



District of Columbia State Board of Education
DCSBOE



To: Members, State Board of Education

From: Kelly Davis, Attorney Advisor

Date: March 27, 2015

Subject: Rulemaking that amends Title 5-E DCMR § 2202

Background and Problem

On August 12, 2014, pursuant to sections 422(1) and (6) of the District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 790, Pub. L. 93-198 (D.C. Official §§ 1-204.22(1) and (6)), Mayor's Order 2014-196 was issued that delegated the State Superintendent of Education with the authority to take any and all actions in connection with the management of the Hospitality High School of Washington, DC (Hospitality High School). This state takeover was necessary after the Hospitality High School lost its charter earlier in 2014. *Unfortunately, this order did not give the State Superintendent of Education any authority to issue diplomas and the current law and/or regulations for District of Columbia Public School (DCPS) and District of Columbia Public Charter School (DCPCS) did not make any allowance for the Hospitality High School, as managed by a state education agency, to be issued diplomas.* Therefore, the State Superintendent of Education (OSSE) submitted to the State Board of Education (State Board) a draft of proposed rulemaking that amends Title 5-E DCMR § 2202, which establishes a state high school diploma that is to be issued by the State Superintendent of Education.¹

Analysis

The language of the proposed rules read as follows:

2202.10 Notwithstanding and in addition to the Subsections above, a student enrolled in a school managed by the state education agency, the Office of the State Superintendent of Education (OSSE), who has successfully completed the requirements set forth in Title 5-E DCMR § 2203 (Graduation: Academic Requirements) shall be eligible for a high school diploma from OSSE. The diploma of a student graduating from a school operated by the State shall bear the signature of the State Superintendent of Education and the seal of OSSE.

¹ The State Board has received previously received proposal to amend the graduation requirements to include a state diploma for state managed schools, students that pass the GED, and for home-schooled students. The State Board tabled the measure at the December 17, 2014 public meeting.

The above language establishes a State Diploma that is identical to the diplomas issued by District of Columbia Public Schools (DCPS) and District of Columbia Public Charter Schools (DCPCS).² The State Diploma can only be issued in the schools managed by OSSE and that meet the same graduation requirements of DCPS and DCPCS. It is completely acceptable and appropriate to refer to the DC Municipal Regulations cite Title 5-E DCMR § 2203 instead of regenerating the graduation requirements. Further, in the proposed rulemaking graduation requirements have not changed.

Currently, the only school (in turn the graduating students) that would receive the State Diploma would be graduating students of Hospitality High School.³ Although the language does not specifically give the name of the schools that it is impacting, according the fundamental elements of rulemaking such general language is necessary to ensure that rules apply to the “general public”.⁴ In other words, rules must apply equally to the general public. However, it is true that if OSSE obtains the authority to manage other schools in the future then it would be able to issue State Diplomas to those schools.

Alternative Options

To eliminate the application to other schools, OSSE could issue emergency rules that would expire in 120 days. This plan of action has both positive and negative aspects. On the positive side, this would give the State Board and OSSE more time to think about other plans moving forward to enable the State managed schools to be issued State Diplomas. However, approving as a regular rule and not an emergency rule provides OSSE the flexibility of being able to issue State Diplomas to Hospitality High School for this year and the future years without the State Board having to revisit this issue, thus, preventing the danger of some students not receiving earned diplomas.

Another downfall of the emergency rulemaking is that there is no public comment period. This goes against the State Board’s mission of transparency in government. In addition, an emergency rulemaking can be made without prior public notice but must be justified under very rigid standard of “emergency.” OSSE may not get receive legal sufficiency as Office of Documents and Administrative Issuance (ODAI) clearly states that emergency rulemaking cannot be used as an easy method of adopting ‘temporary’ rules in ordinary circumstances. ODAI defines an emergency as the need for immediate preservation of the public peace, health, safety, welfare, or morals.

² It is important to note that DCPS and DCPCS have the same graduation requirements.

³ There are possibly 35 graduating students assuming that each student passes the required courses this year.

⁴ *Rulemaking Handbook and Publications Style Manual*, prepared by David Splitt Esq. (1983) (Office of Documents).

Other Jurisdictions

At this time, we continued to research whether or not other jurisdictions issue state diplomas for state-managed schools. However, most jurisdictions already issue state diplomas for alternative education such as GEDs and/or college credits received. For example, in the states of New Jersey and Oklahoma, their state education agencies have the authority to grant state diplomas to students that have attained 30 hours of college credit.⁵ In Indiana, there is a state diploma that is issued to only certain qualified veterans.⁶ In Illinois, an alternative education diploma is awarded to students who successfully completed alternative education programs. The State Superintendent of Education for Illinois signs the diplomas.⁷ State diplomas are not a unique state education agency authority as other agencies can be granted such authority; however, for agencies that can award diplomas, the groups that qualify for such diplomas vary.

There are other jurisdictions that have statutory provisions for state management of school Districts and individual schools. The states that have provisions for state management of individual schools which include Alabama, Arkansas, California, Colorado, Georgia, Illinois, Maryland, Michigan, Nevada, North Carolina, Oklahoma, Rhonda Island, South Carolina, Texas, and Vermont.⁸ The state of Maryland in the last 15 years “took over” 3 schools; however, they were elementary schools and they did not have the issue of what agency would issue diplomas. Regardless, the State of Maryland is a less complicated. There is only one type of diploma and that is the Maryland State Diploma that is issued by the Maryland State Board of Education to every graduate in every type of school.

Technical Concerns⁹

As written, there are a few technical concerns with the language in the proposed draft rules. The statement “Notwithstanding and in addition to the subsections above” is contradictory. It has to be either “notwithstanding” or “in addition”, it cannot be both. After reading through the amended section it makes more sense to strike “notwithstanding” and simply use “in addition”. This would convey that in addition to all of the above ways that a student may receive a high school diploma the student that attends the state managed school may receive the State Diploma.

Conclusion

After a few technical changes the proposed rules are legally sufficient and the general nature of the language is necessary and in accordance with the standard rulemaking guidelines. It is also important to emphasize that these rules do not change the graduation requirements. These

⁵ 70 Okl.St.Ann.§ 1210.523

⁶ IC 20-20-7-6

⁷ 105 IL 5/2-3.81

⁸ 50-State Report: On Accountability, State Interventions and Takeover. Institute on Education Law and Policy.

⁹ I was recently informed that this technical error has been corrected, but I did not delete this provision because as of March 27, 2015 I have not seen a revised version.

rules just enable the State Superintendent to issue diplomas to schools under its management after meeting the graduation requirements of DCPS and DCPCS. I recommend that the DC State Board of Education approve, with the technical changes, the proposed draft rules.