



September 6, 2005

Via Electronic Mail
IDEAComments@ed.gov

Mr. Troy R. Justesen
U.S. Department of Education
400 Maryland Avenue, S.W.
Potomac Center Plaza, Room 5126
Washington, D.C. 20202-2641

RE: Comments to the Draft regulations to IDEA 2004

The Protection and Advocacy (P&As) Systems and Client Assistance Programs (CAPs) comprise a nationwide network of congressionally mandated, legally based disability rights agencies. The National Disability Rights Network (NDRN – formerly, the National Association of Protection and Advocacy Systems, Inc. (NAPAS)) is the voluntary national membership association of the P&As and CAPs and it assumes leadership in promoting and strengthening the role and performance of its members in providing quality legally based advocacy services. As a network, the P&As provide free assistance to over 20,000 families per year in cases involving the IDEA and Section 504 of the Rehabilitation Act of 1973 and have a unique and significant interest in regulations that will affect the rights of children with disabilities to obtain a free appropriate public education.

NDRN with input from various members of the P&A special education bar reviewed the proposed regulations and drafted comments and recommendations. Together, the proposals and comments below represent the combined experience of seasoned child advocates with years of experience in special education law. We urge the Department to fully consider and modify the current draft regulations based on our suggestions. Further, we press upon the Department the importance of ensuring that the purposes of this statute, known as the Individuals with Disabilities Education Improvement Act (IDEIA), and its predecessor versions are fully realized in the new regulations.

The proposals below outline areas of the regulations that we believe need to be revised and provide our comments on how the specific sections should be revised. As the regulations are lengthy, we have not commented favorably or neutrally on those regulations which NDRN either favors as drafted, or is neutral about. Therefore, the Department may assume that NDRN is either neutral about or favors any proposed IDEA 2004 regulation for which there is no comment below.

Subpart A

1. Problem: Draft § 300.34(b) (Related Services). The draft regulation states that “[r]elated services do not include a medical device that is surgically implanted, the optimization of device functioning, maintenance of the device or the replacement of that device.” The failure to maintain a surgically implanted device such as a cochlear implant could be interpreted to mean that the school will not provide “mapping” (process used to program the speech processor) services to the child.

Recommendation: The regulations should follow the IDEA 2004, not go beyond it. The Department should delete the following part of § 300.34(b): “the optimization of device functioning, maintenance of the device, or the replacement of that device.”

Rationale: If a school is not required to provide necessary services to assist a child who has a cochlear implant on the use of the device (so they may hear properly during classroom instruction) one major aspect of learning will be jeopardized. Further, without such service the underlying purpose and intent of IDEA to provide each child with a Free Appropriate Public Education will be defeated.

IDEA 2004 specifically states that the Department must not lessen the protections provided in the July 20, 1983 regulations. 20 U.S.C. § 1406(b). Further, § 1406(b) specifically mentions that the protections regarding related services must not be lessened by new regulations. Because IDEA 2004 does not mention optimization, or maintenance of a cochlear implant, the regulations may not add these restrictions. Adding such restrictions will lessen the protection of the Act in violation of 20 U.S.C. § 1406(b)(2). Therefore, the language that releases schools from their obligation to provide related services to ensure the proper use of a surgically implanted device should be deleted from the regulations.

Subpart B

2. Problem: Draft § 300.116 (Least Restrictive Environment). The draft regulations permit a parent to agree to place a child in an educational setting that is not as close as possible to the child’s home and in a setting different than the placement he or she would attend if not disabled. The phrase “agreed otherwise” in the proposed regulations allows parents to waive IDEA rights of their child even though the ability to do so is not within the text of the Act.

Recommendation: The Department should strike the phrase “agreed otherwise” from § 300.116(b)(3) and (c).

Rationale: The current regulations, and those in effect on July 1, 1983, state that students with disabilities must be placed as close as possible to the child’s home and that students must be educated in the school he/she would attend if not disabled, unless the IEP requires otherwise. The proposed regulations at § 300.116(b) and (c)

would allow the child to be educated in a more restrictive environment if the parent “agreed otherwise.”

The addition of the language “agreed otherwise” has the effect of permitting parents to waive a child’s educational right to be educated in the least restrictive environment. This language is not in IDEA 2004 at § 1412(5) and none of the changes that IDEA 2004 made to Section 1412(a)(5) supports this proposed regulatory change or has any relationship to it. The regulation also appears impermissibly to lessen the protections in effect on July 20, 1983; IDEA 2004 § 1406(b)(2) specifically warns against doing this with Least Restrictive Environment provisions.

The preamble to the proposed regulations states that this language is to allow children with disabilities to attend magnet, charter, or “special” schools. *Federal Register*, June 21, 2005, p. 35787. However, students with disabilities already have the ability to attend magnet and charter schools. Prohibiting students from attending these types of schools would violate their rights under other civil rights laws such as the Rehabilitation Act and Americans with Disabilities Act.

3. Problem: Draft § 300.151 (Monetary Reimbursement). The draft regulations remove the language in current section § 300.660 which states that monetary reimbursements are appropriate relief in State Complaints.

Recommendation: Reinsert the language of current § 300.660 which states that monetary reimbursement is an appropriate award in IDEA cases.

Rationale: The Department states that the language regarding monetary reimbursements is removed from the regulations “as to not imply that reimbursement would be appropriate in a majority of State Complaints.” Merely stating that monetary reimbursement is one form of relief does not imply that it is the appropriate relief in most cases; however, by removing the language States may assume it is not an appropriate remedy, when in some cases it is. By removing the language the Department creates ambiguity, which in turn may result in increased litigation. If a State provides reimbursement, a parent may be more willing, where appropriate, to go through the State Compliant process as opposed to the more costly due process system.

4. Problem: Draft § 300.152(c)(1) (State Complaints and Due Process Decisions).

The proposed regulation would require the State to set aside an entire complaint if due process has been commenced with respect to any subject at all that is raised in the complaint. Under the current regulations, if a parent files a State Complaint and then initiates a due process hearing, the State will set aside those portions of the State Complaint that are the subject of the due process hearing. This makes sense, since a hearing officer will render a decision on the same issues. Meanwhile, the state resolves the remaining issues within 60 days. But, under the new regulation, these other issues will simply languish during the hearing and any subsequent court proceedings that will not resolve them.

Recommendation: Revise proposed § 300.152(c)(1) to retain existing § 300.661(c)(1), requiring States to set aside only the portions of a State Complaint about which due process has been commenced, and strike the language requiring States to set aside the entire complaint.

Rationale: If issues raised in the State Complaint are not investigated during due process proceedings, children may go without FAPE for extended periods of time for no reason. Moreover, parents, faced with the possibility that their State Complaint will be halted, are likely simply to seek due process on everything in the complaint. The State Complaint process is more parent-friendly and much less expensive than due process, and parents should be able to use it for their complaints if they wish. Further, good public policy requires that parents should be able to use the system.

5. Problem: Draft § 300.152, § 300.506, § 300.510 (State Complaint—Timelines and Enforcement). As stated above, complaint management systems are perhaps the only mechanism by which unrepresented families can quickly and inexpensively correct legal violations. The current proposal will restrict families' access to states' complaint systems and will make those systems less effective. The proposal will permit families to file complaints only within a year of the violation, will eliminate the current option to file claims for compensatory education for up to 3 years from the violation, will eliminate the extended timeline for "on-going" violations, and will delete the provision that requires complaint management systems to enforce hearing officers' decisions.

Recommendation: The Department should retain current regulation § 300.662(c), and should make clear that complaint management systems can be used to enforce written agreements between school districts and families. In addition, families should be able to use their state's complaint process to enforce written agreements reached at mediation or resolution sessions. The Department should also ensure that the regulations regarding State Complaints are in-line with the General Education Provisions Act.

Rationale: Many of the new IDEA 2004 provisions are intended to create opportunities for quick, efficient, and inexpensive methods of resolving disputes. States must now offer mediation and parties to a due process complaint (unless agreed to by both parties) must participate in a resolution meeting to attempt to resolve disputes before going to a hearing. By restricting the complaint management system as proposed, one of the quickest, most efficient and least expensive methods of resolving disputes will be eliminated.

6. Problem: Draft § 300.165 (Public Participation). Draft regulation § 300.165 deletes several provisions that have details requiring public participation before adopting state policies and procedures relating to Part B (see current regulations at § 300.280 through § 300.282). Many key details regarding Part B are provided at the state level; and therefore, stakeholder participation is critical to providing an effective system of services.

Recommendation: The Department should reinsert the language in Sections 300.280-284 of the July 20, 1983 regulations.

Rationale: IDEA 2004 specifically states that the Department may not lessen the protections provided in the July 20, 1983 regulations. Removing language that specifically sets out requirements regarding: notice, the opportunity to participate, the review of comments before adopting a plan, and the publication of the plan, reduces protections for parents and children. Therefore, because removal of the language lessens the rights of parents and children, the Department, in order to comply with the current law, must include the language of former §§ 300.280-300.284.

7. Problem: Draft § 300.169 (State Advisory Panel Duties—Children in Adult Correctional Facilities). The Department removes from mandatory duties of the State Advisory Panel a representative advising on eligible children with disabilities in adult correction agencies on the grounds that it requires too much micromanaging. See current § 300.652(b).

Recommendation: Retain the current language in § 300.652(b).

Rationale: The Department permits a representative for this population to sit on the advisory panel, but the Department does not provide the representative with advisory power. The population of children with disabilities in adult correction agencies is one of the most vulnerable populations, and therefore it is important the issues of this group are appropriately represented. The Department should not only permit, but encourage advice and information from someone with knowledge in this area. Therefore, the Department should retain the language in current regulations § 300.652(b).

Subpart C

8. Problem: Draft § 300.226(c) (Early Intervening Services). The regulations fail to clarify that parents must be informed in writing and given the opportunity to object when a LEA proposes to include a child in an early intervening services program; that the LEA must apprise the parents of the child's progress in the early intervening services program at reasonable intervals and refer the child for a special education evaluation if that child has not made progress in the early intervening services program; and that a parent's right to request an initial evaluation is not suspended when a child participates in an early intervening services program.

Recommendation: The regulations should explain (a) that parents must be given written notice of the fact of their child's participation in an early intervening services program and an opportunity to refuse such services; (b) that early intervening services do not replace child find obligations, thus school districts must apprise parents of their child's progress in the program after 90 days and refer the child for a special education evaluation if it appears that the child may be a child with a disability; and (c) that

nothing in § 1413(f) removes the parent's right to request—at any time—an initial evaluation for special education services to be completed within the applicable timelines.

Rationale: We support the Department's clarification that students continue to have a right to services and that the public agency still must carry out its child find responsibilities; however, more specificity regarding child find is needed. The regulations should explain that an LEA's decision to provide early intervening services does not relieve it of specific "child find" duties. See § 1412(a)(3) (requiring States to provide assurances that "All children with disabilities residing in the State . . . and who are in need of special education and related services, are identified, located, and evaluated"). As the Senate report explicitly states, Congress did "not intend for early intervening to prevent or delay a student from receiving an evaluation to determine the presence of a disability and the need to special education and related services." S. Rep. No. 108-185, at 20 (2004), *available at* <http://thomas.loc.gov>. While the regulations should clarify that parents should be apprised of their child's progress in the early intervening services program, it is imperative that they also state that school districts must refer for special education evaluations those children who do not make progress in these programs within a reasonable time period. ("The committee encourages local educational agencies to develop a systematic process by which they determine whether or not a student receiving early intervention services should be subsequently referred for an evaluation."). *See id.* To prevent children with qualifying disabilities from languishing in these early intervening services programs, we suggest that LEAs be required to make this determination within 90 days.

Subpart D

9. Problem: (Consent v. Agree; Both Should Have Same Meaning). Throughout the statute and the proposed regulations, there are circumstances in which parents must "agree" or "consent" for the school district to take action. In IDEA 2004, these terms are frequently used when the parent is authorizing the school district to depart from otherwise mandated procedures, e.g., 3-year reevaluations, not including staff at IEP meetings, making changes to IEPs without convening IEP meetings, etc. These are important rights that can only be waived if the parents have received "informed consent" which includes written notice of the rights the district is asking the parent to waive and a written waiver of rights. It is simply unacceptable for parents to waive rights if they are not first made aware of what they are agreeing to waive or what they are agreeing to implement.

Specifically, the areas of concern are as follows:

- a. **Draft § 300.300(a)(3) (Consent for Evaluation).** This section states that if a parent refuses to consent or fails to consent to initial evaluations of a child, the LEA is not required to pursue evaluation or services for the child.

- b. **Draft § 300.301(d)(2)(iii) (Waiver of Evaluation Timeline).** When a child enrolls into a new public agency, the timelines for an initial evaluation continue to apply unless the public agency can ensure “prompt” completion of the evaluation and the public agency and parent “agree” to waive the evaluation timeline.
- c. **Draft § 303.303 (Waiver of Reevaluation).** A student with a disability must be reevaluated every three years unless the parent and the public agency “agree” that the reevaluation is unnecessary.
- d. **Draft § 300.321(e)(1) (Agreement to Excuse IEP Team Member).** An IEP member may be excused from an IEP meeting if the parent and public agency “agree” to the excusal and the member’s subject area will not be modified or discussed.
- e. **Draft § 300.321(e)(2)(ii) (Agreement to Excuse IEP Team Member).** An IEP member may be excused if the parent and public agency “consent” to the excusal of the IEP team member when the meeting will involve a discussion or modification to that person’s subject area if the member provides information in writing prior to the meeting.
- f. **Draft § 300.324(a)(4) (Agreeing to Change an IEP Without a Meeting).** Parent and public agency can “agree” to make changes to the IEP document without a meeting. However, although the amendment is required to be in writing, the *agreement to amend* is not required to be in writing. Further, there is nothing that requires a showing that the amendment is a reflection of consensus. A parent and a school may agree in good faith to a change, but once the agreement is in writing it may become clear that the parties misunderstood each other or otherwise believed the agreement to be different. The parent could in fact be agreeing to something without fully knowing what they are agreeing to if the “informed consent” requirements are not met.
- g. **Draft § 300.505 (Electronic Mail).** A parent may elect to receive notices such as “prior notices,” “procedural safeguards” and “due process” via electronic mail.

Recommendation: The language defining “consent” in proposed regulation 300.9 properly outlines the requirements that must be met for a parent to “consent” or “agree” to give up rights. These terms should be defined throughout the Act to mean consent as defined by § 300.9. In each place that the regulations permit or require a parent to “consent” or “agree” the Department should add the language, “as defined in § 300.9 of the Act.”

Rationale: These sections of the IDEA provide mechanisms for parents of children with disabilities to “consent,” “agree” or “elect” to follow certain alternative procedures

in the evaluation and IEP processes. The regulations must clarify how these rights can be waived and what prior notice parents must receive. As parents are not always aware of all of their IDEA rights, they may not be fully aware of what they are giving up. Not all IDEA rights are included in the procedural safeguards notices, e.g. the required members of the IEP team.

This position is supported by the language of the IDEA and by caselaw which requires that waiver of civil rights, including rights under the IDEA, must be "knowing and voluntary." *W.B. v. Matula*, 67 F.3d 484, 497-498 (3d Cir. 1995). In *Matula* the court applied a "heightened standard" to its scrutiny of a written agreement purporting to waive IDEA rights. *Id.* at 498. In order to be certain that waiver is knowing, prior written notice must include both a statement of the legal rights the parents are being asked to waive and an explicit statement that refusal to waive the rights will not result in denial of any other rights under the IDEA or state special education laws and regulations, including the right to an IEP meeting and an appropriate educational placement within legally prescribed timelines.

10. Problem: Draft § 300.300(c)(2)(i) ("Reasonable Measures"). The proposed regulations state that parents must provide informed consent before the public agency may proceed with reevaluations, unless the public agency took "reasonable measures" to obtain consent and the parent failed to respond.

Recommendation: The language in current regulation § 300.345(d) defining what constitutes "reasonable measures" should be retained. The language in § 300.345(d) clarifies that a public agency must keep a record of its attempts to reach the parents, suggests the use of detailed telephone calls or attempted calls, copies of correspondence sent to parents and responses received, and visits to the home. This language was included in the July 1983 regulations with respect to IEP meetings. Congress specifically required that procedural protections in the 1983 regulations be maintained in the IDEA 2004 regulations (see 20 U.S.C. § 1406(b)). The 1999 regulations consistently refer to § 300.345 when describing the efforts necessary to contact parents for consent.

If the Department is not willing to retain the current language, it must at a minimum define "reasonable measures" as at least three *good-faith* attempts to contact the parent (i.e., three calls to the home number when the parents is genuinely available and not during the work day, letters in the family's "home language" if it is not English, etc.).

Rationale: The right to agree or disagree with reevaluations is a statutory right, and it cannot be effectively waived or bypassed by school personnel without assurances that the school has made meaningful attempts to reach the parents; otherwise the right would be in name only.

11. Problem: Draft § 300.301 (Initial Evaluations Timeline). The draft regulations should clarify when the 60-day evaluation timeline begins and that a determination of

eligibility must be completed within the 60-day evaluation timeline. Without clarification of these two issues it leaves districts and parents alike without clear guidance on timetables and evaluation requirements. Confusion in this area will lead to further litigation. Further, informed consent requirements must be met when a child enrolls at a new public agency. (See Number 9.b. above for Recommendation and Rationale regarding informed consent.)

Recommendation: The regulations should state that once a parent requests an evaluation of his or her child, school personnel must provide the consent form to the parent within a reasonable time period, but no later than 10 days from date the agency received the request. Further, § 300.301(c) should follow the statutory construction at § 1414(a)(1)(C), otherwise the regulation could be misinterpreted to allow time beyond 60 days (or the time set by the State) to make a determination about eligibility.

Rationale: P&A staff in a number of states, where time limits for evaluations are triggered by parents' written consent, have complained that children's evaluations are sometimes delayed when school districts do not promptly provide families with the necessary written consent forms. The Congressional purpose of ensuring that children with disabilities are evaluated and served in a timely manner will be forwarded by a regulation that states that LEAs are required to present families with the consent forms within a reasonable period of time after the LEA receives the request, but no later than 10 days from the date of the request.

The regulations must provide at least the same protections provided in the statute. The statute is clear at § 1414(a)(1)(C) that the timeline for the initial evaluation process includes the determination of eligibility. The construction of the draft regulations at § 300.301(c) breaks up this requirement into two separate sections. Although the intent may be to follow the statute and ensure a determination of eligibility is completed within 60 days, the language is confusing and could be misinterpreted.

12. Problem: Draft § 300.303(b)(2) (Reevaluations). A student with a disability must be reevaluated every three years unless the parent and the public agency "agree" that the reevaluation is unnecessary. (See number 9.c. above for Recommendation and Rationale)

13. Problem: Draft § 300.303(b)(1) (Reevaluations). The regulations do not clarify that, although reevaluations need not occur more frequently than once a year unless the parent and local educational agency agree otherwise, when a parent provides information from an independent evaluation that has been completed within one year of the last reevaluation, the local educational agency must consider that evaluation in the context of the child's IEP.

Recommendation: The regulations should clarify that, while a school district may not be required to conduct its own reevaluation of a child with a disability if less than a year has passed since its last evaluation, if a parent provides evaluation information to the

school district within that year, this information must be considered at an IEP team meeting for the student.

Rationale: Without such clarification, parents who are informed by the doctors or therapists treating their child of a new disability diagnosis or about different educational approaches will be unable to ensure that school districts consider this new information in a timely fashion. This proposed regulation is in accordance with the current and draft regulatory framework governing IEP development. See current regulation 34 C.F.R. § 300.343 (requiring public agencies to “ensure that the IEP team—(2) Revises the IEP as appropriate to address . . . Information about the child provided to, or by, the parents, as described in § 300.533(a)(1)”)”; see also § 300.533(a)(1)(i) (referring to “Evaluations and information provided by the parents of the child”). These sections are renumbered in the draft regulations respectively at: § 300.324(b)(1)(ii)(C) and § 300.305(a)(2).

14. Problem: Draft § 300.309 (Evaluation Timelines). The regulations guiding the evaluation process for children with possible learning disabilities present several concerns; namely, they are confusing and appear to permit school districts to delay virtually indefinitely the identification of children with “possible LD.”

Only after all of the steps set out in Section 300.309(b) have been concluded does the evaluation officially begin and the 60 day timeline begin to run (there is data that demonstrates that appropriate, high-quality research-based instruction was delivered by qualified personnel; data regarding repeated assessments of achievement at reasonable intervals during instruction have been provided to the parents; and the student has not made “adequate progress”). This proposal, which is not grounded in specific statutory language, would in effect establish a different and less stringent deadline for evaluating children with a suspected learning disability.

Finally, it is unclear how an LEA will identify the students who are “candidates” for this special evaluation process. A child with ADHD can have a learning disability, a serious emotional disturbance, or be “other health impaired.” How at the onset will the LEA be able to determine which process—and which timeline—should apply to this evaluation?

Recommendation: The regulation should state that all evaluations, including evaluations for specific learning disabilities, must be completed within 60 days of the parents’ consent to the evaluation. If there are circumstances that justify a longer period than 60-days (e.g. due to the nature of the research-based intervention process), parental waivers or extensions would be possible with informed consent (as provided in § 300.9).

Rationale: The IDEA provides for one evaluation timeline for all disabilities under the Act. Only this reading is consistent with the IDEA’s requirement that all children be evaluated within 60 days, and the IDEA’s mandate that all children with disabilities be identified and served. In fact, creating different timelines is discriminatory. Further, if the regulations are not clarified they are ripe for litigation as they do not provide clear,

concrete guidance and will be interpreted differently by school districts and parents alike. Since one purpose of IDEA 2004 is to reduce litigation and contentious situations in IDEA cases, this section should be revised to resolve these issues.

15. Problem: Draft § 300.320(a)(3)(ii) (Reporting to Parents). The regulation requires the IEP to indicate when parents will receive periodic reviews of their child's progress, but does not require the periodic reports to be at least as frequent as progress reports provided for regular education students. Further, this section should clarify that periodic reviews/progress reports must indicate the child's progress towards meeting his or her annual goals.

Recommendation: The regulations should add language that states that "the periodic reports are provided at least as often as progress reports for regular education students are provided and that periodic reports must explain, in reasonable detail and with specific progress measures, the extent to which the student is making progress in each of the annual goals on the IEP. In addition, the regulations should clarify that annual progress reports are insufficient and instead urge the use of quarterly reporting (or reporting at the time that report cards are normally issued).

Rationale: The statute states that the periodic reports should be provided concurrent with the issuance of report cards, but does not specify that this means at the same time as progress notes/report cards issued for regular education children. Clarifying this language will avoid confusion.

The IDEA deletes the requirement that IEPs include "benchmarks or short term objectives" for each child with a disability and instead requires that the IEP include a statement of both *how* the child's progress will be measured and *when* "periodic reports" of this progress will be provided to the parents. This requirement was intended to reduce paperwork, but not to reduce LEAs' obligation to define and measure a student's progress towards annual goals and to report that information to families in a comprehensive, regular, and understandable manner. Further, the legislative history supports this view:

In order to measure and report the student's progress toward their annual goals, the IEP must instead contain a description of how the child's progress toward meeting the annual goals will be measured, as well as when periodic reports on the child's progress, such as through the use of quarterly or other periodic reports, will be provided. The committee feels that such progress reports are especially important for students whose IEPs contain non-academic goals and whose progress may not be measured easily by standardized tests or grades. *These progress updates must provide parents with specific, meaningful, and understandable information on the progress children are making. . . .* The committee feels that the new language is sufficiently explicit and will yield more instructionally relevant information to be used by teachers as well as reported to parents regarding a student's progress, and provide a clear

and more appropriate accountability mechanism for monitoring and reporting progress than do short-term objectives and benchmarks.”

S. Rep. No. 108-185, at 25 (2004), *available at* <http://thomas.loc.gov> (emphasis added).

16. Problem: Draft § 300.320(a)(5), § 300.321(a)(2) (Regular Class v. Regular Education Environment). The language in proposed regulation § 300.320(a)(5) must be further defined in order to properly comport with the statutory language in IDEA 2004. The draft regulation states that there should be an explanation in the IEP of the extent, if any, a child will not participate with nondisabled peers in the “*regular education environment*.” This is a change from the IDEA 2004 and the regulations in 1999, which use the phrase “regular class.” The shift in language from regular class to “regular education environment” could be construed to limit the inclusion to non-academic areas such as lunch, library and recess.

Recommendation: The regulations should define “regular education classroom” to mean the regular classroom and the non-academic environment. Specifically, the language would require students to be in the regular classroom and in non-academic activities with non-disabled peers, whenever appropriate.

Rationale: The shift in language from regular class to regular education environment can be construed to limit the inclusion to non-academic areas such as lunch, library and recess. If this phrase took on such a meaning it would contradict the plain meaning and intent of the statute. 20 U.S.C. § 1414(d)(A)(i)(V). IDEA 2004 is clear at 20 U.S.C. § 1406(b)(1) that the implementing regulations to the Act may not violate or contradict any provision of the statute. If the phrase is not defined to mean both regular education class and environment, the change could be interpreted to substantially undercut the Least Restrictive Environment mandate of the statute, which requires students to be part of the regular classroom as much as possible, not merely the “environment.” Specifically, the IDEA 2004 states that Congress finds that “education of students with disabilities can be made more effective by . . . access to the general education curriculum in the regular classroom, to the *maximum* extent possible. . .” (emphasis added). 20 U.S.C. § 1400(c)(5)(A). Clearly, Congress intended students with disabilities to participate in the regular education classroom and the regulations must conform to the statute’s plain meaning and intent.

17. Problem: Draft § 300.320(b) (Planning Should Start Before 16). The draft regulations state that, while transition services are not required before age 16, they may be considered earlier if the IEP team agrees that the services are part of a FAPE. We support the Department’s language in the regulations, but believe more clarification is necessary. We are concerned school districts will inevitably interpret the new statutory language to mean that preparation for transition does not begin until the age of 16. Without assessments and careful planning in the years leading up to age 16—based on the child’s strengths, preferences and interests—the IEP team will not be able to put appropriate goals in place by age 16.

Recommendation: The regulations need to clarify that the actual transition process for a student with a disability now begins at age 16, not merely the planning for transition. The regulations should state that transition assessments and other pre-planning needs that will facilitate movement to post-school life must be done within a timeframe that allows the measurable goals and supports required to afford the student FAPE to be realistically attained prior to graduation or age 21, whichever is determined appropriate by the IEP team.

Rationale: Congress specified in the Act at 20 U.S.C. § 1400 that “[d]isability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.” (Emphasis added). Clearly the regulations must ensure that students with disabilities have the opportunity to obtain the skills necessary to be independent and to transition into adult life successfully. Unless the transition plan is completed by age 16, there will not be enough years of schooling left to achieve these goals.

18. Problem: Draft § 300.321(a)(4)(iii) (LEA Representative with Authority to Commit Resources). This regulation lists the required members of the IEP team, but does not specify that the LEA representative must include an employee with the authority to commit LEA resources. School personnel with such authority are necessary to have a productive IEP meeting that ensures decisions made can be implemented.

Recommendation: The regulations should add language that defines “LEA representative” to mean “school personnel with the authority to commit LEA resources for the services required for students.”

Rationale: Failure to have an agency employee with such authority will result in protracted or multiple IEP meetings, which will be costly in time and resources for families and LEAs. Further, someone with authority is needed to reach consensus and resolve issues; any other option engenders litigation. Another benefit of including a member with decision-making authority is that the member will have early notice of issues that are troubling to the family and can act immediately to resolve the issues, so that the problems do not escalate to the point of needing of a hearing. This is consistent with the goals of the resolution session.

19. Problem: Draft § 300.321(e)(1) (IEP Member Excusal). An IEP member may be excused from an IEP meeting if the parent and public agency “agree” to the excusal and the member’s subject area will not be modified or discussed. (See Number 9.d. above for Recommendation and Rationale.)

20. Problem: Draft § 300.321(e)(2)(ii) (IEP Member Excusal—Written Input). This section repeats the statutory language that allows an IEP member to be excused from the meeting if they submit input in writing prior to the IEP meeting to the parent and IEP team. However, the regulations do not specify how long “prior” to a meeting the information must be submitted, nor does it specify that school personnel must specifically indicate to the parent that the team member’s excusal is sought. (Also See Number 9.e. above regarding informed consent)

Recommendation: The regulations should clarify that the input must be provided a reasonable time prior to the meeting (3 business days) and that informed consent consistent with draft regulations § 300.9 must be followed when a school system seeks to excuse an IEP team member.

Rationale: In order to allow the parent and other team members an opportunity to review the information, and determine if the member’s presence will be necessary, written input must be provided a reasonable amount of time before the meeting. Otherwise parents and school personnel may assume the person’s presence is not necessary when in fact the team needs the person to attend the meeting. In addition, requiring a reasonable standard will ensure parents are not pressured into excusing teachers at the last minute (i.e., fifteen minutes before a meeting is to begin.) Further, a parent must be fully informed of the agency’s request to excuse an IEP team member. Without full information, consistent with § 300.9, the parent may not know until they arrive at the IEP team meeting that the school was seeking excusal of members by providing the written input.

21. Problem: Draft § 300.322(d) (Contacting Parents). The public agency is permitted to proceed with an IEP meeting if they are “unable to convince” the parent to attend the meeting. The draft regulations state that the school staff must document their attempts to contact the parent and to arrange a meeting at a mutually agreeable time and place, however the regulations do not provide the suggested means to do so.

Recommendation: The language of current regulation § 300.345(d) (ways to document contact with parents) should be restated in this section.

Rationale: The 1999 regulations at Sec. 300.345(d) and the 1983 regulations at Sec. 300.345(d) provided that a record of attempts would included “detailed records of telephone calls, visits to the home and copies of correspondence sent home.” The 2005 draft regulations are silent on the ways in which attempts to arrange a meeting could be carried out and documented. Since IDEA 2004 specifically states that all the rights provided in the July 20, 1983 regulations shall remain, this part of the regulation should properly reflect the 1983 and 1999 regulations, otherwise the Department will be in violation of 20 U.S.C. § 1406(b) of the Act. Further, without such regulations, there is a risk of confusion over what is “reasonable” and such confusion could result in further litigation and contention between schools and parents. Since one purpose of the reauthorization was to avoid undue litigation, the Department could help avoid this

problem by simply clarifying “reasonable” and ensuring that the regulations are consistent with prior regulations.

22. Problem: Draft § 300.323 (IEP in Effect at Time of Services). The Department has removed § 300.342(b)(1)(i) of the current regulations, which required the public agency to ensure that an IEP is in effect before the school provides special education services to a student.

Recommendation: The Department should reinsert the language of § 300.342(b)(1)(i) into the draft regulations at § 300.323.

Rationale: School staff cannot properly provide special education services until evaluations are conducted that meet the requirement of the Act and an IEP is developed. Without first completing an IEP, the school staff will not know what they are responsible to provide, or the specific needs, goals and objectives for the child. This requirement is for students who are eligible for an IEP, not for students who receive pre-referral services. Further, the requirement of current regulation § 300.342(b)(1)(i) was also required by the July 20, 1983 regulations at § 300.342(b)(1). IDEA 2004 states that the new regulations cannot violate, contradict or lessen the protections of the July 20, 1983 regulations; therefore, this provision should be reinserted into the regulations, otherwise the Department will violate IDEA 2004. 20 U.S.C. § 1406(b)(1) and (2).

23. Problem: Draft § 300.324(a)(2) (Special Factors). The current regulations require that “special factors” be considered when initially designing an IEP *and when revising* an IEP. The draft regulations do not require consideration of special factors when revising IEPs. Specifically, the regulations no longer require schools to consider if behavior impedes learning, English proficiency needs, Braille instruction, communication needs for a deaf or hard of hearing child, and assistive technology needs.

Recommendation: The regulations should reinsert the language in the current regulation at § 300.346(b).

Rationale: In order to meet the needs of students and to provide FAPE, it is essential that these factors be considered at least at the initial meeting and during the annual review meetings. The most important factor to consider each time is whether the student’s behavior impedes learning because this factor is the one most likely to be in flux over time. Although the regulations do not forbid or otherwise prohibit consideration of these factors, LEAs are no longer required to consider them. Due to development, students needs change over time, and therefore these factors must be considered on a continuing basis.

24. Problem: Draft § 300.324 (State Testing Results). The current regulations at § 300.346(a)(iii) require the IEP team to consider a child’s performance on any general State or district-wide programs, as appropriate. This section is removed from the draft

regulations. Consideration of the district-wide assessments is an important consideration in light of the intent of Congress to align IDEA to NCLB.

Recommendation: Reinsert section 300.346(a)(iii) of the current regulations into the draft regulations creating § 300.324(v).

Rationale: In NCLB and IDEA 2004, Congress made it clear that students with disabilities must be part of the accountability system that applies to all students. Aligning IDEA 2004 with NCLB was one of Congress' major objectives in this reauthorization process. Statewide testing of students with disabilities is an important factor and can provide valuable information to use in a program. The testing should inform the team of the child's success in the general education curriculum. The information obtained is meaningless to the student unless those results are reviewed by the IEP team.

25. Problem: Draft § 324(a)(4) (Agreement). This section permits schools and parents to agree to forego a meeting to amend an IEP. The amendment is required to be in writing, but the *agreement to amend* is not required to be in writing. Further, although the amendment is required to be in writing there is nothing that requires a showing that the amendment is a reflection of consensus. A parent and a school may agree in good faith to a change, but once the agreement is in writing it may become clear that the parties misunderstood each other or otherwise believed the agreement to be different. The parent could in fact be agreeing to something without fully knowing what they are agreeing to if the "informed consent" requirements are not met. (See Number 9.f. above for Recommendation and Rationale.)

26. Problem: Draft § 324(a)(6) (Copy of Amendment). Parents are provided with a copy of the amendment "upon request." A parent may not know that they have the right to request a copy of the amendment.

Recommendation: The regulations should specify that the LEA should send the parent a copy of the amendment upon completion of drafting the amendment and "upon request." Also, the procedural safeguards notice should include information that informs parents of their right to a copy of the amendment and that they may request a copy.

Rationale: Parents are required to have the opportunity to meaningfully participate in IEP meetings about their children. Without all the information and the opportunity to review the final written document they cannot fully participate in the process.

27. Problem: Removal of § 300.345(e), draft § 300.501 (Interpreter Services—Parental Participation). By removing § 300.501(c)(5) and § 300.345(e) the Department eliminates the requirement that schools make reasonable efforts to ensure parents can participate in the meetings, including providing an interpreter if necessary.

Recommendation: The Department should reinsert the language of current regulations § 300.501(c)(5) and § 300.345(e).

Rationale: One of the core requirements of IDEA is to ensure meaningful participation of parents. Parents cannot participate in the process in a meaningful way if they do not have the means to understand the proceedings (i.e., not in their language). Since IDEA 2004 specifically states that all the rights provided in the July 20, 1983 regulations shall remain, this part of the regulation should properly reflect the 1983 and 1999 regulations. Although the need for an interpreter is inherent in the law (§ 300.501(b) participation of parents), without such regulations, there is a risk that school districts will be confused about their responsibilities. This confusion could result in the denial of rights to parents and students over what is required and such confusion could result in further litigation and contention between schools and parents. Since one purpose of the reauthorization was to avoid undue litigation, the Department could help avoid this problem by simply reinserting the clarifying language in the current regulations.

Subpart E

28. Problem: Draft § 300.504(b) (Procedural Safeguards—Web Site). The regulation permits a public agency to place a copy of their procedural safeguards on their web site; however, the regulation does not clarify that placing the safeguards on the web site does not substitute for individually providing the procedural safeguards to parents as required pursuant to § 300.504(a). Also the regulation does not clarify that even if a child has a three-year IEP, the procedural safeguards shall be provided to the parents every year.

Recommendation: The regulations at § 300.504(b) should clarify that placing the procedural safeguards on the web site does not substitute for otherwise providing the safeguards as required by § 300.504(a).

Rationale: Many families do not have access to the internet and it is important to clarify that written copies of the safeguards must be given to the parents under all of the circumstances enumerated in § 1415(d)(1)(A); § 300.504(a). The regulations should clarify that placing the notice on the agency's web site does not negate the duty of the district to provide the notice individually to the parent per this provision. Also, if the parent elects to use the three-year IEP process through a State pilot program as explained under Section 1414(d)(5), the regulations should clarify that the requirement that the parent receive the notice annually is not affected.

29. Problem: Draft § 300.504, § 300.510(a)(3)(ii) (Mediation v. Resolution Session) The procedural safeguards do not include providing notice about the resolution session, nor does it provide a requirement for the procedural safeguards to provide an explanation of the difference between mediation and the resolution session.

Recommendation: In proposed regulation § 300.504(c)(6) after the phrase “the availability of mediation” the Department should add the phrase, “the requirements of a resolution session and the difference between mediation and a resolution session.”

Parents should be notified in writing that mediation sessions are confidential, whereas resolution sessions are not. Schools should also notify parents that, after filing a due process hearing, they might choose between the two, if the school agrees (mediation instead of resolution session). Further, the explanation should explain the ability to withdraw within 3 days from an agreement formed as a result of the resolution meeting, whereas an agreement formed out of mediation does not provide the same option.

Rationale: The resolution session is a new process in IDEA 2004 and it has certain procedural requirements that must be met. Parents have a right to notice of these requirements just as they have the right to notice about mediation, due process and other requirements. Congress intended that parents be fully informed of their rights, and in order to further the purpose of the Act, the regulations must require notice and an explanation of the resolution session.

Parents are entitled to be fully informed of their rights in order to make informed decisions about how to address their child’s education and how to address concerns with their education. Ensuring that parents are provided with information that fully informs them of their rights is consistent with the plain meaning and intent of the Act.

30. Problem: Draft § 300.505 (Electronic Mail). A parent may elect to receive notices such “prior notices,” “procedural safeguards” and “due process” via electronic mail. (See Number 9.g. above for Recommendation and Rationale.)

31. Problem: Draft § 300.152, § 300.506, § 300.510 (State Complaints—Timelines and Enforcement). See Number 5, above.

32. Problem: Draft § 300.506(c)(i) (Mediator). The regulation states that a mediator cannot be an employee of the SEA or LEA involved with the current case. Prior regulations did not allow mediators to be employees of *any* SEA or LEA.

Recommendation: The Department should maintain the language that is in the current § 300.506(c)(1)(i)(A) and (B) and (c)(1)(ii).

Rationale: The way the proposed regulations are drafted a special education coordinator from one county could be a mediator for another LEA in the same state. This could cause a loss of trust on the side of the parents. Without trust parents will seek due process over mediation, which is more costly.

33. Problem: Draft § 300.506(b)(8) (Confidentiality of Mediation). The regulations state that discussions in mediation cannot be used in any subsequent action regarding the dispute. The statute does not limit the confidentiality to only those subsequent

actions in the same dispute, but prohibits disclosure of information in any subsequent action.

Recommendation: The regulations should follow the statute. The draft regulations reads as follows: “Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearing or civil proceedings arising from that dispute.” The Department simply needs to drop the last phrase, “arising from that dispute” to be consistent with the statute at 20 U.S.C. §1415(e)(2)(F)(i).

Rationale: The Department is permitted to issue regulations only to ensure the specific requirements of the Act are properly implemented. 20 U.S.C. §1406(a). The change made by the proposed regulation goes beyond the statute in an impermissible way. Further, the plain meaning and intent of this section is to encourage the use of mediation as a forum to resolve disputes. One method Congress has chosen to do so is by ensuring information exchanged during mediation is kept confidential. The regulation seeks to make the confidentiality conditional, only permitting it to apply to the current issue in dispute, but allowing the information to be used in other actions. The lack of required confidentiality will quell the desire to engage in mediation for both schools and parents, and will result in more, and possibly avoidable, litigation.

34. Problem: Draft § 300.507(a)(2), § 300.511(e), § 300.301(c)(1)(ii) (Reasonable Timelines). The statute provides timelines for conducting evaluations and filing a request for a special education due process hearing. The Act states that these time lines apply unless state law has established an alternate timeline. The regulations must clarify that states’ timelines must be “reasonable” and must offer parents an adequate opportunity to assert their procedural rights.

Recommendation: The regulations should clarify that any timelines set by the State must be reasonable in light of the purpose of the Act.

Rationale: According to IDEA 2004 § 1400(d), two purposes of the Act are “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living” and “to ensure that the rights of children with disabilities and parents of such children are protected.” In addition, school districts are affirmatively required under § 1412(a) to locate, evaluate, and identify children with disabilities and provide them with FAPE. While the new law was intended to give states flexibility, it was not intended to allow states to establish wholly unreasonable timelines (e.g.: one year timeline for evaluations; 10 day statute of limitations) that would cause children to go without FAPE for extensive periods of time. Therefore, the regulations should clarify that any state laws or regulations setting timelines different from those in IDEA 2004 must be reasonable in order to further the purpose of the Act.

35. Problem: Draft § 300.507 (Informing Parents). The regulation removes the provision that requires the public agency to inform the parent of the right to mediation when they file for due process.

Recommendation: Reinsert the language of § 300.507(a)(2) that requires the public agency to inform parents of this option.

Rationale: The Department reasons that the language is no longer necessary because mediation is required even for informal disputes now, not just when due process is filed. However, informing parents of this right when they have filed a due process complaint may encourage using this informal and less costly process rather than due process. Congress recognized that mediation is a different process than due process with a different set of principles and requirements; therefore, it is important that parents are informed about their rights to this process.

36. Problem: Draft § 300.508 (Tolling). When a complaint must be amended there may be a need to determine if the filing timeline tolls from the date of the original filing. The Hearing Officer should use as a guidepost the general rule that if the amendment relates back to the original claim, the timeline should toll. (See Number 45, below.)

37. Problem: Draft § 300.508(c) (Sufficiency). This section states that a party may not have a hearing on a due process complaint or “engage in a resolution session” until the party files a due process complaint that complies with the requirements of § 300.508(b)(Content of Complaint). The statute at 20 U.S.C. § 1415(b)(7)(A) states that a party may not go forward with a due process hearing if they have not fulfilled the requirements of § 300.508. The statute does not forbid parties from moving forward with the resolution process, but the regulation does limit the party’s ability to go forward with the resolution session. (See Also, Number 43.b. below)

Recommendation: The regulation should align with the statute, therefore the requirement that parties may not proceed to the resolution session should be removed.

Rationale: If a party seeks a finding from the Hearing Officer that a due process complaint is insufficient, this must be done within 15 days from the date the complaint was filed. The Hearing Officer then has five days to make a determination of the sufficiency of the complaint. If the resolution process is stalled until the determination of sufficiency and the 15-day timeline to conduct the session does not trigger until sufficiency is determined, an additional 20 days could be added to the due process procedures. This is contrary to the statute and cuts against the intent of the Act. IDEA 2004 specifically requires the LEA to convene the resolution session “within 15 days of receiving notice of the parents’ complaint.” 20 U.S.C. § 1415(f)(1)(B)(i). The Senate Report specifically states that “a District’s belief that a parent has failed to meet the notice requirement of § 1415(b)(7)(B) should not delay a resolution session between the parties. In fact, the parent may be able to more clearly articulate their problem during the session, which would give the LEA sufficient information to try to

resolve the problem.” S. Rep. No. 108-185, at 38 (2004), *available at* <http://thomas.loc.gov> (emphasis added).

38. Problem: Draft § 300.508(d)(3) (Amend Complaints). The regulations do not provide guidance as to when it is appropriate for a hearing officer to grant permission for a complaining party to amend their complaint.

Recommendation: The regulations at § 300.508 (d)(3)(iii) should state that leave by the hearing officer to amend the complaint should be permitted unless doing so would prejudice the other side. In the alternative, the regulations should at least state that hearing officers should follow the Federal Rules of Civil Procedure standard that permits courts to “freely grant amendments when justice so requires.”

Rationale: Many parents will not know the procedural rules required by the new IDEA. Parents should be able to amend complaints when necessary, rather than being forced to start the entire process again. The purpose of the complaint is to notify the opposing party of the claims alleged. Unless the party would be prejudiced by permitting an amendment it should be permitted in order to meet the underlying intention of due process—resolving disputes. Alternatively, the regulations should follow the Federal Rules of Civil Procedure, Rule 15(a) which states that leave to amend a complaint in federal court is to be “freely given when justice so requires.” The Department needs to ensure that there is a standard for hearing officers to follow when granting amendments and ensure that the standard meets the intent of the Act.

39. Problem: Draft § 510(a)(3)(ii) (Use of Mediation Process). The regulation states that the parents and school system can agree to use the mediation process in lieu of going to a resolution meeting. However, the regulations do not clarify that, if the parties choose mediation, the 45-day due process timeline stays in effect.

Recommendation: The regulations should clarify that if the parents and LEA agree to waive the resolution meeting and go to mediation instead, the 45-day timeline remains in effect.

Rationale: If the parties choose to go to mediation rather than through the resolution process, the parties must follow the mediation requirements under § 300.506. Those requirements as well as IDEA 2004 prohibit the use of mediation “to deny or delay a parent’s right to a hearing on the parent’s due process complaint.” Therefore, the timeline to conduct a due process hearing should commence from the date that due process request was received.

40. Problem: Draft § 300.510(a) and(b)(1) (Resolution Session Delay by School). The draft regulations require the due process hearing process to commence 30 days after the complaint is received if the resolution process has not resulted in a resolution to the parent’s complaint. It requires that the 45-day timeline for a hearing decision run from that point. However, the statute does not clarify that a hearing should not be delayed for 30 days if a school system does not schedule a resolution session and

otherwise engage in measures to attempt to resolve the dispute. (See also Number 45.c. below.)

Recommendation: The intent of Congress was to move the process forward. Once it is clear that the process is not moving forward (e.g., failure of school to schedule a resolution session within 15 days of receiving due process notice) the 45-day timeline shall resume beginning from the date the school received the due process request.

Rationale: Many school districts will comply with § 1415(f)(1)(B) of IDEA 2004 and convene the meetings on time with the required representatives. LEAs that act in bad faith and do not convene the meeting or do not bring an official with authority to make decisions for the school district, as the law requires, should not be rewarded with a 30-day halt in the proceedings. The 30 days was intended by Congress to be used to resolve complaints, not as a break for school districts that were not complying with the law.

41. Problem: Draft § 300.510(b)(3) (Delay by Parents). The regulation permits the public agency to hold a hearing in abeyance if a parent does not participate in a resolution session, but the regulations do not provide (1) guidelines to ensure schools properly arrange the meetings so that parents can participate; or (2) a means for parents to dispute any characterization from schools that the parent is delaying the process. (See Also Number 45.d. below). Further the language of the regulation assumes parent fault if a resolution session is delayed and does not provide a means to move the process forward if a LEA is responsible for the delay in conducting the resolution session.

Recommendations: The regulations should clarify the schools' requirement. The schools should be required to contact parents within 5 days after the hearing request or complaint was filed. The purpose of this contact is to: (1) inform parents of their right to waive the resolution session (if school agrees to do the same), to proceed to mediation if both parties agree or if the parties do not wish to waive the meeting or proceed to mediation, to set a date for the resolution session; and (2) if the parties have not waived the session, set a time and place for the resolution session or mediation that is "mutually agreeable."

Further, during this contact the school should also ensure that parents are given the opportunity to be part of the group that determines the "relevant" team members to be present at the meeting. During this contact the schools should document their attempts to schedule a meeting by the method outlined in current regulation § 300.345(d). (See Number 10 above.)

Rationale: Schools must work in good faith with parents, and parents must be provided with notice and an opportunity to meet at a time and place when they are able to do so. Parents may have to ask to be excused from work or make childcare arrangements. This may be a particular problem for low-income parents. Further, a parent must have the opportunity to dispute the school's characterization that parents

did not participate or the ability to move forward to a due process hearing will be entirely within the purview of the party that is being sued. This of course, is not appropriate and does not provide due process.

42. Problem: Draft § 300.510(a)(3)(i) (Timeline for Hearings if Resolution Session Waived) The regulations state that the parents and school system may agree to waive the resolution session, but the regulation does not clarify that if the parties agree to waive the resolution session, the hearing process being immediately.

Recommendation: Clarify in the regulation at § 300.510(b)(2) that if the parties choose to waive the resolution process, the timeline for the hearing process at § 300.515 begins upon date of the agreement to waive.

Rationale: Without this clarification, the parties may misinterpret the statute and regulation to believe that they must wait 30 days (without attempting to negotiate the issues) before the due process hearing timeline begins. This would create a situation where parties that already believe they are at an impasse and therefore waiving the negotiation process, to wait an additional 30 days before beginning to resolve the dispute. The purpose of the resolution session is to attempt to settle dispute without the need to proceed to a hearing. If the parties believe a hearing is necessary, delaying the hearing 30 days does not meet the underlying purpose of the provision and therefore, the process should move forward without delay.

43. Problem: Draft § 300.513 (Hearing Decisions—Least Restrictive Environment). The regulation requires a hearing officer to make a decision on substantive grounds to determine if a child received a FAPE or on procedural grounds that also rise to a denial of FAPE. The regulation does not clarify that the requirement that a student is placed in the Least Restrictive Environment is a substantive requirement that is part of a determination as to whether a child has, in fact, received FAPE, or at a minimum is a procedural violation that impedes the student's access to FAPE and causes a denial of educational benefit.

Recommendation: Clarify that Least Restrictive Environment is within the scope of a hearing officer's authority to rule on substantive issues that relate to whether a child has received FAPE, or clarify that it is a procedural right that impedes a child's right to FAPE and denies the child educational benefit.

Rationale: The requirement that a hearing officer must make a determination based on substantive law affecting a child's receipt of FAPE means that a hearing officer cannot base retroactive relief (such as reimbursement or compensatory education) on procedural or substantive violations unless the procedural or substantive violation impeded the child's right to FAPE. Regardless of whether LRE is considered substantive (which we believe it is) or procedural, a denial of education in the LRE for a child is clearly a denial of FAPE, and a Hearing Officer should clearly order appropriate prospective and retroactive remedies if such a violation is found. This regulation should eliminate any ambiguity as to this extremely important entitlement. In IDEA

2004, Congress reaffirmed the right of children with disabilities to LRE, and the Department should make sure that this Congressional purpose is not muddled by this regulation. 20 U.S.C. §1412(a)(5). Further the requirement to educate students in the Least Restrictive Environment to the maximum extent possible is one of the fundamental purposes of the act. Specifically IDEA 2004 states that, “education of students with disabilities can be made more effective by . . . access to the general education curriculum in the regular classroom, to the *maximum* extent possible” (emphasis added). 20 U.S.C. § 1400(c)(5)(A).

44. Problem: Draft § 300.513 (Hearing Decisions—Hearing Officer’s Authority).

Throughout the Act there are issues/disputes that may present the need for an immediate resolution. The regulations should be clear that a hearing officer has the right to hear these pre-hearing issues/disputes and make a decision on how the parties should proceed. The list of issues includes, but is not limited to the following:

- a. **Draft § 300.508 (Tolling).** The statute and proposed regulations permit a complaining party to amend its complaint under certain enumerated circumstances but the regulations are silent regarding the effective date of those amendments for statute of limitations purposes. Without further clarification, the question whether an amended complaint relates back to the original complaint could cause unnecessary litigation between numerous parties. Further, unrepresented parents may be denied the opportunity to litigate a claim due to an inartfully drafted complaint, even when they have a valid claim that was timely (if inelegantly) filed. When a party has filed a complaint, but later is forced to amend that complaint because of imprecision or omission that does not prejudice the other side’s defense, the amendment should, for the purposes of the statute of limitations, date back to the filing of the initial complaint. Otherwise requirements that Congress added to ensure that both sides are adequately informed of the issues in dispute will become instead a maze through which unrepresented families will be unable to make their way.

For example, in some cases after the parties meet at a resolution session and fully air their differences, there will be a clearer understanding of the exact issues in dispute. In those cases it makes sense to treat the amended complaint as filed on the date of the original complaint for statute of limitations purposes. *Compare* Federal Rule of Civil Procedure 15(b) (allowing relation back whenever not barred under state law and “the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.”).

- b. **Draft § 300.508(e) and (f) (Sufficiency).** The statute and regulation require the non-complaining party to provide an answer to the complaint. However, there is no specific guidance on the mechanism to enforce this provision including a mechanism to dispute the sufficiency of an answer. If a party fails to file a timely answer, the complaining party should have the ability to seek an order from the

hearing officer directing the party to file an answer or to seek other relief if the interest of justice so requires.

The purpose of the Act is to resolve disputes. The requirement to file an answer is a mandated part of the act. In most cases parents will be filing a complaint and schools an answer. Parents (or school if it is the complaining party) have the right to know the response to the complaint prior to participating in a hearing. If a party provides a sufficient answer it furthers the possibility of resolving the issues early and avoiding a costly hearing. Congress attempted to reduce litigation when it reauthorized the IDEA, and one method was to provide specific notice requirements. Since the intent is clear, the Department should ensure that parties properly implement the plain language of the law.

- c. **Draft § 300.510(b) (Scheduling a Resolution Session).** The draft regulations require the hearing process to commence 30 days after the complaint is received if the resolution process has not resulted in a resolution to the parent's complaint. It requires that the 45-day timeline for a hearing decision run from that point. However, the statute does not clarify that a hearing should not be delayed for 30 days if a school system does not schedule a resolution session and otherwise engage in measures to attempt to resolve the dispute. If the school fails to follow through on the requirements of the resolution session, a parent should have the ability to seek a hearing date, within the 45-day timeline, to proceed to hearing.
- d. **Draft § 300.510(b)(3) (Delay by Parents).** The regulation permits the public agency to hold a hearing in abeyance if a parent does not participate in a resolution session, but the regulations do not provide: (1) guidelines to ensure schools properly arrange the meeting, or (2) a means for parents to dispute any characterization from schools that the parent is delaying the process.

Recommendation: The regulations should specifically state that a party has the right to seek immediate intervention from a hearing officer to resolve pre-hearing issues and disputes.

Rationale: The intent of the due process procedures is to ensure disputes are resolved and that they are resolved without unnecessary delay. Without a process in place to ensure pre-hearing issues can be resolved, cases may be unnecessarily delayed, possibly resulting in a delay of proper services for children.

45. Problem: Draft § 300.516 (Federal and State Appeal Timelines). The statute and regulation require that appeals to state or federal court occur within 90 days of the decision of the hearing officer. This language does not take into consideration an appeal to a state review officer if the state has a two-tier system.

Recommendation: Modify section 300.516(b) by including reference to the state review process and clarify that the 90 day timeline begins either from the date of a

hearing officer's decision or from the date of a state review officer's decision if the state has a two-tier process.

Rationale: The IDEA permits states to have a one-tier system (hearing officer only), or a two-tier system (hearing officer's decision is subject to an impartial review). 20 U.S.C. § 1415(g)(2). However, parties cannot appeal to a court until the entire administrative process has been exhausted. The regulations must clarify that the 90-day timeline or the State's alternate timeline begins to run from the date of the final administrative decision by either the hearing officer or the reviewing officer or panel in order to prevent the inappropriate dismissal of cases.

46. Problem: Draft § 300.519(d)(2) (Court Appointed Surrogates). The regulation requires that court-appointed surrogates for wards of the state only meet the requirement that they are not employees of the LEA or other agency involved in the child's care and does not require such surrogates to meet the requirement that the surrogate have no conflict of interest or that the surrogate have adequate knowledge and skills to be a surrogate.

Recommendation: Recommend that court-appointed surrogates for wards of the state also meet the same requirements in § 300.519(d)(2) as school district-appointed surrogates for wards: they have no conflict of interest and adequate knowledge and skills to be a surrogate.

Rationale: Wards of the state are particularly in need of surrogate parents who meet all three requirements. There is no reason to distinguish between court-appointed surrogates and school-district appointed surrogates on these requirements. No child should have a surrogate parent who has a conflict of interest or lacks adequate knowledge and skill to be a surrogate.

47. Problem: Draft § 300.519 (Surrogate Parents). The regulation sets out requirements to appoint surrogate parents, but there is no guidance, however, regarding the power of LEAs to appoint a replacement surrogate parent, thereby divesting the original surrogate of his or her authority to act on behalf of the child.

Recommendation: The regulations should make clear that, just as an LEA cannot divest birth parents of their authority to make education decisions for their child because the parents disagree with the LEA's decisions, surrogate parents require the same protection if they are to be forceful and independent advocates for children. The regulations should state that a "surrogate" parent's rights may not be subrogated by an LEA—by the appointment of a new surrogate parent—unless the first surrogate has failed to fulfill his or her responsibilities (e.g., by failing to meet with the child or failing to attend IEP meetings that have been scheduled for a mutually agreed-upon time).

Rationale: We have received complaints from social workers and child advocates suggesting that, at least in some instances, school districts have chosen to "fire" proactive surrogate parents because they have successfully advocated for the children

whom they serve. This practice violates the spirit of the IDEA and undermines the independence of surrogates necessary to ensure that the children for whom they are responsible have the opportunity to obtain FAPE.

48. Problem: § 300.532(c)(4) (Exchange of Documents). This regulation would let states reduce to two business days the period in § 300.512(a)(3) and § 300.512(b) for exchanging evaluations, recommendations, and evidence for expedited discipline hearings.

Recommendation: The draft regulation at § 300.532(c)(4) should be removed.

Rationale: The proposed regulation contradicts IDEA 2004, § 1415(f)(2), and lessens protections in the July 20, 1983 regulations, and therefore violates § 1406(b)(1) and § 1406(b)(2) of IDEA. Regulation § 300.508(a)(3) in the July 20, 1983 (and existing) regulations states that parties cannot introduce evidence that was not disclosed to the other side at least 5 business days before the hearing. This applies to all hearings. IDEA 2004, § 1415(f)(2), requires parties to disclose to the other side five business days before the hearing evaluations and recommendations based on those evaluations that the parties intend to use at the hearing. Since § 1415(f)(2) applies to hearings under § 1415(f)(1), it includes expedited discipline hearings under § 1415(k). Reducing the period to 2 days would also be a hardship on unrepresented parents.

49. Problem: Draft § 300.532(c) (Procedural Rules in Expedited Hearings). This section permits States to establish a different set of procedural rules for expedited hearings. However, the regulations do not clarify that the purpose of permitting States to establish a different set of procedural rules is to assist in the prompt resolution of the dispute, not to strip parents of rights. States could misinterpret the draft regulations to allow them to re-write rules regarding basic rights such as the right to a public hearing, the right to provide a free transcript of the proceedings and the right to qualified hearing officers (§ 300.511). The Department should clarify, by simply changing the regulations that these basic rights are part of all IDEA due process hearings.

Recommendation: The hearing rights established in § 300.511-513 should remain intact for hearings brought under § 300.532.

Rationale: The Act provides that these rights apply to any hearing conducted, including a hearing conducted as part of the discipline proceedings. Therefore, the Department violates 20 U.S.C. § 1406(b) if it does not apply these basic rights to students involved in hearing under § 300.532. Further, the regulations in the July 20, 1983 regulations provide for these hearing rights, and the regulations issued to implement IDEA 2004, must not lessen the rights provided in July 20, 1983.

50. Problem: Draft § 300.530(b)(1) (FAPE and Suspensions or Expulsions). The draft regulations state that a school system may remove a student to an interim alternative setting, another setting, or suspend a child for up to 10 consecutive school days. However, the regulation at § 300.530(b)(1) does not clarify that during this time

period the child still must receive a free appropriate public education in accordance with § 1412(a)(1).

Recommendation: The regulations should add a statement that if a student is removed from school as stated under § 300.530(b)(1), the school system must still provide the student with FAPE during this time.

Rationale: IDEA 2004 is clear that during the time that a student is suspended or expelled from school, the child must receive a free appropriate public education. Often school personnel assume that services are not required for students who are removed or suspended from school for 10-days or less. However, the statute is clear that services are required even if a child is suspended or removed for one day. Therefore, in order to ensure that schools understand that they must provide services during this time and to ensure the intent of the Act is carried out the regulations should refer to § 1412(a)(1) in § 300.530(b)(1).

51. Problem: Draft § 530(b), § 300.536 (Definition of Change in Placement and Additional Requirement for Manifestation Review). Without any specific statutory language, the proposed regulations create out of whole cloth an extremely complex and internally inconsistent definition of “change in placement” for school discipline (§ 300.536). Under the proposed regulations, a “change in placement” occurs if the exclusion is for more than 10 consecutive days OR if the child has been subjected to a series of removals that constitute a pattern because the removals total more than 10 days in a school year (the current regulatory standard); and the child’s behavior is substantially similar to the child’s behavior in the incidents that resulted in a series of removals, taken cumulatively, as determined under § 300.530(f) to have been a manifestation of the child’s disability; and because of additional factors such as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

Here are a few of the problems created by these new provisions:

- The language “substantially similar” is very vague and does not reflect the reality of how and why students with a disability “act out.” Students frequently change their conduct even when the disability is the underlying reason for the acting out (or other negative behavior).
- Unless a student is removed from school for more than 10 school days in a row or is expelled, the student will be eligible for continuing special education services only if the school exclusion meets the new definition of change in placement § 300.536. This approach violates the Congressional purpose of assuring that all children with disabilities—even those expelled for behavior that is not disability-related—will continue to get the special services that will benefit the student and the broader society.

- Section § 300.530(d)(4) is inconsistent with the statute in that it appears to give districts the authority to deny special education services to students who have been excluded from school for more than 10 days in a school year as is required by 20 U.S.C. § 1415k(1)(C) and (D).
- The new definition of “change in placement” is confusing and burdensome for LEAs and parents. Under the statute and the current regulations, if a child is suspended for a time period that exceeds 10 consecutive days or the suspensions amount to a change in placement, the school must conduct a manifestation determination to determine if the child’s behavior was a manifestation of his or her behavior. If so, the discipline protections of IDEA must be followed. Under the new proposal, however, a necessary criterion for determining whether a proposed school exclusion constitutes a “change in placement” is whether the child’s conduct was a manifestation of her disability. Thus, under this proposal, the LEA must conduct a manifestation determination review to determine if it should conduct a manifestation determination review. This complex and circular process will burden and bewilder parents and LEAs.

Recommendation: The regulations should retain the current definition of “change in placement” for discipline purposes (current § 300.519). Remove § 300.530(d)(4) as it is inconsistent with the statute.

Rationale: The draft regulations are confusing, conflict with the statute, and will result in litigation. They create a circular series of events for parents and schools. Even well intentioned districts will interpret these regulations differently, which will result in delay and inconsistencies. Moreover, this proposal will deny special education services to students with disabilities whom Congress clearly did not intend to be excluded from education. By sections 1415(k)(1)(d)(i) and 1412(a)(1) Congress made the decision specifically to require schools to provide special education services to all disabled students, even those who have been suspended or expelled. The regulations cannot infringe upon these important statutory rights, especially without specific statutory authorization for this departure.

52. Problem: Draft § 300.532, § 300.533 (Remaining in current placement pending appeal).

Section 300.532 permits appeals in a wide range of situations, including when there is a dispute regarding whether the child’s misbehavior is a manifestation of the disability; whether the placement to which the child is being transferred can offer appropriate services; and, even if the misbehavior is a manifestation of the disability, whether the child is “dangerous” and thus can be removed from his/her current educational placement. In some of these situations, the child will have been removed from his/her current educational placement before the hearing (e.g., if the team determined that the behavior was not a manifestation), and in some situations, the child will still be in the current placement during the hearing process. When the team has concluded that the

misbehavior is a function of the disability, in the absence of special circumstances, a child cannot be moved from his/her current educational placement unless, after a full hearing, a Hearing Officer concludes that “maintaining the current placement of the child is substantially likely to result in injury to the child or to others.” §300.532(b)(2)(ii).

The statute (and §300.533) state that, pending appeal, a child shall “remain” in the “interim alternative educational setting.” This is not intended to preempt the right of a child to remain in her current educational setting – not in an alternative setting – unless and until a Hearing Officer determines that the child meets the dangerousness standard. This should be clarified in the regulation.

Recommendation: The regulation at § 300.533 should clarify that a child whose team has concluded that the misbehavior was a manifestation of the disability – in situations that do not involve special circumstances – can remain in his/her current education setting unless and until there is a hearing, and the hearing officer has concluded that he/she meets the dangerousness standard.

Rationale: Unless this is clarified, the dangerousness criterion becomes a fourth “special circumstance” that would allow a child whose conduct is a manifestation of his/her disability to be moved during the appeal process. This is clearly not what Congress intended when, after much debate, it added only one additional special circumstance – that the child had actually inflicted serious bodily injury upon another person.”

53. Problem: Draft § 300.534(d) (LEA did not have knowledge of Disability)

This provision does not clarify that a finding of ineligibility based on an out-dated evaluation cannot be the basis for an exception under this provision.

Recommendation: The regulations should clarify that a finding of ineligibility based on an evaluation that is more than 3 years old cannot be the basis for an exception under the provision.

Rationale: An LEA is required by child find obligations pursuant to 20 U.S.C. § 1412(a)(3) to ensure students who need to be evaluated and require special education services receive evaluations and services. An LEA cannot avoid the requirement to provide service by relying on old, outdated evaluations. Some disabilities are not normally diagnosed until later in the child’s education even though symptoms are evident earlier. Issues that may not have been present at the time of the initial evaluation may arise later in the child’s life or issues that did arise may be more pronounced as the child get older and these changes may require new evaluations.

Subpart F

54. Problem: Draft §§ 300.600-609 (Monitoring and Enforcement) There are significant weaknesses in the language of the proposed regulations (§§ 300.600-300.609) with regard to monitoring and enforcement, in spite of Congress's clearly stated intention that improving accountability for implementation of the statute was one of the most important goals of this reauthorization process. The IDEA contains a specific mandate for the Secretary to monitor and enforce the law, but the proposed regulatory language does not reflect this mandate and is therefore inconsistent with the statute. These omissions will result in significantly less accountability for the implementation of the law, which is contrary to the carefully considered revisions to § 1416. In addition, SEAs and LEAs attempting to comply with the law in good faith will have difficulty doing so if they refer only to the regulations for guidance. Other key stakeholders to the monitoring and enforcement will be similarly disadvantaged.

It is our understanding that the regulations are intended to act as a "stand alone" legal document, and, as such, readers should not be forced to refer to additional sources of legal authority in order to determine what the law requires. See the Preamble to the NPRM, page 35783. In order for that goal to be achieved, certain statutory language must be included in the final regulations.

Recommendation: The statutory language from 20 USC § 1416(a)(1) and 20 USC § 1416(a)(3) omitted from the proposed regulations must be included in the final regulations in order for them to serve their purpose and fully inform the public about the intent behind the monitoring and enforcement system. Without it, the accountability Congress sought will not occur.

Rationale: First, information about the Department's role in IDEA monitoring and enforcement has been omitted from the proposed regulations. The following statutory language (20 USC § 1416(a)(1)) or a paraphrase thereof is absent from the proposed regulations:

In general.—The Secretary shall—(A) monitor implementation of this part through—(i) oversight of the exercise of general supervision by the States, as required in section § 1412(a)(11); and (ii) the State performance plans, described in subsection (b); (B) enforce this part in accordance with subsection (e); and (C) require States to—(i) monitor implementation of this part by local educational agencies; and (ii) enforce this part in accordance with paragraph (3) and subsection (e).

This omission makes it impossible for the reader to understand the Department's full role in monitoring and enforcement without referencing the statute and a statutory cite is not even provided that would alert the reader to this need. The regulations do address state performance plans and enforcement steps, but this initial statutory

language provides important information about the overall goal and purpose of federal monitoring. Without it, the SEAs and other stakeholders are not truly on notice regarding the scope of the Department's duty.

Second, the omitted priorities section of 20 USC § 1416(a)(3) begins with this language, which is also omitted from the proposed regulations: "(3) Monitoring priorities.—The Secretary shall monitor the States . . ." (re: the priorities). This language makes clear that the Secretary, in addition to the states, has both the authority and the obligation to monitor in these specific areas.

Third, the language of the proposed regulations (§ 300.600(c)) fails to include the statutory language containing the specific priorities for monitoring, relegating them to a statutory cite. 20 USC § 1416(a)(3). Technically the priorities are still included by reference, but the reader must turn to the statute in order to determine exactly what they are. This makes compliance with the monitoring requirements of the law and preparation for monitoring more difficult for both SEAs and LEAs, and makes it more difficult for other stakeholders to know SEAs' and LEAs' obligations.

If you have any questions or concerns about our comments, please feel free to contact Elizabeth A. Greczek at 202-408-9514 or via email at Elizabeth.greczek@ndrn.org.

Sincerely,

Curtis Decker, Executive Director
National Disability Rights Network