

DEPARTMENT OF HEALTH CARE FINANCE

NOTICE OF PROPOSED RULEMAKING

The Director of the Department of Health Care Finance (DHCF), 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 intent to adopt an amendment to Section 922 of Title 29 of the District of Columbia Municipal Regulations (DCMR), entitled “Methods for Determining Costs of Prescribed Multiple Source Drugs” and section 925.99 of Title 29 DCMR entitled “Definitions”.

These proposed rules will establish a Maximum Allowable Cost (MAC) program for prescription drugs covered by the Medicaid program. The MAC program is a payment mechanism designed to standardize the reimbursement rates for multi-source drugs, when there are at least two multi-source drugs in the therapeutic category. The MAC rate will be the maximum amount the District will reimburse a pharmacy for affected multi-source drugs. Implementation of the MAC standardizes the rate of reimbursement to pharmacies, thus encouraging pharmacies to obtain the lower priced multi-source drug for dispensing purposes. Medicaid state agencies are adopting MAC programs as a best practice initiative to contain the increasing cost of prescription drugs needed by Medicaid recipients. The MAC program will work together with the Preferred Drug List to help DHCF to obtain the lowest price for prescription drugs, consistent with quality of care standards. DHCF estimates savings of more than \$4 million dollars from the new MAC.

To ensure compliance with federal law, DHCF is also amending the District of Columbia State Plan for Medical Assistance (State Plan) to reflect these changes. 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), must approve the corresponding State Plan amendment. The Council approved the State Plan amendment on August 11, 2006 by PR 16-786.

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 District of Columbia Municipal Regulations (Public Welfare) is amended as follows:

Section 922 (Methods for Determining Costs of Prescribed Multiple Source Drugs) of Chapter 9 of Title 29 DCMR is deleted in its entirety and replaced to read as follows:

Section 922 METHODS FOR DETERMINING COSTS OF PRESCRIBED MULTIPLE SOURCE DRUGS.

- 922.1 The allowable cost for multiple source designated by the Centers for Medicare and Medicaid Services (CMS) and included in its listing pursuant to 42 CFR 447.332, shall be the lower of the following:
- (a) The upper limit established by the Secretary of the U.S. Department of Health and Human Services pursuant to Section 1927(a)(5) of the Social Security Act; or
 - (b) The Maximum Allowable Cost (MAC) established pursuant to §§ 922.3 and 922.4 of these rules.
- 922.2 The Department of Health Care Finance (DHCF) shall restrict payment to only those drugs supplied from manufacturers that have signed a national agreement, or have an approved existing agreement, as specified in Section 1927(a) if Title XIX of the Social Security Act.
- 922.3 The MAC may be established for any drug for which there is a significant cost difference between two or more A-rated therapeutically equivalent, multi-source, non-innovator drugs.
- 922.4 The MAC for a drug shall be determined by:
- (a) Using comparable drug prices obtained from multiple nationally recognized comprehensive data sources including, but not limited to pharmacy providers, wholesalers, drug file vendors and pharmaceutical manufacturers; and
 - (b) Reviewing the Average Wholesale Price and the Wholesale Acquisition Cost and applying necessary multipliers to ensure reasonable access by providers to the drug at or below the MAC rate.
- 922.5 If a drug is unavailable in the local market at a cost at or below the CMS limit described in Section 922.1, the allowable cost shall be the lowest price, determined by the Pharmacy Benefit Manager (PBM), at which the drug is available in the local market.
- 922.6 The CMS upper limit for a drug price and the MAC shall not apply if a physician certifies in his or her own handwriting that a specific brand is medically necessary for a particular patient.
- 922.7 The handwritten or electronically written phrase "Medically Necessary" or "Brand Necessary" shall appear on the face of the prescription form. If the prescription is for a nursing facility resident a handwritten phrase "Medically Necessary" or "Brand Necessary" shall be documented in the resident's medical record accompanied by a copy of the physician's order and plan of care.

- 922.8 Neither a dual line prescription form, check-off box on the prescription form, nor check off-box on the physician's orders and plan of care shall satisfy the certification requirement.
- 992.9 DHCF shall supplement the CMS listing set forth in 42 CFR 447.322 by adding drugs and their prices which meet the following requirements:
- (a) The formulation of the drug approved by the U.S. Food and Drug Administration (FDA) has been evaluated as therapeutically equivalent in the most current edition of its publication, Approved Drug Products with Therapeutic Equivalence Evaluations (including supplements or in successor publications); and
 - (b) At least two (2) suppliers list the drug (which has been classified by the FDA as category "A" in its publication, Approved Drug Products with Therapeutic Equivalence Evaluations (including supplements or in successor publications) based on listing of drugs which are locally available.
- 922.10 A pharmacy provider may identify MAC rates by visiting the PBM website located on the DHCF website at <http://dhcf.dc.gov>.

Add the following definition to Section 925.99:

925.99 DEFINITIONS

Department of Health Care Finance - the executive department responsible for administering the Medicaid program within the District of Columbia effective October 1, 2008.

DHCF – Department of Health Care Finance.

Delete the current definition of Department of Health, Medical Assistance in section 925.99 and replace it with the following definition:

925.99 DEFINITIONS

Department of Health, Medical Assistance Administration – the administration within the Department of Health responsible for administering the Medicaid program within the District of Columbia until October 1, 2008.

Delete the current definition of Prescribed Drugs in Section 925.99 and replace it with the following definition:

925.99 DEFINITIONS

Prescribed drugs – Legend drugs approved as safe and effective by the U.S. Food and Drug Administration and those over-the-counter medications which fall into the following categories:

- (a) Oral analgesics with a single active ingredient (i.e., aspirin, acetaminophen, ibuprofen, etc.);
- (b) Ferrous salts (sulfate, gluconate, etc.);
- (c) Antacids with up to three active ingredients, (i.e., Aluminum, magnesium, bismuth, etc.);
- (d) Diabetic preparations;
- (e) Pediatric, prenatal and geriatric vitamin formulations;
- (f) Family planning drugs and supplies;
- (g) Senna extract, single dose preparations when required for diagnostic radiological procedures performed under the supervision of a physician; and
- (h) Over the counter non-sedating antihistamines.

Persons desiring to comment on these proposed rules should submit comments in writing within thirty (30) days of publication of this notice in the *D.C. Register* to John McCarthy, Deputy Director, the Department of Health Care Finance, 825 North Capitol Street, N.E., 5th Floor, Washington, D.C. 20002. Copies of these proposed rules and related information may be obtained between 8:30 a.m. and 5:00 p.m., Monday through Friday, excluding holidays, at the address stated above.

700 SCOPE

700.1 The provisions of this chapter shall apply to all employers, places of public accommodation, educational institutions, and housing and commercial space subject to the D.C. Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1401.01 *et seq.*).

701 COVERAGE

701.1 The provisions of this chapter shall govern the processing of any matters involving discrimination on the grounds of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, status as a victim of an intrafamily offense, and place of residence or business.

701.2 Nothing in this chapter shall be construed to supersede any federal or District of Columbia law, or to invalidate any proceedings commenced under the authority of any prior regulations.

702 JURISDICTION

702.1 The Office has the statutory authority to receive, investigate, and seek an appropriate remedy for allegations of conduct prohibited by the Act and which has caused harm to a person or persons protected by the Act; provided, that the following requirements are met:

- (a) The complaint is filed with the Office within one year of the occurrence of the unlawful discriminatory practice, or the discovery thereof, except as may be modified in accordance with procedures established pursuant to section 303 of the Act (D.C. Official Code § 2-1403.03);
- (b) The alleged unlawful discriminatory practice occurred within the District of Columbia; and
- (c) The respondent is identified as follows:
 - (1) Maintaining a presence within the District of Columbia, including that of a registered agent;
 - (2) Substantially engaged in doing business within the District of Columbia; or
 - (3) Operating an enterprise which is subject to licensing by the District of Columbia government.

703 CONTINUING VIOLATION

703.1 The complainant may allege that his or her claim is a continuing violation if the claim involves a hostile work environment and at least one of the discriminatory acts occurred within the statutory period of one (1) year or three hundred sixty-five (365) days of the date of filing.

704 SUBMISSION OF INFORMATION REGARDING ALLEGED DISCRIMINATION

704.1 The Office shall accept information concerning alleged violations of the Act, Title VII of the federal Civil Rights Act of 1964, Title VIII of the Federal Civil Rights Act of 1968, and other applicable statutes from any person.

704.2 Where the information discloses that a person is entitled to file a charge with the Office, the matter will be investigated.

704.3 Any person or organization may request the issuance of a Director's order for an inquiry into individual or systematic discrimination prohibited by any of the laws referred to in § 704.1.

705 FILING OF COMPLAINTS

705.1 Any person or organization may file with the Office a complaint of a violation of the provisions of the Act, including a complaint of general discrimination, unrelated to a specific person or instance. If a complainant lacks capacity, the complaint may be filed on his or her behalf by a person with an interest in the welfare of the complainant.

705.2 The complaint shall be in writing on a form obtained from the Office, and can be filed online through the Office's website (<http://www.ohr.dc.gov>), via fax, or in-person. Although the date of the online filing will constitute the filing date for the complaint, the original complaint shall be signed and verified before a notary public or other person duly authorized to administer oaths and take acknowledgements. The Office shall furnish notary public service without charge.

705.3 The Director may initiate a complaint whenever the Director has reason to believe that any person has committed an unlawful discriminatory practice. A complaint initiated by the Director shall be signed by the Director.

705.4 A complaint alleging a discriminatory practice shall contain the following information:

- (a) The full name and address of the complainant(s);
- (b) The full name and address of the respondent(s);
- (c) A statement of the alleged unlawful discriminatory practice(s) and a statement of the particulars;

- (d) The date(s) of the alleged unlawful discriminatory practice, and if the alleged unlawful discriminatory practice is of a continuing nature, the dates between which the continuing acts of discrimination are alleged to have occurred; and
- (e) A statement describing any other action, civil, criminal, or administrative in nature, instituted in any other forum or agency based on the same unlawful discriminatory practice as is alleged in the complaint.

705.5 Notwithstanding the provisions of § 705.4, a complaint shall be deemed sufficient when the Office receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practice complained of.

705.6 A notarized complaint shall be filed with the Office, either in person, and the US Postal Service. The Office shall accommodate a disabled person who wishes to file a complaint or who wishes to make a personal appearance at the Office when filing a complaint. Accommodations may include, but shall not be limited to, a personal representative making an appearance on behalf of a disabled complainant, or an Office representative delivering a complaint to a complainant for signature and notarization.

705.7 The Director shall establish and maintain a complaint file containing all documents pertinent to each case. The complaint file shall contain, at a minimum, the following documents as appropriate to the individual case:

- (a) The complaint;
- (b) The reply to data request;
- (c) Amendment(s) to the complaint;
- (d) The respondent's reply to the complaint and any amendments;
- (e) The complainant's statement of withdrawal;
- (f) The investigator's summary or findings of fact and recommendations;
- (g) The extended processing summary and recommendations;
- (h) The Director's Letter of Determination (LOD);
- (i) The conciliation agreement;
- (j) Letter of certification to the Commission; and
- (k) Letter of dismissal.

705.8 If the Office determines that a complainant is filing what are determined to be frivolous complaints, which may include filing an unreasonable number of complaints during a

given time, it may bar the filing of additional complaints until all of the complainant's previous complaints are resolved.

706 AMENDMENT OF COMPLAINTS

- 706.1 A complainant may request that the complaint be amended at any time prior to a hearing.
- 706.2 If the complainant requests an amendment prior to the issuance of the LOD, the Director shall remand the matter to the investigator for further investigation.
- 706.3 If the complainant requests an amendment after certification to the Commission, the matter shall be remanded back to the Office for further investigation.
- 706.4 When an amendment is filed, the Office shall serve a copy of the amendment upon the respondent within two (2) calendar days of the amendment. The respondent shall, within five (5) calendar days after service, file an answer to the amendment. If more time is needed for answering an amendment, the Office shall grant an extension for a reasonable period of time upon the respondent's written request. Any request for an extension must be filed within the five (5) calendar days after service of the amendment.
- 706.5 If the investigation is completely or nearly complete, a new docket number may be assigned.

707 DISMISSAL FOR LACK OF JURISDICTION

- 707.1 If the Director determines, on the face of a complaint, that the Office lacks jurisdiction, an order dismissing the complaint shall be issued without an investigation being made.

708 ADMINISTRATIVE DISMISSALS

- 708.1 A case shall be terminated without prejudice if the complainant submits a written request to withdraw the complaint, or for the following administrative reasons:
- (a) The complainant is absent and has failed to contact the Office or cannot be contacted by the Office. The Office shall attempt to contact the complainant either by telephone, e-mail, or mail addressed to the complainant's address of record. Inability to contact by mail shall consist of mailing at least one (1) regularly mailed letter and one (1) certified letter, return receipt requested, which is returned unclaimed;
 - (b) The complainant fails to proceed and the Office has unsuccessfully attempted to contact the complainant by telephone, e-mail, or mail, and the complainant has failed to contact the Office within thirty (30) days of the date the first letter was

mailed;

- (c) The complainant fails to state a claim for which relief can be granted under the Act;
- (d) The respondent no longer exists as a result of a court action (bankruptcy or dissolution); and
- (e) After preliminary investigation, the Director determines that the Office lacks jurisdiction over the respondent.

708.2 An order dismissing a complaint for administrative reasons shall be in writing and served on the parties, stating the reasons for the dismissal.

708.3 A complainant may request that a complaint previously closed for administrative reasons or voluntarily withdrawn be reopened; provided, that the complainant submits a written request within thirty (30) days of receipt of the order dismissing the complaint, stating specifically the reasons why the complaint should be reopened.

708.4 The Director, upon receipt of a request to reopen a complaint, may, within his or her discretion, reopen the case for good reasons or in the interest of justice; provided, that no determination has previously been made on the merits of the case.

708.5 The decision of the Director to reopen a complaint shall be served on all parties.

709 WITHDRAWAL OF COMPLAINTS

709.1 Complaints filed with the Office under the provisions of the Act may be voluntarily withdrawn at the request of the complainant at any time prior to the completion of the Office's investigation and findings, as specified in section 305 of the Act (D.C. Official Code § 2-1403.05), except that the circumstances accompanying a withdrawal may be fully investigated by the Office.

710 MEDIATION

710.1 The complainant and respondent must attend a mandatory mediation session to be held on a mutually agreed upon date.

710.2 A Mediator shall be appointed by the Director, or his designee, from a list of individuals qualified in alternative dispute resolution.

710.3 Prior to beginning the mediation session, the Mediator shall require both parties and their representatives to sign an agreement that all aspects of the mediation are to be kept confidential.

710.4 No aspect of the mediation shall become a part of the investigative record, and the Mediator shall not be called as a witness in any later proceeding between the parties.

- 710.5 During the mediation, the parties shall discuss the issues in the complaint in an effort to reach an agreement that satisfies the interest of all concerned parties.
- 710.6 The parties shall have forty-five (45) days from the date of the initial mediation session within which to mediate a settlement. If an agreement is reached during the mediation process, the terms of the agreement shall control resolution of the complaint.
- 710.7 The Office may initiate a preliminary investigation before the conclusion of the mediation proceedings. If the parties are finalizing a settlement agreement, the respondent may request an extension of time in which to file an answer.
- 710.8 If an agreement is not reached, the Office shall proceed with an investigation of the complaint.

711 INVESTIGATION

- 711.1 The investigation file shall include the respondent's Statement of Position, responses to the Office's Request for Information and Documents, the complainant's Rebuttal, affidavits of the parties and witnesses, and notes of interviews and fact-finding conferences, if appropriate.
- 711.2 The investigation may be made by field visits, written or verbal inquiry, conference, or any other method or combination of methods suitable in the discretion of the Director or staff personnel assigned responsibility for the investigation, subject to appropriate guidelines.
- 711.3 As part of the Office's investigation, the Office may require the person claiming to be aggrieved to provide a statement which includes the following:
- (a) A statement of each specific harm that the aggrieved party has allegedly suffered and the date on which each harm occurred;
 - (b) For each harm, a statement specifying the act, policy, or practice which is alleged to be unlawful; and
 - (c) For each act, policy, or practice alleged to have harmed the aggrieved party, a statement of the facts which led the party to believe that the act, policy, or practice is discriminatory.
- 711.4 If the investigator concludes that no additional information is necessary or that the investigation is complete, the investigator shall submit his or her findings of fact or investigative report to the Office of General Counsel (OGC) of the Office for legal sufficiency. OGC shall then submit a draft LOD to the Director for review, approval, and issuance.

712 REQUESTS

- 712.1 Within five (5) calendar days of the service of a complaint on the respondent, the complaint shall be assigned to an investigator who shall, within eight (8) calendar days thereafter, prepare and serve upon the respondent, via certified mail, a data request. The data request shall include a request for an answer to the complaint, generally in the form of a Position Statement.
- 712.2 The respondent shall have twenty (20) calendar days after receipt of the data request to submit the requested information. However, in all instances, the requested information shall be submitted five (5) calendar days before the scheduled fact-finding conference.
- 712.3 If the respondent requests additional time to respond to the data request, a reasonable time shall be allowed, as agreed upon by the respondent and the investigator.
- 712.4 If the respondent fails to comply within the agreed upon extended time, the Office may amend the complaint to include violation of section 264(b) of the Act (D.C. Official Code § 2-1402.64(b)), which will invoke the subpoena power, as provided in § 720.
- 712.5 When a request is made to the respondent for additional data not covered in the original data request, the respondent shall be given a reasonable time to submit the additional information, as determined by the investigator in light of the circumstances of the case, but not fewer than four (4) calendar days.
- 712.6 The parties may only request case information at the close of the investigation, pursuant to the Freedom of Information Act of 2000, effective April 27, 2001 (D.C. Law 13-283; D.C. Official Code § 2-531 *et seq.*).
- 712.7 The complainant shall have an opportunity to rebut evidence submitted by or obtained from the respondent, at any time before the issuance of the LOD.

713 FACT-FINDING CONFERENCE

- 713.1 Within fifteen (15) calendar days of the filing of a complaint, the Office shall serve a notice of the complaint and a copy of the complaint on the respondent.
- 713.2 If considered appropriate, the Director or the Director's designee shall schedule a fact-finding conference within twenty (20) calendar days of the date that a complaint is filed.
- 713.3 The Director or the Director's designee shall, at least seven (7) calendar days prior to the fact-finding conference, do the following:
- (a) Inform the parties of the date of the fact-finding conference; and
 - (b) Inform the parties of their responsibility to provide the Director or the Director's designee with names of witnesses who will provide information at the fact-finding conference.
- 713.4 If a witness for a party is unable to attend the fact-finding conference, that party may

request the witness to submit a notarized statement. The party shall deliver the statement to the Office no later than two (2) calendar days before the scheduled date of the fact-finding conference.

- 713.5 The purpose of the fact-finding conference shall be to provide for the rapid processing of charges that are narrowly defined and limited to allegations of direct harm to the charging party.
- 713.6 A record of the fact-finding conference shall be made by a recording device. If a settlement negotiation is initiated during the conference, the settlement discussions shall be confidential and off the record.
- 713.7 For purposes of this section, a “fact-finding conference” is an informal, investigative technique, not an adversary proceeding.
- 713.8 Each allegation of the charge shall be closely examined and fully discussed. Each party shall be allowed ample time to present and defend his or her position.
- 713.9 If counsel for the respondent or the complainant is present, counsel shall be limited to an advisory role and will not be permitted to speak for their clients. For cross-examination purposes, counsel may ask questions through the conference leader.
- 713.10 The fact-finding conference may be waived or suspended when it becomes apparent to the Director or the Director’s designee that the remedy sought by the complainant may be achieved through a negotiated settlement.
- 713.11 A request for rescheduling a fact-finding conference shall be granted at the discretion of the Director or the Director’s designee. A scheduled court appearance of counsel for either party, illness of either party, or other extenuating circumstances are factors that shall be considered in rescheduling a fact-finding conference.

714 FINAL INVESTIGATIVE REPORT

- 714.1 When an investigation and fact-finding conference have been completed, the investigator shall, within thirty (30) days of the conference, write a final report of all fact-findings to date and recommend a final determination of probable cause or no probable cause. OGC will review the case file and report for legal sufficiency to determine if further investigation is necessary.

715 DIRECTOR’S DETERMINATION

- 715.1 OGC shall send a draft LOD recommending probable cause or no probable cause to the Director. The Director shall review the LOD, make a substitute determination or approve the determination, and issue a final determination to the parties. The LOD shall state whether there is probable cause or no probable cause to credit the complaint, or whether the complaint should be dismissed.

716 PROBABLE CAUSE DETERMINATION

- 716.1 A finding of probable cause shall be based upon credible, probative, and substantial evidence which demonstrates a nexus between the harm complained of and the protected characteristic or activity of the complainant.
- 716.2 If the Director determines there is probable cause to credit the complaint, the LOD shall be served on all parties, advising them of the opportunity to conciliate.
- 716.3 If probable cause is found, the respondent shall have fifteen (15) calendar days to file for reconsideration based on misapplication of law, material misstatement of fact, or discovery of evidence not available during the investigation.

717 CONCILIATION

- 717.1 After the Director has issued the probable cause LOD, the parties shall be given notice of an opportunity to settle the complaint through conciliation.
- 717.2 If a conciliation conference is scheduled, it shall be for the purpose of discussing all relief appropriate under the Act. The relief shall be in the form of compensatory relief and/or other remedies deemed appropriate, but shall not include punitive damages.
- 717.3 At the conciliation conference and during the entire period of conciliation, discussions on the merits of the complaint shall not be entertained.
- 717.4 If the endeavors to conciliate succeed, a written conciliation agreement shall be prepared by and executed between the parties, subject to the approval of the Director.
- 717.5 The conciliation agreement shall not constitute an admission by the respondent of any violation of the law, federal or local.
- 717.6 The terms of a conciliation agreement may require a respondent to refrain from committing specified discriminatory practices in the future, and, within the judgment of the Office, to take such affirmative action as will effectuate the purpose of the Act.
- 717.7 The terms of a conciliation agreement may also include consent by the respondent to the entry of a consent decree in a court of competent jurisdiction, embodying the terms of the conciliation agreement.
- 717.8 When a conciliation agreement has been fully executed, it shall be binding on all parties. The parties shall waive all rights to file a subsequent complaint based on issues which could have been included in the conciliation charge or based on issues arising out of the same facts addressed in the complaint.
- 717.9 If during conciliation efforts, the respondent offers a remedy that would place the complainant in the same position that the complainant would have been in had the alleged discriminatory practice not occurred, and the complainant refuses to accept the offer, and if the Director determines that the offered remedy would make the complainant whole, the Director may order the complaint dismissed.

- 717.10 The period for conciliation shall extend for thirty (30) days from receipt of the notice inviting the parties to conciliate the complaint.
- 717.11 Conciliation shall be considered to have failed if, during the thirty (30) day conciliation period, the respondent refuses to participate in conciliation, or if the respondent's offer of a remedy is such that it will not make the complainant whole and the complainant refuses to accept the offer.
- 717.12 A complaint by either party alleging that the terms of a conciliation agreement are not being complied with shall be submitted to the Director for review.
- 717.13 Upon receipt of a charge of noncompliance with a conciliation agreement, the Director shall notify the party being charged with the noncompliance, and permit the party an opportunity to respond to the charge.
- 717.14 The Director shall review the charge of noncompliance, the conciliation agreement, and the response to determine whether the terms are being complied with.
- 717.15 If it is determined that the terms of a conciliation agreement are being complied with, the parties shall be notified and the complaint of noncompliance shall be dismissed.
- 717.16 If it is determined that the terms of a conciliation agreement are not being complied with, the party guilty of noncompliance shall be notified and given five (5) calendar days, after receipt of the notice, to comply. If the party fails to comply within the given time, the agreement shall be referred to the Office of the Attorney General (OAG) for enforcement.
- 717.7 Pursuant to the Age Discrimination in Employment Act of 1967, approved December 15, 1967 (81 Stat. 602; 29 U.S.C. § 621 *et seq.*), the complainant may withdraw his or her agreement to settle within seven (7) calendar days of signing the agreement.

718 FAILURE OF CONCILIATION AND CERTIFICATION TO COMMISSION

- 718.1 If conciliation efforts fail, the Director shall certify the complaint to the Commission and shall serve written notice on the parties that conciliation efforts were not successful.
- 718.2 The notice required by § 718.1 shall be served in the name of the Commission, together with a copy of the complaint or amended complaint, and require the respondent to answer the charges at a public hearing before one or more members of the Commission or before an Administrative Law Judge. The notice shall be served by registered or certified mail, return receipt requested, or by personal service.
- 718.3 The hearing before the Commission or an Administrative Law Judge shall be scheduled not less than ten (10) days or not more than thirty (30) days after service of notice and at a place to be specified in the notice.

719 DISMISSAL FOR LACK OF PROBABLE CAUSE

- 719.1 If, after the investigation and recommendation by OGC, the Director determines that there is no probable cause to credit the complaint, the Director shall issue an order dismissing the complaint.
- 719.2 The Director shall serve a copy of an order dismissing the complaint for lack of probable cause on all parties and shall advise the complainant of the right to apply to the Director for reconsideration of the dismissal.

720 RECONSIDERATION

- 720.1 A complainant seeking reconsideration of a dismissal under § 719.1, or a respondent seeking reconsideration under § 716.3, shall submit an application for reconsideration to the Director in writing, stating specifically the grounds upon which the request for reconsideration is based. The grounds shall be limited to misapplication of law, material misstatement of fact, or discovery of evidence not available during the investigation.
- 720.2 If the request is not based on one of the grounds cited in § 720.1, or is not timely filed, the Director shall reject the application for reconsideration. A request for reconsideration shall be filed with the Director's office, in writing, within fifteen (15) calendar days from the receipt of the Director's LOD.
- 720.3 Upon receipt of an application for reconsideration, the Director shall send letters acknowledging receipt of the application to both the complainant and the respondent. The respondent shall also receive a copy of the grounds upon which the complainant bases the request for reconsideration, and shall be given ten (10) calendar days from receipt of the information to file a response.
- 720.4 If, after review of a timely-filed application for reconsideration and the response thereto, the Director concludes that the complainant has not presented evidence that would warrant change, modification, or reversal of the prior dismissal, the Director shall affirm the original no probable cause finding.
- 720.5 If the Director concludes that the complainant has provided sufficient evidence to raise a genuine issue of law or fact, the complaint shall be reopened for further investigation.
- 720.6 If the respondent adequately refutes the allegations presented in the application for reconsideration, the prior dismissal shall be affirmed and the parties notified.
- 720.7 Where the complainant raises issues of material misstatement of fact or discovery of evidence not available during the investigation, and if the respondent fails to respond within the required time period or fails adequately to refute the allegations in the application for reconsideration, the Director shall reopen the complaint for further investigation.

- 720.8 If, at the end of further investigation and after considering the record as a whole, the Director concludes that the complainant has not presented sufficient evidence to warrant a change of the prior dismissal, the prior dismissal shall be affirmed, and the parties notified in writing.
- 720.9 If the Director determines, after further investigation, that a prior dismissal should be reversed, the Director shall find probable cause to credit the complaint, and the parties shall be served with a detailed written basis for the reversal and afforded an opportunity to conciliate.

721 SUBPOENAS

- 721.1 Subpoenas issued by the Director may require the following:
- (a) The attendance and testimony of witnesses;
 - (b) The production of evidence, including, but not limited to, books, records, correspondence, or documents in the possession or under the control of the person subpoenaed; and
 - (c) Access to evidence for the purpose of examination and copying.
- 721.2 The form, issuance, and manner of service of subpoenas shall be as prescribed by the Rules of Civil Procedure of the D.C. Superior Court.
- 721.3 A subpoena shall do the following:
- (a) State the name and address of its issuer;
 - (b) Identify the evidence or person to be subpoenaed;
 - (c) Identify the person to whom and the place, date, and time at which the subpoena is returnable;
 - (d) Identify the nature of the evidence which is to be examined or copied; and
 - (e) State the date and time when access is requested.
- 721.4 A subpoena shall be returnable to a duly authorized investigator or other representative of the Director.
- 721.5 Upon failure of any person to comply with a subpoena issued under this section, the Office shall request that the OAG undertake appropriate action to compel compliance with the subpoena.

721.6 Witnesses who are subpoenaed shall be entitled to the same fees and mileage that are paid to witnesses under the schedule used by the D.C. Superior Court.

722 CLASS ACTIONS

722.1 A complaint containing a request for class certification may be filed either by an individual complainant or by an organization. Upon receipt of a notarized class action complaint, the Office shall within fifteen (15) days serve on the respondent a notice of the complaint and a copy of the complaint. The respondent shall, within ten (10) days of the receipt of the notice, file a written answer to the request for class certification.

722.2 Within thirty (30) calendar days of receipt of a notarized class action complaint, the Director shall certify the class only if all of the following are satisfied:

- (a) The class is so numerous that joinder of all injured persons is impracticable;
- (b) Common questions of law and fact exist as to the injured persons;
- (c) Claims or defenses of the named complainant(s) are typical of the claims or defenses of the class members;
- (d) The named complainant(s) will fairly and adequately represent and protect the interests of the class; and
- (e) The party opposing the class acted on grounds applicable to the class.

722.3 The decision of the Director to certify a class shall be served on the complainant and the respondent in writing. When the Director denies certification of a class, the complaint shall be considered as an individual action. The time limitations in § 712 shall begin on the date that the parties receive notification of the Director's decision to certify or to deny certification of a class.

722.4 The time limits in § 712 may be adjusted at the discretion of the Director for a complaint certified as a class action.

723 DISCLOSURES

723.1 Documents in the complaint file shall be made available to the parties through a FOIA request after an administrative dismissal, withdrawal of the complaint, or after the issuance of an LOD.

723.2 If an LOD has been issued, only the parties can request the documents after a reconsideration. The complaint file is considered confidential and only the parties may request documents in the official complaint file.

723.3 Internal agency communications, mediation documents, investigator's notes, supervisory memoranda of instructions, and recommendations shall not be made available to the parties.

723.4 The request for documents shall be made pursuant to FOIA.

724 REPORTING REQUIREMENT

724.1 An employer, employment agency, or labor organization subject to the Act and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) shall be considered to be in compliance with the reporting requirements of section 213 of the Act (D.C. Official Code § 2-1402.13) if it has duly filed the EEO-1, EEO-2, or EEO-3 report with the U.S. Equal Employment Opportunity Commission, and the report is made available to the Office.

725 INTERNAL OPERATING GUIDELINES

725.1 The Office shall compile, publish, and maintain a standard operations procedural manual (SOP) which will include, among other things, guidelines for each of the steps required to discharge the primary responsibility of processing complaints of discriminatory practices or policies. Upon request, the Office shall make a copy of the SOP available to any person wishing to examine it.

799 DEFINITIONS

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

Aggrieved Party - any person claiming to be aggrieved by an unlawful discriminatory practice.

Act - the District of Columbia Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1401.01 *et seq.*).

Commission - the Commission on Human Rights, as established by section 401 of the Act (D.C. Official Code § 2-1404.01).

Complainant - any person or organization filing a complaint with the Office.

Complaint - a notarized statement filed with the Office that sets forth a claim of discrimination.

Day - a calendar day, unless otherwise specified.

Director - the Director of the Office, or a member of the Office staff specifically delegated the authority to act for the Director.

Office - the District of Columbia Office of Human Rights, as established by section 202 of the Act (D.C. Official Code § 2-1411.01).

Party or Parties - the complainant or the respondent.

Position Statement - the respondent's official response to the allegations in the Charge of Discrimination.

Respondent - any person specified in the complaint as having engaged in an unlawful discriminatory practice.

Persons desiring to comment on these proposed rules should submit comments in writing to the Office of Human Rights, Office of the General Counsel, 441 4th Street, N.W., Suite 570N, Washington, D.C. 20001, no later than thirty (30) days after the date of publication of this notice in the *D.C. Register*. Copies of these proposed rules may be obtained between 8:30 A.M. and 5:00 P.M. at the address stated above.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA

NOTICE OF PROPOSED RULEMAKINGFORMAL CASE NO. 1075, IN THE MATTER OF THE APPLICATION OF POTOMAC ELECTRIC POWER COMPANY FOR A CERTIFICATE AUTHORIZING IT TO ISSUE AND SELL UP TO \$750,000,000 OF LONG-TERM SECURED AND UNSECURED DEBT SECURITIES

1. The Public Service Commission of the District of Columbia (“Commission”) hereby gives notice, pursuant to D.C. Official Code §§ 2-505, 34-502 and 34-503, that it intends, in not less than 30 days from the date of publication of this Notice in the *D.C. Register* (“publication date”), to take final action on the application of Potomac Electric Power Company (“Pepco” or “Company”) for a certificate authorizing the Company to issue and sell up to \$750,000,000 of long-term secured or unsecured debt securities.¹

2. On May 12, 2009, Pepco filed an Application seeking authority to issue and sell up to \$750,000,000 of long-term secured or unsecured debt securities through public sale or by way of private placement and in domestic or foreign markets.² Pepco also seeks expedited review of its Application under the Commission’s expedited review process in Chapter 35 of the Commission’s rules.³

3. Pepco states in its Application that the proceeds from the sale of the Debt Securities would be used: (1) to refund maturing debt securities; (2) for redemptions; (3) to refund outstanding securities of the Company, should future market conditions make refinancing feasible; (4) to refund short-term debt incurred to finance utility construction and operations on a temporary basis; (5) to fund ongoing capital requirements of the Company; and (6) for other general corporate purposes. Pepco also submits that the precise timing and types of financings selected would depend on factors such as prevailing and anticipated market conditions, the costs and amount of the Company’s anticipated and outstanding short-term debt, the costs of the Company’s outstanding securities and upon capital structure considerations.⁴ Finally, the Company seeks authority for a three-year period.⁵

¹ *Formal Case No. 1075, In the Matter of the Application of Potomac Electric Power Company for a Certificate Authorizing it to Issue and Sell up to \$750,000,000 of Long-term Secured and Unsecured Debt Securities (“F.C. 1075”),* filed May 12, 2009 (“Pepco’s Application”).

² Pepco’s Application at 2.

³ *Id.* at 1; 15 DCMR § 3500, *et seq.*

⁴ Pepco’s Application at 2.

⁵ *Id.* at 6.

4. Pepco's Application and supporting documentation are on file with the Commission and may be reviewed at the Office of the Commission Secretary, 1333 H Street, N.W., Second Floor, West Tower, Washington, D.C. 20005, between the hours of 9:00 a.m. and 5:30 p.m., Monday through Friday, or may be viewed on the Commission's website at www.dcpsec.org. Copies of the Application are available, upon request, at a per-page reproduction fee.

5. Any person desiring to comment on the Application or object to the expedited handling of the Application shall file written comments or objections stating the reasons for the objections no later than 30 days from the publication of this Notice in the *D.C. Register* addressed to Dorothy Wideman, Commission Secretary, at the above address. Any responses to comments or objections shall be filed within 35 days of the publication of this Notice in the *D.C. Register*. Once the comment period expires, the Commission will take final rulemaking action.

THE OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

NOTICE OF PROPOSED RULEMAKING

The State Superintendent of Education, pursuant to the authority set forth in section 3(b)(11) of the State Education Office Establishment Act of 2000, effective October 21, 2000 (D.C. Law 13-176; D.C. Official Code § 38-2602(b)(11)(2008 Supp.), hereby gives notice of her intent to adopt amendments to Chapter 30 of Title 5 of the District of Columbia Municipal Regulations (DCMR), in not less than thirty (30) days from the date of publication of this notice in the D.C. Register. The proposed rule sets forth the procedures regarding resolution meetings and due process hearings and decisions following the filing of an administrative due process complaint against a public education agency.

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

- 3030 **Resolution Meeting, Due Process Hearing, and Final Decision Procedure**
- 3030.1 Resolution meeting. Within 15 days of receiving notice of the parent’s due process complaint, and prior to the initiation of a due process hearing, the public education agency (“agency”) shall convene a resolution meeting with the parent and the relevant member(s) of the IEP Team who have specific knowledge of the facts identified in the due process complaint. The resolution meeting need not occur if the parent and the agency agree in writing to waive such meeting, or agree to use the mediation process described in § 3028 of this Chapter. The resolution meeting:
- (a) Shall include a representative of the agency who has decision making authority on behalf of such agency;
 - (b) May not include an attorney of the agency unless the parent is accompanied by an attorney; and
 - (c) Must provide the parent of the child an opportunity to discuss their due process complaint and the facts that form the basis of the due process complaint so that the LEA has an opportunity to resolve the dispute that forms the basis of the due process complaint.
- 3030.2 Relevant Team Members. The parent and the agency shall determine the relevant members of the IEP Team to attend the resolution meeting.
- 3030.3 Resolution period. If the agency has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur.

- 3030.4 Except as provided in § 3030.8, the timeline for issuing a final decision under § 3030.11 begins at the expiration of the 30-day period identified in § 3030.3.
- 3030.5 Except where the parties have jointly agreed to waive the resolution process or to use mediation, the failure of the parent, who has filed a due process complaint, to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.
- 3030.6 If the agency is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented using the procedures in § 3026.4), the agency may, at the conclusion of the 30-day period, request that a hearing officer dismiss the parent's due process complaint.
- 3030.7 If the agency fails to hold the resolution meeting specified in § 3030.1 within 15 days of receiving notice of a parent's due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of a hearing officer to begin the due process hearing timeline.
- 3030.8 Adjustments to 30-day resolution period. The 45-day timeline for the due process hearing in § 3030.11 starts the day after one of the following events:
- (a) Both parties agree in writing to waive the resolution meeting;
 - (b) Either the mediation or resolution meeting starts but, before the end of the 30-day period, the parties agree in writing that no agreement is possible; or
 - (c) Both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or agency withdraws from the mediation process.
- 3030.9 Written Settlement Agreement. If a resolution to the dispute is reached at the meeting described in § 3030.1, the parties shall execute a legally binding agreement that is:
- (a) Signed by both the parent and a representative of the agency who has the authority to bind such agency; and
 - (b) Enforceable in any State court of competent jurisdiction or in a District Court of the United States.

- 3030.10 Agreement Review Period. If the parties execute an agreement pursuant to § 3030.9, either party may void such agreement within three (3) business days of the agreement's execution. The party who voids the agreement shall provide written notice to all other parties to the agreement.
- 3030.11 Due Process Hearing. Not later than forty-five (45) days after the expiration of the thirty (30) day resolution period or any adjusted time period described in § 3030.8:
- (a) A final decision shall be reached in the hearing; and
 - (b) A copy of the decision shall be mailed to each of the parties, or alternatively may be transmitted electronically or by facsimile if all parties to the due process complaint consent.
- 3030.12 An impartial hearing officer may, for good cause shown, grant specific extensions of time beyond the periods set forth in § 3030.11 at the request of either party.
- 3030.13 Hearing Officer Determination (HOD). The HOD must be in writing. The hearing officer must include the following in the HOD:
- (a) The identity of the parties;
 - (b) The identity of the student, which shall include the student's name, student ID number, date of birth, and attending school;
 - (c) The case number;
 - (d) Findings of fact and conclusions of law, separately stated;
 - (e) The final determination;
 - (f) What must be done by each party, where applicable, to carry out the decision, including the establishment of timelines for each step or action, and by whom;
 - (g) Any appeal rights; and
 - (h) The Hearing Officer's signature, which may be designated by electronic signature.
- 3030.14 The burden of proof shall be the responsibility of the party seeking relief; either the parent of a child or the agency. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine

whether the party seeking relief presented sufficient evidence to meet the burden of proof.

- 3030.15 After deleting personally identifiable information from hearing decisions, the Student Hearing Office of the District of Columbia shall transmit the findings and decisions to the SEA Advisory Panel and make the findings and decisions available to the public.

Persons wishing to comment on this proposed rule should submit their comments in writing to Kerri L. Briggs, Ph.D., Acting State Superintendent of Education, 441 4th Street, N.W., Suite 350N, Washington, D.C. 2001, Attn: Adam Thibault. 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 amendment and related information may be obtained by writing to the above address, by calling the Office of the State Superintendent of Education at (202) 727-6436, or on the OSSE website at www.osse.dc.gov.