providers subject to the criminal background check and traffic record check provisions of the Act and these regulations
- 414.4 The D.C. Department of Human Resources may execute a Memorandum of Understanding to conduct criminal background checks and traffic record checks under the Act for an independent agency considered a covered child or youth services provider.

Section 419 is amended to read as follows:

419 CRIMINAL BACKGROUND AND TRAFFIC RECORD CHECKS FOR THE PROTECTION OF CHILDREN AND YOUTH – REVIEW AND DETERMINATION PROCESS

- 419.1 The Mayor’s authority to make suitability determinations under this section is delegated to the D.C. Department of Human Resources (DCHR) and independent personnel authorities, as appropriate.
- 419.2 Upon completing each criminal background check, the designated MPD representative, or the representative for any other entity conducting the check, shall forward the criminal background check to the DCHR or independent personnel authority, as appropriate.
- 419.3 Upon receipt of the criminal background check, the DCHR or independent personnel authority shall complete a review and determination process as specified in this section.
- 419.4 The DCHR or independent personnel authority shall conduct an initial review of the criminal background check to determine if the appointee or employee has a criminal record, including any of the proscribed offenses, and determine if there are any charges with no clear disposition.
- 419.5 The information obtained from a criminal background check shall not immediately disqualify or create a presumption against employment or volunteer status of an appointee, employee, or unsupervised volunteer with a criminal record, including a proscribed offense, unless the DCHR or independent personnel authority determine that because of such criminal record, the person would pose a present danger to children or youth that makes him or her unsuitable for paid employment of unsupervised voluntary service in a covered position. This determination shall be made based on the following seven (7) factors:
- (a) The specific duties and responsibilities necessarily related to the employment sought;
 - (b) The bearing, if any, the criminal offense for which the appointee was previously convicted will have on his or her fitness or ability to perform one (1) or more of the duties or responsibilities of the position;
 - (c) The time which has elapsed since the occurrence of the criminal offense;
 - (d) The age of the appointee at the time of the occurrence of the criminal offense;
 - (e) The frequency and seriousness of the criminal offense;

- (f) Any information produced by the appointee, or produced on his or her behalf, in regard to his or her rehabilitation and good conduct since the occurrence of the criminal offense; and
 - (g) The public policy that is beneficial generally for ex-offenders to obtain employment.
- 419.6 When there is a discovery of charges with no clear disposition, the DCHR or independent personnel authority shall:
- (a) Contact the appointee or employee and inform him or her of the charges with no clear disposition contained in the criminal background check;
 - (b) Notify the appointee or employee, in writing, that he or she has five (5) business days to provide the necessary information on the final disposition of the charges; and
 - (c) Determine whether or not the information submitted by the appointee or employee resolves the charges with no clear disposition.
- 419.7 Notwithstanding the seven (7) factors listed in section 419.5 of this section, a covered District government agency shall terminate the employment of current employees and shall not employ or permit to serve as unsupervised volunteers persons who have been convicted of, have pleaded nolo contendere, are on probation before judgment or placement of a case upon a stet docket, or have been found not guilty by reason of insanity for any sexual offenses involving a minor.
- 419.8 When the DCHR or independent personnel authority resolve criminal background check information issues, the DCHR or independent personnel authority shall make the final suitability determination whether:
- (a) In the case of an appointee (new hire), a final offer of appointment should be made or denied;
 - (b) In the case of an unsupervised volunteer, he or she shall be allowed to provide the volunteer services;
 - (c) A person newly appointed to a compensated position who had begun to work in a supervised setting prior to receiving the results of the check should be retained or employment shall be terminated; or
 - (d) A current employee shall be retained or employment shall be terminated.
- 419.9 The DCHR or independent personnel authority shall notify the employing agency of the final suitability determination.

- 419.10 If the determination of the DCHR or independent personnel authority is that a final offer of appointment should be made to an appointee, the final offer letter shall be promptly issued.
- 419.11 If the determination of the DCHR or independent personnel authority is to terminate employment because of a failed criminal background check, the termination action shall be based on the employee's type of appointment (i.e., Career Probational/Permanent, term appointment, etc.) and service (i.e., Career Service, Management Supervisory Service, etc.), and the applicable legal and regulatory provisions governing terminations, including terminations for cause pursuant to Chapter 16 of these regulations.
- 419.12 In completing the review and determination process of traffic records checks, records of traffic infractions shall be judged on an individual basis for appointees whose duties would include driving a motor vehicle to transport children or youth as described in the Act. A pattern of disregard for existing traffic regulations, particularly where there has been a conviction for driving under the influence of intoxicants or drugs, may make the appointee unsuitable for employment or voluntary service, if the appointee could be required to drive a motor vehicle to transport children or youth in the course of performing his or her duties.
- 419.13 A final suitability determination by the DCHR or independent personnel authority on a criminal background check or traffic record check pursuant to this section that results in termination of employment shall be the final agency decision; except that in the case of a Career Service employee terminated under Chapter 16 of these regulations, the employee shall have appeal rights as specified in that chapter.

Comments on these proposed regulations should be submitted, in writing, to Brender L. Gregory, Director, DCHR, 441 4th Street, NW, Suite 300 South, Washington, D.C. 20001, within thirty (30) days of the date of the publication of this notice. Additional copies of these proposed rules are available from the above address.

THE OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**NOTICE OF EMERGENCY AND PROPOSED RULEMAKING**

The Acting State Superintendent of Education, pursuant to the authority set forth in Section 3 (b) of the District of Columbia State Education Office Establishment Act of 2000, (D.C. Law 13-176; D.C. Official Code § 38-2602 (b) (11) (2008 Supp.); and pursuant to the District of Columbia School Reform Act of 1995, effective April 26, 1996 (110 Stat. 1321; D.C. Official Code § 38-1802.02 (19))(2008 Supp.); hereby gives notice of the adoption on an emergency basis of an amendment to Section 3019, in Chapter 30 of Title 5 of the *District of Columbia Municipal Regulations* (DCMR). The emergency rule became effective on April 14, 2009.

The purpose of the emergency rule and proposed rule is to revise Title 5, Chapter 30, Section 3019 of the DCMR to reflect the status of current law with a clear enunciation of charter school special education responsibilities. The revision to section 3019 of the DCMR replaces references to the District of Columbia Public Schools (DCPS) with a reference to the Office of the State Superintendent of Education where appropriate, as the District of Columbia state education agency (SEA).

Recent experience indicates that section 3019 of the DCMR has been a source of confusion among charter schools, parents and the student hearing office with regard to charter school responsibilities as a Local Education Agency (LEA) or a District of Columbia Public Schools charter school for purposes of providing services to children with disabilities enrolled in their respective schools. The emergency rule seeks to eliminate confusion and provide clarity in conformance with current law.

The emergency and proposed rule enhances the public welfare of District of Columbia special education students in conformance with the Individuals with Disabilities Education Act, 20 USC §1400 *et seq.* (IDEA) and District of Columbia law. The emergency rule shall expire 120 days from the effective date, or upon publication in the *D.C. Register* as a final rule, whichever occurs first.

The Acting State Superintendent of Education also gives notice of her intent to take final rulemaking action in not less than 30 days from the date of publication of this notice in the *D.C. Register*.

Section 3019 of Chapter 30 of Title 5 of the DCMR is amended to read as follows:

3019 CHARTER SCHOOLS

3019.1 Pursuant to the D.C. School Reform Act, District charter schools shall elect to be a Local Education Agency Charter ("LEA Charter") or a District of Columbia Public Schools Charter ("District Charter") for special education purposes.

- 3019.2 LEA Charters shall be responsible for ensuring that the requirements of Part B of the Act, including documentation of required policies and procedures, are met in regard to children enrolled in their schools, consistent with the requirements of Chapter 38.
- 3019.3 Except as provided in §§ 3019.4 and 3019.5 below, LEA Charters are responsible for the following: special education evaluation; and, if necessary, an Individualized Education Program (IEP); and placements for children with disabilities enrolled in their facilities.
- 3019.4 When a parent requests an evaluation for a determination of special education eligibility while his/her child is registered in a District of Columbia Public Schools (DCPS) school, and does not enroll his/her child in an LEA Charter until the applicable 120-day period for assessment and placement required by applicable law has expired, the child's evaluation and, if necessary, IEP and placement remain the responsibility of DCPS.
- 3019.5 When a parent requests an evaluation for a determination of special education eligibility while his/her child is registered in an LEA Charter and does not enroll his/her child in another LEA Charter or a DCPS school until the applicable period for assessment and placement has expired, the child's evaluation and, if necessary, IEP and placement, remain the responsibility of the LEA Charter in which the child was enrolled during the applicable period.
- 3019.6 When a child is enrolled in more than one LEA during the applicable period for assessment and placement, the LEAs are jointly responsible for the child's evaluation and, if necessary, IEP and placement. Every effort will be made by both LEAs to cooperate to achieve the necessary timelines and legal requirements.
- 3019.7 DCPS is responsible for special education evaluations, and, if necessary, IEPs and placements for children enrolled in District Charters.
- 3019.8 LEA Charters and District Charters are responsible for providing all necessary related services to children with disabilities enrolled in their facilities, consistent with these children's IEPs.
- 3019.9 When an LEA Charter concludes that it cannot serve a child with a disability enrolled in its facility using the funds available to it, it shall notify the Office of the State Superintendent of Education (OSSE) in writing as far as possible in advance of the Multi Disciplinary Team/Individualized Education Program (MDT/IEP) meeting in which change of placement is likely to be discussed. Contact with the OSSE should be made at a minimum of thirty days before any MDT/IEP meeting in which change of placement is likely to be discussed. In any case in

which a change of placement is being considered on an emergency basis, OSSE should be notified as soon as feasible.

- 3019.10 The OSSE shall arrange for and fund special education mediation and due process hearings involving charter schools if asked to do so by the charter school.
- 3019.11 Except as provided in § 3019.12 below, LEA Charters shall provide their own representation at, and be responsible for implementation of all agreements or decisions resulting from, mediation and due process hearings involving children enrolled in their school, unless implementation of the agreement or decision is the responsibility of DCPS as a result of any actions or inactions of DCPS while a child had been enrolled at an LEA Charter school or pursuant to federal or local law or regulation.
- 3019.12 When, a mediation or due process hearing involving an LEA Charter, a responsibility or action of another LEA is at issue, the second LEA shall provide representation at, and be responsible for implementation of, all agreements or decisions pertaining to the second LEA resulting from the mediation or due process hearing. Every effort will be made by both LEAs to cooperate to achieve the necessary timelines and legal requirements.
- 3019.13 DCPS will provide representation at, and be responsible for implementation of all agreements or decisions resulting from, mediation and due process hearings involving District Charters.
- 3019.14 District Charters shall not convene a Multi-Disciplinary Team meeting without first providing sufficient notice to DCPS and giving DCPS an opportunity to reschedule the Multi-Disciplinary Team meeting if the proposed dates are unsatisfactory.
- 3019.15 DCPS will transfer a child's special education file upon request of any public charter school following the charter school's submission of appropriate documentation of the child's enrollment in that charter school.

Persons wishing to comment on this rule should submit their comments in writing to Kerri L. Briggs, PhD., Acting State Superintendent of Education, 441 4th Street, NW, Room 350N, Washington, D.C. 20001, Attn: Beth Colleye. All comments must be received by the Office of the State Superintendent of Education not later than thirty (30) days after publication of this notice in the *D.C. Register*. Copies of this rulemaking may be obtained from the OSSE website at www.osse.dc.gov or upon request at the above referenced location.