

CENTER FOR LAW AND EDUCATION

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September 5, 2005

Troy R. Justesen
Acting Deputy Assistant, Secretary for Special Education and
Rehabilitative Services
Office of Special Education and Rehabilitative Services
U.S. Department of Education
400 Maryland Avenue, SW.
Potomac Center Plaza, Room 5126
Washington, DC 20202-2641

Re: Comments in response to NPRM re: Individuals with Disabilities Education Act 204

Dear Dr. Justesen:

Attached are comments submitted by the Center for Law and Education in response to the Notice of Proposed Rulemaking (June 21, 2005), re: the Individuals with Disabilities Education Act, as amended. We have attempted to identify areas of concern where we believe that Department guidance and/or clarification may be especially helpful in effectively implementing this important law.

The Center for Law and Education (CLE) is a national advocacy organization that works with parents, advocates and educators to improve the quality of education for all students, and in particular, students from low-income families and communities. Throughout its history, CLE has been a recognized leader in advancing the rights of students with disabilities -- from federal policy through state and local implementation. As one of the few national organizations that is firmly rooted in both disability rights and school reform, CLE has focused increasingly on bringing the two together -- in order to help ensure, for example, that specialized instruction and support services provided through individualized education programs (IEPs), assessment practices, placement decisions, etc. are aimed at overcoming the barriers for students with disabilities to meeting high standards, rather than being vehicles for lower expectations.

We appreciate this opportunity to comment and would be pleased to discuss with the Department constructive approaches for addressing any of the issues we have flagged.

Yours truly,

Kathleen B. Boundy
Co-Director

Comments Submitted by the Center for Law and Education

In response to Notice of Proposed Rulemaking (June 21, 2005)

RE: Individuals with Disabilities Education Act, as Amended

NPRM 34 C.F.R. §300.18 HIGHLY QUALIFIED

Proposed regulations at §300.18(a) – (g) identify specific requirements to be met by special education teachers participating in an alternative route to certification program; special education teachers who do not teach core academic subjects; special education teachers teaching to alternate achievement standards; and special education teachers teaching multiple subjects. The proposed regulations expressly state that these requirements do *not* apply to teachers teaching in public charter schools unless specifically provided for in the state’s public school charter law or to teachers hired by private elementary and private secondary schools. Nor as written do they identify the tasks and activities that are authorized to be provided by special education teachers who are not “highly qualified” to teach core academic subjects or to paraprofessionals who do not meet the requirements of NCLB. Proposed regulation §300.18(g) is also uncannily silent about the right of a parent to file a state administrative complaint when an LEA is not complying with its obligation to provide “highly qualified” special educators. Each of these provisions needs to be addressed through modifications, amendments or deletions to the proposed regulations.

**Highly qualified special education teacher teaching in public charter school –
NPRM 34 C.F.R. §300.18(b)(i)**

The statute states that the term “highly qualified” when used with respect to any special education teacher teaching in a public charter school, means that the teacher meets the requirements of the State’s public charter school law.

Comment/Recommendation: Clarify that while a “highly qualified” special education teacher who teaches core academic subjects in a charter school does not have to be licensed or certified by the State if the State’s charter law does not require such licensure or certification, all other elements of the “highly qualified teacher” requirement, including the requirements for teaching core academic subjects, apply to charter school teachers in the same way, and on the same timeline, that they apply to teachers in traditional public schools. The IDEA amendments do not authorize treating charter schools that receive federal funds, including Part B monies, differently than they are treated under Title I of the ESEA [or NCLB].

**Highly qualified special education teachers not teaching a core academic subject
NPRM 34 C.F.R. §300.18(b) (3)**

Comment/Recommendation: ADD after proposed language at §300.18(b)(3) referencing the requirements to be met for any public [ADD: or publicly funded] elementary or secondary special education teacher teaching in a State, who is not highly qualified for purposes of teaching a core academic subject, “and that (i) such teacher shall be authorized to provide only consultative services to a ‘highly qualified’ general

education teacher, and (ii) must restrict his or her services to areas that supplement, not replace, the direct instruction provided by the ‘highly qualified’ general education teacher in core academic subject(s).”

Rule of Construction NPRM 34 C.F.R. §300.18(e)

The language at issue reads as follows: “Notwithstanding any other individual right of action that a parent or student may maintain under this part, nothing in this section [602] or part [B] shall be construed to create a right of action on behalf of an individual student or class of students for the failure of a particular State educational agency or local educational agency employee to be highly qualified.”

Comment/Recommendation: *Add clarifying language* that “notwithstanding this provision” a parent may file a cause of action under §1415 to challenge an LEA’s failure to provide FAPE to an eligible child that may to rely, in part, on evidence that the child’s special education teacher(s) is/are not “highly qualified” as defined by law. Also, reiterate the language from the statute that there is nothing to prevent a parent from filing an administrative compliance complaint under §615(f) (3) (F) with the State that alleges that an LEA has failed to provide a child with a “highly qualified” teacher, as defined by 20 U.S.C. §1401(10).

Given the Department’s use of the regulations, in general, to restate the statutory provision, the Department’s failure to do in this instance undermines the Congress’s expressed purpose of aligning IDEA 20045 with NCLB. State and LEA efforts to comply with the “highly qualified” mandates of IDEA 2004 and NCLB are critical to closing the achievement gap for students with disabilities and these students Not Being Left Behind.

Highly Qualified and Private Schools Serving Publicly Placed Students NPRM 34 C.F.R. §300.18(g)

Proposed regulation 34 C.F.R. §300.18(g) states that “[t]he requirements in this section [highly qualified special education teachers] do not apply to teachers hired by private elementary and school and secondary schools.” Subsection (g) is overly broad and, to the extent it applies to private schools receiving public funds to educate students with disabilities who are publicly placed by the LEA or SEA, is contrary to the IDEA as well as Section 504 of the Rehabilitation Act. See 20 U.S.C. §§1410 (B)(i), (ii); 1412(a)(1)(A).

Comment/Recommendation: Modify this provision to state that the requirements of this section on highly qualified special education teachers shall apply to those teachers employed by private schools who provide special education and related services under Part B to publicly placed students with disabilities, who are entitled to the same rights and privileges that they would receive in public school..

Definition of Parent NPRM 34 C.F.R. §300.30(a)(2)

The regulations implementing IDEA 1997 narrowed the definition of “parent” to those foster parents who had an “on-going, long-term parental relationship with the child.” This language has been deleted in the NPRM and eliminates an important safeguard for children who are disproportionately poor and racial minorities.

Comment/Recommendation: Replace the language from the current regulation at 34 C.F.R. 300.20(b) (2) (2004). There seems little rationale for deleting this protection for primarily poor and disproportionately racial minority children at this time when Congress consciously aligned IDEA 2004 with the purpose and premise of No Child Left Behind and underscored through the Act its concern with over-identification of racial minority children.

Related services – exempting a surgically implanted medical device NPRM 34 C.F.R. §300.34(b)

The statutory definition of “related services” was amended to narrowly except “a medical device that is surgically implanted, or the replacement of such device.” This narrow exception does not, as stated by the NPRM limit the definition of related services to preclude either “the optimization of device functioning” or “maintenance of the device.” To the contrary, the narrow exception established by the Congress authorizes “provision of mapping services for a child with a cochlear implant” either as a related service or as part of the definition of audio logy services.

Comment/Recommendation: Consistent with the above paragraph, DELETE the language in the NPRM that exceeds the narrow exception established by the Congress. Clarify that related services, including audio logy services, as a related service, explicitly include “provision of mapping services for a child with a cochlear implant.”

Related services – school nurse services NPRM 34 C.F.R. §300.34(a)

The statutory definition of “related services” has been amended to include “school nurse services designed to enable a child with a disability to receive a free appropriate public education.” The NPRM define “school nurse services ...” but have deleted the specific definition of the broader “school health services” that is listed but now not defined.

Comment/Recommendation: Through regulation, the Department needs first, to clarify that the list of related services defined by statute, consisting of transportation and such other developmental, corrective and other supportive services, is not exhaustive. Next, the Department needs to clarify that “school health services” has not been replaced by the narrower “school nursing services designed to enable a child with a disability to receive a free appropriate public education.”

Although the term “school health services” was previously defined as “services provided by a qualified school nurse or other qualified person,” the proposed regulation while listing “school health services” has eliminated the more specific definition. This is confusing and it is important that the school nursing provision does not unduly narrow the nature or provider of school health services. Significantly, the majority of schools do not have a “school nurse” on staff, and there is well established case precedent upholding the obligation of the SEA and LEA to provide a student with health related services that are not provided by a licensed physician when necessary to benefit for a child to benefit from his/her specialized instruction, including, e.g., instruction in physical education –which may not be part of FAPE – depending upon state law. Include a definition of “school health services” as “health related services provided by a qualified person who is not a licensed physician and not a school nurse providing such services for purposes of enabling a child to receive FAPE.”

Secondary education – NPRM 34 C.F.R. §300.35

Comment/Recommendation: Clarify with respect to NCLB and use of high stakes assessment that the reference to grade 12 refers to the regular education 12th grade curriculum aligned to state academic and achievement standards established for all students enrolled in that curriculum, not as a limitation based on number of years in school for students with disabilities, nor a limitation as to the place where such curriculum may be delivered..

Universal Design NPRM 34 C.F.R. §300.43

Comment/Recommendation: CLE supports the proposed regulation.

STATE ELIGIBILITY

Eligibility for Assistance NPRM 34 C.F.R. §300.100

At 20 U.S.C. §1412(a) new language requires as a condition of eligibility that each State “submits a plan that provides assurances to . . .” The Senate Report states that the change from “demonstrates to the satisfaction of” the Secretary was made because the former had been interpreted as “requir[ing] the States to submit thousands of pages of documents” –an outcome not in keeping with the goal of reducing paperwork (S.Rept. 185, 108th Congress, 1st Sess. 14 (2003)). NPRM 34 C.F.R. §300.100 merely repeats the statutory language that has eliminated the former requirement that was seen as burdensome while offering no guidance to further the purpose of the Act, i.e., to align the statute with NCLB and to improve State or LEA accountability to parents.

Comment/Recommendation: Through regulation, clarify that policies, laws and procedures identified in the plan as evidence of compliance with the requirements of IDEA, as amended by the Amendments of 2004, shall be provided to the Secretary in electronic format and made available to the public via the respective SEA’s website.

Rationale: Sending updated documents in electronic/digital format is a simple solution to amassing a new set of documents that, in all likelihood, have already been submitted to the Secretary. Requiring submission of a complete set of state law, regulations, policies and procedures allows for federal compliance review, so as to ensure, for example, that changes necessary for state standards applicable to students with disabilities are aligned with federal standards, in particular, those under the No Child Left Behind Act that creates a single accountability system for all students.

Free Appropriate Public Education NPRM 34 C.F.R. §300.101

Comment/Recommendation: Clarify that to comply with the statutory mandates of §1412(a) (1) (A) and §1111(a) (2) (b) of the ESEA/NCLB, the proposed regulations at NPRM 34 C.F.R. §300.101 that cross references NPRM 34 C.F.R. §300.530(d) must be read in conjunction with the substantive statutory provisions of IDEA and ESEA/NCLB, not independent of the statutory provisions. This clarification may be accomplished by restating the statutory mandate found at 20 U.S.C. §1412(a) (1) (A) and the statutory definition of FAPE at 20 U.S.C. §1401(9)

Throughout the proposed regulations the Department has consistently repeated statutory language. Yet, here, when repeating the statutory definition of FAPE found at 20 U.S.C. §1401(9) would have the most significant impact, the proposed regulations are silent. This deliberate obfuscation of a statutory mandate is the reason why children with disabilities, who are already academically behind their peers, and who continue to be subject to myopic disciplinary exclusions, are virtually guaranteed that they will be left behind. The solution is simple. Repeat the statutory definition for FAPE that must by statutory mandate [20 U.S.C. §1412(a) (1) (A)] be provided ALL students with disabilities, including during suspension or expulsion. Under the statute, a “free appropriate public education” means ‘special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State education agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.’ 20 U.S.C. §1401(9); NPRM 34 C.F.R. §300.17.

Given the Congress’s clearly expressed intent to align IDEA with NCLB/Title I of the ESEA, the importance of this definition as never had more import. There is no doubt that the key to ensuring the no child with a disability shall be left behind is providing FAPE consistent with the state adopted academic content and achievement standards. 20 U.S.C. §6111(b).

Unless the Department clarifies that the plain language of FAPE means what it says at §1412(a)(1)(A) and §1401(9) -consistent with and encompassing state academic and achievement standards required by ESEA/NCLB – on the basis of current practice, innumerable students with disabilities, who are disproportionately poor and minority students, will continue to be suspended/expelled or otherwise excluded from school and **provided from 5 to 10 hours of education per week –in violation of the statutory definition of FAPE**. The Department needs to make clear to States and school districts that this limited amount of services is NOT consistent with FAPE. The regulatory requirement that students must be provided services “to the extent necessary to enable the child to appropriately progress in the general curriculum” must be read consistent with the duty to provide FAPE –i.e., consistent with the prescribed elementary or secondary education curriculum that is aligned to the State’s standards established for all students.

By not holding States and school districts accountable for providing the statutorily mandated right to FAPE that is statutorily defined as consistent with a prescribed curriculum and in accordance with the SEA’s standards, including academic and achievement standards required by NCLB, school districts have no incentive for developing IEPs that represent high expectations and the same rigorous high standards set for all other students – standards that are aligned with the curriculum, which students with disabilities must be given the opportunity to learn through provision of specialized instruction and supportive, corrective and developmental services. So long as these students are not being provided an education to enable them to meet the single set of standards established by the state and, at a minimum, to make Adequate Yearly Progress, they are not being provided FAPE.

Full Educational Opportunity - Extended School Year NPRM 34 C.F.R. §300.106

Comment/Recommendation: Through regulation, identify specific steps that each State and school district must take to implement the statutory mandate under IDEA at §612(a)(2) and (5)

to ensure that all students with disabilities are provided a full, meaningful opportunity to participate in the general education curriculum, and to learn the State and school district's standards set for all students with the sole exception of the less than 1% of all students, who are so cognitively disabled that even with the best instruction and support they are unable to make progress toward learning the standards set for all, who are to be taught to an alternate/different standard. Expressly identify extended school-year and summer school programming taught by highly qualified special educators among the steps to be taken by each LEA to ensure provision of full educational opportunity.

Comment/Recommendation: With respect to proposed regulation 34 C.F.R. §300.106(a) (2) after “Extended school year services must be provided” DELETE “only” as unduly limiting. Extended school year services ought to be perceived among those services routinely considered and provided by IEP Teams when the Team determines that such services are necessary for an eligible child to receive FAPE –particularly, with respect to meeting the State education agency standards, including those state standards adopted pursuant to NCLB/Title I of the ESEA.

Least Restrictive Environment (LRE) NPRM 34 C.F.R. §300.114

Comment/Recommendation: At proposed regulation §300.114(a) (2) (ii), DELETE the reference to “environment” in the provision stating that “Special classes, separate schooling, or other removal of children with disabilities from the regular educational *environment* occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” Replace the term “environment” with the term “classroom” which is the more explicit, limited term used in the statute. Children are expected to be taught in the “regular class” not just the general environment.

Changing the statutory term “regular class” to the term “regular educational environment” creates ambiguity when there is none based on the more explicit statutory language.

Placements NPRM 34 C.F.R. §300.116(b) (3)

Comment/Recommendation: At subsection (b) (3) of Proposed regulation §300.116(b) (3), DELETE the phrase “unless the parent agrees otherwise” as unnecessary. The presumption is that with respect to the educational placement of a child with a disability, all eligible children shall be educated in the least restrictive environment with their non-disabled peers. Parents should not be asked to waive their children’s rights. Similarly at subsection (c), DELETE the same phrase, after “[u]nless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if non-disabled...”

In the explanatory note, DOE states that this clause was added in both paragraphs to enable parents to choose to send their child to a charter, magnet or other specialized school without causing a violation of the LRE mandate. To the extent all other parents have the right to send their non-disabled students to a charter, magnet or other specialized school, parents of students with disabilities must be provided the same right. The additional language “unless the parent agrees otherwise” is misleading in that it erroneously suggests that parents can be asked to waive their child’s right to be educated with non-disabled students to the maximum extent.

Children in Private Schools NPRM 34 C.F.R. §300.118

Comment/Recommendation: Clarify with respect to children with disabilities placed in, or referred to, private schools by public agencies under 20 U.S.C. §1412(a)(10)(B)(i) and (ii) that SEAs through grants and contracts ensure that LEAs develop and implement procedures for ensuring that all such students are provided FAPE, pursuant to 20 U.S.C. §1412(a)(1)(A), through instruction and learning by highly qualified teachers who teach them so as to enable them to learn the standards expected to be met by all students who attend public schools.

Each publicly placed private school student has all of the rights of a child with a disability who is served by a public agency. NPRM §300.146(c). It is hard to fathom that this “right” does not extend to receiving publicly funded specialized instruction from a teacher who is “highly qualified” under the statute. Barring such protection, what meaning does FAPE for any child subject to disciplinary exclusion to an interim alternative education setting or other transfer to a more restrictive setting, if a publicly placed child for whom the public school is unable to provide FAPE has not right to receive instructional programming and services from ‘highly qualified’ special education teachers? What is to prevent special education from continuing to be treated as unrelated to the core academic content areas?

Comment/Recommendation: Clarify too through regulations how the State and the LEAs will be held accountable, including through the required participation and public reporting of publicly placed private school students in the state assessment, for ensuring they are taught by “highly qualified” teachers, that the curriculum being taught is aligned with the respective state’s standards, and these particular students are provided effective intervention, including through specialized instruction and related services, when needed, to close the achievement gap between these publicly placed private students in need of special education.

State Complaint Procedures

Adoption of State complaint procedures-Remedies for denial of appropriate Services NPRM 34 C.F.R. §300.151

Comment/Recommendation: The final regulation for §300.151(b) (1) should expressly add the phrase “the awarding of monetary reimbursement” from current regulation §300.660(b).

Removing the reference to monetary reimbursement makes it less likely that parents will use this complaint process to challenge parental placements of children in private schools when FAPE is at issue. This remedy is one of multiple equitable remedies that are within the discretion of the State to grant.

Minimum State Complaint Procedures NPRM 34 C.F.R. §300.152

Comment/Recommendation: At proposed regulation §300.152, DELETE new subsections (a) (3) and subpart (b) that change the nature of the compliance complaint procedure that was designed to provide a “no cost,” time-limited, mechanism for any parent, who is seeking an alternative to due process resolution of complaints, or other individual or organization seeking to file a complaint alleging a violation of Part B of the Act. DELETE language in new subsection (b) (ii) referencing agreement being made between only parents and the public agency involved. Instead retain language of current regulation §300.661(b) that makes clear that this set of complaint procedure is not limited to parents of an eligible child under this Act.

The new language gives discretion to the public agency that is the subject of the complaint to engage the parent in mediation or alternative means of dispute resolution regulations. The State complaint procedures are not limited to parents of children with disabilities. Rather, the minimum State complaint procedures, as under current regulation 34 C.F.R. §§300.661-300.662, must authorize any individual or organization to file an allegation that the requirements under Part B of the IDEA, as amended, have been violated by a public agency receiving funds under the Act.

Comment/Recommendation: ADD/RETAIN the language of current regulation 34 C.F.R. §300.662(c) that expressly requires: “any issue in the complaint that is not a part of the due process action must be resolved using the time limit and procedures described in paragraphs (a) and (b) of [34 C.F.R. §300.661 (2004)].

It is important that those issues that do not overlap with a due process complaint that has been filed under the Act are resolved through this complaint system within the mandated time limit of 60 days following the filing of the complaint. This language ensures that resolution of all the issues in a complaint will not be delayed because one or more are part of a due process hearing.

Filing a Complaint NPRM 34 C.F.R. §300.153

Comment/Recommendation: DELETE proposed regulation §300.153(c) and RETAIN current regulation 34 C.F.R. §300.662(c) that recognizes the distinction between a past non-compliance complaint and a continuing violation. In the alternative DELETE the reference to “one year”, ADD: “two years” and use the following language from current regulation 34 C.F.R. §300.662(c): ...unless a longer period is reasonable because the violation is continuing, or the complainant is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint is received.

Rationale: It is illogical for Congress to finally establish as federal policy a two year statute of limitations for due process hearings that would not apply to the low cost, alternative State complaint system that Congress sought to encourage.

Qualified Personnel NPRM §300.156

Under Title I, paraprofessional aides hired to work in programs supported with Title I, Part A funds must have a high school diploma or its recognized equivalent. Except for paraprofessionals who act as translators or conduct parent involvement activities, they must also have completed at least two years of study at an institution of higher education, possess at least an associate’s degree, or demonstrate subject-matter competence through a formal State or local assessment [Section 1119(c)-(e)]. In addition, DOE’s regulations clarify that the term “paraprofessional” applies only to individuals who provide instructional support and not to school staff who have only non-instructional duties (e.g., providing technical support for computers, providing personal care services to students, carrying out clerical functions) [34 C.F.R. Section 200.58(a)(2)].

As under Title I of ESEA, the IDEA regulations need to distinguish paraprofessionals who provide instructional support services from “assistants” and other individuals who are not

“highly qualified” related services professionals or providers and who perform non-instructional duties. There is no justification in law or policy for requiring a lower standard of qualifications for paraprofessionals engaging in instruction under Part B and part C than are required under Title I [34 C.F.R. §200.58].

The Department by failing to require “highly qualified” related services providers who meet the state standards of training and experience in their respective professions to supervise “assistants” and similarly failing to distinguish “paraprofessionals” who are knowledgeable and experienced to meet instructional related needs of children with disabilities from those who are not, and failing to require proper supervision of such “assistants” in providing non-instructional services, opens school districts to liability. Delivery of instructional or other educational related services by unqualified personnel –whether unsupervised “assistants” to highly qualified related services providers or unsupervised “assistants” to “highly qualified” paraprofessionals consistent with Title I, or to paraprofessionals under the proposed IDEA regulation who are not qualified to provide direct instruction, will constitute a constructive denial of peer reviewed, scientifically validated specialized instruction in violation of IDEA and Section 504.

Comment/recommendation: Clarify that the duties and limitations of a paraprofessional assisting in the provision of specialized instruction to students with disabilities must be consistent with those set forth at 34 C.F.R. §200.59. Instead of merely regurgitating the statutory reference to “assistants” to be used in the provision of special education and related services at 34 C.F.R. §300.156(2) (iii), clarify that States must ensure that “assistants” are properly supervised at all time, and shall not be allowed to act in place of a highly qualified related service provider or paraprofessional who minimally meets the requirements set forth in NCLB.

Participation in Assessments NPRM 34 C.F.R. §300.160

Comment/Recommendation: CLE supports all the provisions set forth in Proposed regulation §300.160.

Comment/recommendation: ADD by regulation, a provision specifying that in no case shall IEP teams (absent the participation of a qualified school psychologist or other qualified evaluator), or other school personnel be permitted to make a determination about any student, who has not previously been identified as having a significant cognitive disability and, who, even with the best instruction, is unable to make significant progress toward the achievement standards set for all, to be eligible for participation in the alternate assessment that uses different/lower achievement/ performance standards. See 34 C.F.R. §200.13(c) (1)]

Comment/recommendation: Specify through a new regulation under IDEA that when an IEP team makes a determination on the basis of an evaluation of the child in all areas of suspected disability, that a child has a very significant cognitive disability, and that even with the best instruction by highly qualified teachers, will be unable to make significant progress toward learning to high standards and based on that finding, proposes to assess the student based on alternate, academic achievement standards, *the parent must receive explicit notice in writing of that finding and the implications of the finding, i.e., that though the child may be participating to some degree, in the general curriculum, the child will not be participating with an expectation of learning the same high standards of all other children.*

Comment/recommendation: CLARIFY through regulation that an IEP team is precluded from finding a 3 year reevaluation is unnecessary for any child being assessed based on alternate academic and achievement standards. Said reevaluation must be used to review the child’s disability related needs, including whether the student, even with the best instruction, has been correctly identified as incapable of learning to the regular standards, and to consider based on any other evaluative information whether the child is, to the extent possible, being educated based on alternative standards in the general curriculum and being assessed by instruments aligned with that curriculum.34 C.F.R §200.6(a) (2) (C).

State Advisory Panel

State Advisory Panel NPRM 34 C.F.R. §300.167

Comment/recommendation: ADD: Regulatory language that encourages States to ensure that there is representation by high school and post secondary education age students with disabilities. The State Advisory panel should be an authentic source for student learning, growth, skill building and leadership development while tapping a virtual pool of knowledge and experience and expertise.

Disability remains one of the few areas in which those who are the presumed beneficiaries of a civil rights statute, here public school students, are virtually invisible with limited voice. Given the full range of disabling conditions, it is hard to fathom a reason why those who are most affected by the Act, its policies and practices, have been given so minimal a voice.

Other Provisions Required for State Eligibility

Over identification & Disproportionality – NPRM 34 C.F.R. § 300.173

Comment: CLE supports the proposed regulation clarifying through regulation new language requiring the collection of data “by race and ethnicity” shall identify children with disabilities by disability. Only by disaggregating such data by disability type and race and ethnicity is it possible to monitor over-representation and disproportionality by race and ethnicity, for example, with respect to African American students who are identified as having mental retardation or a specific learning disability and being in need of special education.

Local Educational Agency Eligibility

Early Intervening Services NPRM 34 C.F.R. §300.226

General: §300.226(a)

Comment/recommendation: Through regulation the Department needs to ADD/CLARIFY that such Part B funds for early intervening services shall not be expended on any child previously identified as having a disability and eligible for special education under Part B. This will remove any incentive to change the classification of students with behavioral needs from being identified as having a disability and thus to deny them protections and safeguards under IDEA.

Activities: §300.226(b)

Comment/Recommendation: The regulations should provide a framework for the development and implementation of early intervening services that includes the following:

- High-quality, research-based instruction and behavioral supports in general education settings;
- Scientific, research-based interventions focused specifically on individual student difficulties and delivered with appropriate intensity;

Reporting: §300.226(d)

Comment/recommendation: ADD: Requirement for supplemental information to be reported annually to the State by school, grade, race, ethnicity, and LEP status about the number of such students receiving early intervening services paid for by these funds; and, for each reporting year, by performance achievement levels, and suspension/expulsion during the year reported. Procedural protection: **ADD** provision to the effect that any parent whose child is being considered for receiving early intervention services shall be provided written notice of their rights under the Act, including the right to request an evaluation if it has not already been targeted.

State Flexibility NPRM 34 C.F.R. §300.304(f) Current law was modified to authorize “a state that provides early intervention services in accordance with Part C to a child who is eligible for services under section 619 [preschool], NOT to provide such child with a free appropriate public education.”

Comment: ADD/Clarify that parents of eligible children participating in the State’s Part C program who chose to stay in the Part C program, instead of enrolling in the Part B early education program, must give informed consent attesting to their understanding that by remaining in the Part C program, the child is not entitled to FAPE. This is especially important given that Early Intervention Services are not necessarily free and without cost.

Comment/Recommendation: ADD language requiring all LEAs to provide notice in writing, in the parents’ native language, and in the mode of communication most feasible for informing parents of children enrolled in Part C programs and/or otherwise eligible for Part B services that the LEA is required to provide and has a program for providing FAPE to those children eligible for Part B programming and services.

EVALUATIONS, ELIGIBILITY DETERMINATIONS, IEPs, AND EDUCATIONAL PLACEMENTS

Parental Informed Consent for Initial Evaluation –NPRM 34 C.F.R. §300.300(2).

Comment/recommendation: RETAIN the language from current regulation §300.505 which states that the public agency must take reasonable measures to obtain consent from the parents for the initial evaluation, for initiating services and for reevaluations.

Comment/recommendation: ADD/DEFINE: the term “informed consent.” In addition to the definition of consent under the current regulation 34 C.F.R. §300.500(a)(1), *informed* consent requires additional documentation by the agency that the parent understands the nature and

scope of the activity for which the parent is giving consent, here, the initial evaluation..

Absence of Consent for Initial Evaluation Initial Services and Effect on Agency Obligations NPRM 34 C.F.R. §300.301

Comment/recommendation: Clarify/ADD: While there are certain limited instances in which parental consent may not be required from the parent of a child who is a ward of the state, for example, if the parent cannot be found despite reasonable efforts, the parent’s rights have been terminated, or the court has subjugated the right of the parents to make educational decisions, such children are, nonetheless, entitled to have a person appointed to act as a surrogate whose informed consent to an initial evaluation must be solicited. Wards of the state must not be given less protection than other students, including those who have surrogate parents acting in their stead.

Evaluations, Parental Consent, and Reevaluations NPRM 34 C.F.R. §300.301

Comment/recommendation: CLARIFY/ADD: *unless State law prescribes a lesser period of time*, the federal standard [60 days] must as a matter of policy apply. This marks the first time that the federal law has mandated a timeframe; because it reflects a new federal policy favoring completion of multidisciplinary evaluations within a specified, limited timeframe, the federal standard should trump state laws that exceed 60 calendar days.

Comment/recommendation: ADD/CLARIFY that for a parent to *repeatedly fail or refuse to produce* the child for an initial evaluation, the LEA must consistent with its obligation under the Act, be able to document that it has initiated several attempts to engage the parent, identify obstacles, whether confusion, fear, or impediments such as lack of transportation, childcare, etc., to bring the child to the site of the evaluation. The LEA cannot be passive; the LEA must make repeated efforts to connect with the parent, to address the parent’s fears or concerns, to ensure that the parent has ample opportunity to learn and be informed about the evaluation process so the parent’s decision to give or deny consent to the child’s being evaluated is, in fact, an informed decision.

Comment/recommendation: ADD/CLARIFY that any LEA not conducting a reevaluation at least every 3 years must justify in writing a decision not to do so ---especially if there is evidence based on a report of the student’s performance with respect to the state’s achievement standards that the student has not yet learned the knowledge and skills expected of all other students.

Comment: Require those LEAs and other publicly funded agencies providing direct services to students to report to the State the number of students with disabilities who qualified for, but were not given a 3 year re-evaluation.

Evaluation Procedures, Conduct of Evals, Additional Requirements NPRM 34 C.F.R. §§300.304-300.305

Comment/regulation/recommendation: ADD/Clarify that when the State is required to assess all students with disabilities using a variety of assessment instruments, each which has

been properly validated for its particular use, and is reliable, the assumptions being made about the tests and the tests results – i.e., the chain of inferences regarding how the tests are to be used – is articulated, and each of the important inferences that will be drawn from the tests and the test results is carefully identified, including of course the overall inference that the test results accurately tell us that the individuals being tested have or lack certain relevant qualifications; the evidence supporting each inference is carefully gathered, presented, analyzed, and weighed, and evidence that would call into question the accuracy of each inference is similarly identified and taken into account.

Comment/recommendation: ADD/Clarify that the obligation or burden is on the State or LEA using the tests in a certain way to validate that particular use, through the process above. Add clarification that the fact that a test may be valid for one purpose does not automatically make it valid for other purposes.

Comment/recommendation: ADD/Clarify that despite the exception to the 60 calendar day requirement being applied when a student with an evaluation pending transfers from one district to another, there is a clear mandate to facilitate and expedite completion of an evaluation for eligibility for special education within the 60 calendar day period.

Additional Procedures for Evaluating Children with Specific Learning Disabilities NPRM 34 C.F.R. §§ 300.307-300.311

SPECIFIC LEARNING DISABILITIES

Comment/recommendation: Clarify/Modify the provision at proposed regulation 34 C.F.R. §300.304(a) (1) authorizing a State to *prohibit the use* of the severe discrepancy model, to require the Team to consider all relevant evaluation data provided. The weight of the evidence should be left to the Team based on factors such as nature and type of evaluation, qualifications of evaluator, outcome data compared to other data. .

Comment/Recommendation: Clarify that a student shall not per se be found ineligible for having a specific learning disability because the student either did not respond to a “scientific, research –based intervention” because he or she was not provided an adequate opportunity to respond to such an intervention.

Comment/Recommendation: Clarify how long students must fail to make significant improvements after receiving research-based intervention strategies, before they are then categorized as having a specific learning disability and become eligible for individually designed special education services. ADD/CLARIFY a maximum timeline for allowing the scientific research strategies to prove they are making an impact on the individual student’s performance. Once a student’s performance has not improved after that period of time, the student will be assessed for eligibility for special education services.

Comment/Recommendation: at NPRM 34 C.F.R. §300.309(b)(1) the group responsible for determining eligibility for SLD, is required to consider data that demonstrates whether the child was provided appropriate high quality research based instruction in regular education settings, whether the instruction was delivered by qualified personnel and whether data based documentation of repeated assessments was provided to parents. Clarify what is the legal basis for providing those elements of learning if the student is determined not to be eligible for e

special education. If the student has not provided such teaching and instruction what is the premise that such services will be provided instead of specialized instruction?

Individualized Education Programs (IEPs) NPRM 34 C.F.R. §§300.320-300.328

IEPs Defined –NPRM 34 C.F.R. §300.320

Comment/recommendation: Clarify that benchmarks and short term objectives” continue to be required for “children with disabilities who take alternate assessments aligned to alternate achievement standards”

While the 1% cap only applies to the number who can be counted for purposes of showing AYP of those students with significant cognitive disabilities who take the alternative assessment based on alternate achievement standards, clarify that the number of these students should, nonetheless, be limited.

Comment/recommendation: Clarify that these students who have significant cognitive disabilities, must have been determined through the use of valid and reliable assessments, to be unable, even with the best instruction, to make progress toward the regular achievement standards, and thus, determined by their IEP teams with the consent of their parents to be taught and assessed based on alternate achievement or performance standards.

Comment/recommendation: Clarify how the child’s progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided. Presumably under Section 504, “the periodic reports are provided at least as often as progress reports for regular education students are provided.”

Comment/recommendation: Because the annual goals for all but those students with the most significant cognitive disabilities must by definition be aligned with the achievement standards set for all, clarify that LEAs through the progress reports must indicate the student’s performance based on those standards, and “*the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year*” so that the parent and members of the IEP team can assess the outcomes and determine what, if any, additional specialized instruction, related services, or other interventions will be necessary to enable the student to meet the annual goals.

Comment/recommendation: The Department needs to clarify that failure of the LEA to identify “peer reviewed research” shall not be used to deny provision of specialized instruction and related services that members of the IEP team determine are necessary to enable an eligible student with a disability to learn.

Comment/Recommendation: Clarify that the failure to identify peer reviewed research and to offer evidence of a child’s meaningful progress in learning to the state’s standards, shall constitute evidence that the child is not being provided FAPE and may require compensatory education.

Comment/recommendation: At NPRM §300.320(b) (2), DOE should retain language in the

current regulation at 34 C.F.R. §300.347(b) (1) that specifically refers to the student’s transition service needs under the IEP that focus on the student’s courses of study “(such as participation in advanced placement courses or a vocational education program)” and, if appropriate, a statement of the interagency responsibilities or any needed linkages. The language is important in underscoring how specialized instruction follows a student to regular classes, including advanced placement classes. Especially in light of the Congressional intent to align IDEA with the high standards of NCLB, this sole reference in the statute and regulations to students with disabilities participating in high quality programs should be retained.

Comment/recommendation: Proposed regulation §300.320(d) merely repeats the Rule of Construction regarding provisions in the IEP, [i.e., §614(d)]. DOE should CLARIFY that nothing in the provision limits a State from adding its own mandatory components of the IEP, especially given the purpose and intent to align IDEA with NCLB, if the State components are consistent with §608(b), i.e., “designed to enable children with disabilities to meet the challenging State student academic achievement standards.”

IEP Team Participants-Transition services

Comment/Recommendation: Proposed regulation §300.321 (b)(3) should include the following language from the current regulation: “If an agency invited to send a representative to a meeting does not do so, the public agency shall take other steps to obtain participation of the other agency in the planning of any transition services.”

Development of IEP

Development, Review and Revision of IEP NPRM 34 C.F.R. §300.324

Comment/recommendation: Clarify that when any change is proposed to amend an IEP by either the entire IEP Team or, through agreement by the parent and the public agency who decide not to convene an IEP meeting for the purposes of making the changes, the parties may develop a written document to amend or modify the child’s current IEP. However, DOE must clarify that any proposed change to the IEP requires written notice of the proposed change pursuant to NPRM 34 C.F.R. §300.503(a)(1) to the parent who must also be informed of the right to receive a full copy of the revised IEP with the amendments incorporated.

Alternative Means of Meeting Participation NPRM 34 C.F.R. §300.328

Comment/Recommendation: CLARIFY that this provision shall be used only when necessary and in general, as necessary to hold multiple IEP meetings. DOE should underscore that given the few required members necessary to attend a child’s IEP meeting that an annual in person meeting is important, especially given the emphasis on improving teaching and learning so that all these students also attain proficiency and No Child Is Left Behind. Through the regulation DOE should CLARIFY the importance of a in-person meeting to share knowledge and information about what each partners knows about a struggling child’s ability to learn; and should reinforce the use of the IEP as a critical tool for ensuring that all students learn to high standards through specialized instruction and supportive services provided by highly qualified school based teachers. To the degree the IEP is viewed as a meaningless tool, it is being misunderstood and inappropriately used in this critical era of standards-based education.

PROCEDURAL SAFEGUARDS

Due Process Procedures for Children and Parents

Parent participation in meetings NPRM 34 C.F.R. §300.501(c)

Comment/Recommendation: Retain the language in 34 C.F.R. § 300.501(c)(4) (2004) of the current regulation that requires the public agency to keep detailed records of telephone calls, correspondence and visits to document its attempt to ensure parental involvement in meetings. Congress has placed great emphasis on parent participation in educational decisions. The regulations should be clear about the lengths to which the public agency is expected to go to obtain the parent participation in a placement decision before the decision can be made without the involvement of a parent.

This is an area where an argument about paperwork burden must be balanced against the importance of parental involvement. Given the purpose and intent of this reauthorization, namely to close the gap for students with disabilities by aligning IDEA with NCLB, and the educational research attesting to the connection between parent involvement and improved achievement, the balance must go in favor of the parents.

Comment/Recommendation: The language at subsection (c) (5) of the current regulation at 34 C.F.R. §300.501(2004) should also be retained in NPRM 34 C.F.R. § 300.501(c). The current regulatory provision requires the public agency to make reasonable efforts to ensure that the parents understand, and are able to participate in, any group discussions relating to the educational placement of their child, including arranging for an interpreter for parents with deafness, or whose native language is other than English. Such understanding and comprehension is critical to parents being able to provide informed consent in those instances in which it is required.

Procedural Safeguards Notice - NPRM 34 C.F.R. §300.504

A number of changes were made to the requirement regarding the procedural safeguards notice.

Comment/recommendation: CLARIFY that a parent shall be informed of their right to request and to receive a copy of the procedural safeguards notice at any time during the school year.

Comment/recommendation: If an LEA chooses to place a current copy of the procedural safeguards notice on its Internet website, CLARIFY that such placement shall not be used as a substitute for making the full procedural safeguards notice accessible to all parents, including those who do not have access to the Internet.

Filing a Due Process Complaint –Timeframe NPRM 34 C.F.R. §300.507

According to a change in the statute, a complaint must set forth an alleged violation that

occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint or, if the state has an explicit time limitation for presenting such a complaint, in such time as the state law allows, except that the exceptions to the timeline related to due process hearings shall apply to this timeline.

Comment/Recommendation: The Department must CLARIFY that the state law shall apply only if state law provides for a period that exceeds the federally mandated 2 year period for a party to file a complaint. This is especially important now that the federal statute has established a two year time period from the date the complaining knew or should have known of the alleged violation because otherwise where the amended statute has created a 15 day period for the complainant to file a complaint challenging the sufficiency of the complaint, a 5 day period for the State hearing officer to make a determination as to the sufficiency of the complaint, a 30 day resolution session.

Where the Congress has now established an explicit federal standard to govern causes of action brought under this federal Act, authorizing the rights and protections of children and their parents to be determined state to state raised basic issues of fairness and equity given that some states have statutes of limitation of 120 days, 6 months, and one year. Different and limited state time frames when read in conjunction with the new federally mandated process for completing the due process hearing can lead to harsh and inequitable results for individuals in states with short timeframes. As a matter of public policy, no state statute of limitations should apply that would be less than the federally established 2 year period for bringing a complaint under IDEA.

Comment: CLE supports the phrase “knew or should have known” of the alleged violation as it is consistent with actions brought under 42 U.S.C. §1983.

Comment/Recommendation: DOE also needs to clarify through regulation that the timeline is *tolled for purposes of the statute of limitations* upon either party serving a due process complaint notice upon the other with a copy to the SEA. It is important to establish this point because time will be lost if a complaint is challenged as insufficient, whether or not it is found insufficient. In the event that it is found insufficient, the complaining party will be required to correct the notice and resubmit. There is reason for further confusion given that there is no right to a due process hearing until the party, or the attorney representing the party, files a notice that meets the specificity requirements, including sufficiency, and a resolution session of 30 days that can, to some extent, be manipulated by the other party. .

Resolution Session NPRM 34 C.F.R. §300.510(a) (1) (i)

A new provision was added to the law requiring the convening of a resolution session.

Comment/recommendation: CLE supports the proposed regulatory provision requiring that one of the relevant members of the IEP Team includes a representative of the public agency who has decision-making authority on behalf of that agency.

Comment/recommendation: Clarify through regulation that when the LEA convenes a meeting with the parents and the relevant member or members of the IEP Team, who have specific knowledge of the facts identified in the complaint, that the parents participate in

selecting the so-called “relevant” members of the IEP team to participate in the resolution session.

Comment/recommendation: DELETE proposed regulatory language and modify to clarify that with respect to the mediation process while the goal of the parties is to enter into a legally binding agreement, such determination is a matter within the jurisdiction of any state court of competent jurisdiction or a district court of the United States. Two signatures on a document do not meet the criteria for a legally binding agreement. Saying it is so doesn’t make it so.

Comment/recommendation: The Department needs to underscore that where the parties have executed an agreement in writing, either party may void the agreement within 3 business days of the agreement’s execution. The Department needs to further clarify that failure to void the agreement does not override the independent jurisdiction of a court of law to void an agreement that is not binding on its face because it is unconscionable or does not represent a meeting of the minds. Furthermore, the Department ought to consider extending the timeframe for voiding the purported agreement when there are extenuating circumstances, for while school districts have access to counsel, who are often on retainer or are municipal counsel, parents are much less likely to have ready access to counsel, and 3 days is unrealistic as no attorney concerned about liability issues where a parent has represented themselves at a resolution session without counsel, is going to sign off without full review of the record. Failure to identify such realities will result in limited use of the resolution session, as parents will most likely seek mediation.

Timeline for Filing a Complaint Requesting Hearing – NPRM 34 C.F.R. §§ 300.508, 300.511

Comment: DOE should clarify that the statute of limitations that applies when a party files a notice of a due process complaint under Section 615(b) is the same two year statute of limitations that applies to a request for a due process hearing under Section 615(f)(3). The statute and the proposed regulations are confusing because they separately set out two 2 year statutes of limitations as if they are independent for filing a complaint and for filing a request for a due process hearing. DOE must CLARIFY that the notice of a due process complaint is the same document that triggers the request for due process hearing after the failure to resolve the complaint through a resolution session or mediation. Therefore, there can be no question but that the two year statute of limitations is tolled with the filing of the notice of complaint [that seeks a due process hearing] at Section 615(b). This means that when a party files a notice complaint within 2 years of the date the parent or agency knew or should have known about the alleged action, the time stops running and that filing also acts as the filing for the request for an administrative due process hearing that might ultimately be necessary to resolve the subject matter of the due process complaint.

Comment/recommendation: Clarify that filing a due process complaint tolls the statute during any challenge to the sufficiency of the complaint, the resolution session, if any, and the mediation and administrative due process hearing, if necessary, .and/or resolution of any challenge to the sufficiency of the complaint

Comment/recommendation: Clarify that if the state has an explicit time limitation for requesting a hearing, state law applies only if the timeframe is greater than the 2 year period.

This must be the result, for otherwise the results would be most inequitable.

Decision of Hearing Officer – NPRM 34C.F.R. § 300.511(d)

Comment: Clarify that consistent with Section 615(b), 20 U.S.C. §1415(b)(6), a party may file a due process notice complaint seeking an administrative hearing about any matter pertaining to the identification, evaluation, educational placement or provision of FAPE.

Comment: Clarify that consistent with the statute at §615(b) (1), 20 U.S.C. §1415(b) (6), the hearing officer must be able to render a final decision on any such matter pursuant to §615(i) (1) (A).

Comment/recommendation: Clarify that when a complaint raises procedural issues pertaining to the denial of FAPE, the HO must make a substantive determination of whether the child received FAPE, and may find that a child did not receive FAPE only if the procedural inadequacies:

- Impeded the child’s right to FAPE,
- Significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of FAPE, and
- Caused a deprivation of educational benefits.

Comment/recommendation: Clarify that nothing in subparagraph (3) (iii) of 20 U.S.C. 1415(f) shall be construed to preclude a hearing officer from ordering an LEA to meet the procedural requirements set forth in §615.

Limitation on Right to Bring Civil Action - §615(i) (2), NPRM 34 C.F.R. §300.516(b)

For the first time the federal statute has been expressly amended to limit the right of a party to bring a civil action within 90 days of an administrative decision being issued in writing. Where a federal policy has been established state law shall only apply if it exceeds the protection provided by federal law.

Comment/recommendation: The Department needs to clarify that the party bringing the action shall have 90 days from the date of the written decision of the hearing officer to bring such an action or if the state has a time period for bringing such civil action that *exceeds* 90 days, state law shall apply.

Award of Attorneys Fees - §615(i) (3) (B)

Comment/recommendations: The Department needs to clarify that Sections 615(i) (3) (B) (I) (II) and III) seek to codify the standards set forth in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). Based on the holding of *Christiansburg*, attorney’s fees may only be awarded to defendants in actions where the plaintiffs’ claims are frivolous, without foundation or brought in bad faith. [Since both school districts and parents can bring complaints, the

principles of Christiansburg should not only apply in favor of school districts.]

Discipline Provisions

Authority of School Personnel NPRM 34 C.F.R. §300.530

Changes made to the provisions related to the authority of school personnel include provisions authorizing school personnel: to consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct to “remove” a child with a disability [instead of order a change in placement] “who violates a code of student conduct from their current placement” for not more than 10 school days to the extent such alternatives are applied to children without disabilities.

Case-by-Case Basis, 20 U.S.C. §1415(k) (1) (A); NPRM 34 C.F.R. §300.530(a)

Comment/recommendation: The Department needs to CLARIFY that this provision authorizing school officials to act on a “case by case basis” does NOT give carte blanche to school officials, whose authority is otherwise expressly limited by statute not to sanction a child with a disability, whose conduct is a manifestation of disability, except when the child’s conduct involves possession or use of dangerous weapons, controlled drugs, or bodily injury to others.

Comment/recommendation: CLARIFY that this authorization to school personnel to act on a “case-by-case” basis, shall be read as a grant of discretion to school administrators to utilize professional and educational judgment NOT to order a “change in educational placement” of a student with a disability, who has violated a student code of conduct for a period in excess of 10 days cumulatively or consecutively because, e.g., there may be extenuating circumstances or removing the student from his/her placement is not in the child’s educational interest, and for whom a manifestation of behavior related to disability was not found.

This interpretation is consistent with the amendment to the Gun Free School District in which the Congress gave Superintendents to act as professionals and to exercise discretionary judgment as opposed to applying ‘zero tolerance’ and imposing extreme and unjust sanctions.

Change in Educational Placement –exclusion in excess of 10 consecutive school days or a pattern of suspensions that exceed 10 cumulative school days. 20 U.S.C. §1415(k) (1) (B), NPRM 34 C.F.R. §300.530(b)

Comment/recommendation: CLE supports the NPRM 34 C.F.R. §300.530(b) that Clarifies that consistent with §615(k) (1) (B), a ‘change in educational placement’ consists of an exclusion from school for more than 10 school days in the school year. See also §615(k) (1) (C); NPRM 34C.F.R. §300.530(c). ..

Comment/recommendation: CLE supports this provision that clarifies that while the regulations are specific, providing that these suspensions may last up to 10 consecutive school days, they also recognize that a series of suspensions that are each less than 10 days, when taken together, may constitute a pattern of exclusion requiring that they be treated, for purposes of rights under the Act, as a single, continuous suspension, This provision also states that where such a pattern exists, the upper limit on suspension without a manifestation

determination is 10 cumulative school days.

Consider clarifying that as soon as school authorities decide to initiate a suspension or exclusion of more than 10 consecutive school days, a suspension that would include the 11th cumulative suspension day in a school year where a pattern exists, or an expulsion, the school authorities must notify the student's parents, give them written notice of all procedural and substantive safeguards available to them and their child.

A manifestation determination must be held no later than within 10 days of the school district's decision to take disciplinary action, conduct a manifestation review of the relationship between the student's behavior at issue and the child's disability, and determine whether the behavior is a manifestation of the child's disability.

Even though school authorities may remove (without triggering IDEA protections) a student with a disability who violates a code of student conduct from her current placement for not more than 10 school days to the extent such sanction is applied to students without disabilities, consider clarifying that ALL students still must be provided their basic due process procedures.

Additional Authority - §615(k) (1) (C); NPRM 34 C.F.R. §300.530(c)

Comment/recommendation: CLE supports subsection (c) that clarifies that school personnel may seek a 'change in placement' that exceeds 10 school days if the student's behavior at issue that gave rise to the school code violation is determined not to be a manifestation of the child's disability.

Comment/recommendation: Clarify that in such case, the student is subject to the same disciplinary procedures applicable to children without disabilities "and for the same duration" except the student with a disability must continue to be provided FAPE under §612(a) (1) (A) during the period of any exclusion from his last educational placement, "although [FAPE] may be provided in an interim alternative educational setting."

Comment/recommendation: Consider clarifying that in such instance as described in the above paragraph, that school officials have the authority to act on a "case by case" basis NOT to initiate the change in educational placement procedures.

Services - § 615(k) (1) (D); NPRM 34 C.F.R. §300.530(d)

CLE supports this regulatory provision that more clearly sets out in one section the continuing obligation of school personnel to provide FAPE to those students with disabilities who have been properly removed from their current educational placement whether for up to 45 school days irrespective of whether the behavior was found to be a manifestation of disability for carrying or possessing a weapon at school, on school premises, or at a school function; knowingly possessing or using illegal drugs, or selling, soliciting the sale of a controlled substance at school, on school premises, or at a school function; or who has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function; or who were removed for a period of in excess of 10 school days where there was no evidence of a pattern or change of placement, and for those students who violated the school code, were excluded after failing to demonstrate manifestation determination. As recognized by

Subsection (k)(1)(D) of §615, and subsection (C), these students who are removed from their current educational placement (irrespective of whether their behavior is or is not a manifestation of their disability) must “continue to receive educational services,” consistent with FAPE as required by §612(a)(1)(A), “so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child’s IEP...”

Comment/recommendation: Clarify that under the statute and subsection (d) of NPRM §34 C.F.R. 300.530, the requirements must all be read consistent with the overriding statutory mandate to provide FAPE under §612(a)(1)(A) and as defined by §602(9). [Under prior law, the Department obfuscated the statutory mandate to provide FAPE consistent with state educational agency standards by promulgating regulations that it construed to authorize provision of limited educational services and encourage fragmentation of services “to make progress in the general education curriculum” and advance toward achievement of individualized education program goals –as if separate from the mandated provision of FAPE consistent with state educational agency standards.]

Congress has expressly integrated the requirements that these students shall continue to receive educational services consistent with §612(a)(1)(A), the mandate to provide FAPE, (defined as consistent with the State education agency’s [academic and achievement] standards, prescribed curriculum, in accordance with the IEP) “so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child’s IEP...”

Comment/recommendation: Clarify that these components must be integrated and read consistent with the statutory mandate of §612(a)(1)(A) [and CANNOT be read, as current practice, divorced from the mandate to provide FAPE as defined by statute].

This obfuscation of the statutory mandate and failure to require implementation of FAPE during the period of any exclusion from school for in excess of 10 school days is one of the primary reasons that thousands of students with disabilities continue to be inappropriately and inadequately educated, and left behind. Thousands of children with disabilities are sent home – euphemistically, the “interim alternative education setting” – and provided 5-10 hours of education per week based on school authorities misinterpreting the requirement to provide FAPE as authorizing fragmented and isolated services.

Comment/recommendation: Clarify that States and school districts shall be held accountable for providing the statutorily mandated FAPE that is statutorily defined as consistent with a prescribed curriculum and in accordance with the SEA’s standards under 20 U.S.C. §1412(a)(1)(A) including State academic and achievement standards required by NCLB.

Only through such accountability will school districts have an incentive to develop IEPs that represent high expectations for teaching and learning the same rigorous high standards set for all other students – standards that are aligned with the curriculum, which students with disabilities must be given the opportunity to learn through provision of specialized instruction and supportive, corrective and developmental services.

Placement during Appeals § 615(j); NPRM 34 C.F.R. §300.533

Comment/recommendations: To mitigate harsh and unintended consequences, in particular, disruption of an innocent child’s educational program, resulting from the elimination of a student’s right to “stay put” while his/her parent challenges her wrongful exclusion or a school district’s finding of “no manifestation,” or inappropriate placement of child in an interim educational setting, the Department needs to identify affirmative steps that the State and the LEA shall take to fulfill their responsibilities for ensuring that any child who is placed in, and [barring an agreement of the school and parent], remains in, the interim alternative educational setting pending an appeal, receives FAPE – consistent with state education agency standards, so as not to fall behind his peers, and to be prepared to meet the content and achievement standards expected to be met by all other students.

Comment/recommendations: CLARIFY that students placed in IAES must be provided FAPE. Barring provision of FAPE, disciplinary exclusion is virtually a guarantee that students will continue to fall behind. ADD: after “.” The SEA must ensure that all IAES are able to provide students FAPE pursuant to 20 U.S.C. §1412(a) (1) (A), and effective teaching to prepare them with the knowledge and skills they need to learn to transition back to the regular public school. Without affirmative mitigation of the harm, there is little recourse for a student who is wrongly excluded for so-called “code violations” other than compensatory education after the fact.

Manifestation Determination §615(k) (1) (e); NPRM 34 C.F.R. §300.530(e)

Comment/recommendation: *Expressly* underscore by regulation that the requirement to examine “all *relevant* information in the child’s file, including the child’s IEP,” requires a review of the child’s IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were appropriate and being provided consistent with the IEP and placement.”

Comment/recommendation: Clarify too that “all relevant information in the child’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents” must consider whether the child’s disability impaired the ability of the child to understand the impact and consequences of the behavior subject to the disciplinary action.

Comment/recommendation: Given the stakes for children with disabilities, who, as a subpopulation group, are already well behind their peers without disabilities, the Department needs to promulgate through regulation that “relevant members of the IEP team” shall, for purpose of the manifestation determination, include “qualified persons with specialized knowledge of the child and the child’s disability.”

Determination that Behavior Was A Manifestation §615(k) (1) (F); NPRM 34 C.F.R. §300.530(f)

Comment/recommendation: Clarify that even if a child’s conduct is determined NOT to be a manifestation of disability, the IEP team in determining how the student will be provided FAPE in an appropriate interim alternative educational setting, must at least consider, whether to conduct a functional behavioral assessment and implement a behavioral intervention plan for such child (provided that a previous assessment has not been conducted) through the student’s modified IEP.

Appeal, Authority of Hearing Officer §615(k) (3); NPRM 34 C.F.R. §300.532

Comment/recommendation: Clarify through regulation that the Hearing Officer in making such determination must find that the public agency has demonstrated based on a preponderance of the evidence standard that maintaining the current placement of such child is substantially likely to result in injury to the child or to others; considers the appropriateness of the child’s current placement; considers whether the public agency has made reasonable efforts to minimize the risk of harm in the child’s current placement, including the use of supplementary aids and services; and determines that the interim alternative educational setting meets [specified] requirements...”

Comment/recommendation: Clarify that a parent who has filed an appeal under the Act is not seeking a change in placement subject to §615(k)(3)(B)(2), but the child’s return to his/her last lawful placement based on the school authorities’ wrongful decision in any matter concerning the alleged code violation, placement, or denial of manifestation.

Placement during Appeals §615(k) (4); NPRM 34 C.F.R. §300.533

Comment/recommendation: Given the known and serious consequences of students with disabilities whose heightened levels of school failure, drop-out rates, poor graduation rates, and unemployment are well documented, the Department ought to consider identifying alternatives to use of school exclusion, suspension and expulsion to mitigate the foreseeable harm to this vulnerable population of having their educational programs disrupted. Now is not the time to make it easier for schools to remove this population from school.

Comment/recommendation: Given the serious extension of time that a student is excluded from his/her educational placement, the Department should press States and school districts to high standards for implementation of the right to FAPE consistent with state academic content and achievement standards..

Change of Placement for Disciplinary Removals NPRM 34 C.F.R. §300.536

Comment: ~~DELETE~~ provision as redundant and the phrase at subsection (a) (2) “is substantially similar to the child’s behavior in the incidents” **as having no foundation in the statute.** Subpart (2) would read as follows: Because the child’s behavior taken cumulatively is determined, under §300.530(f) to have been a manifestation of the child’s disability; and ...”

In defining the term “change of placement” there is no basis in law for the deleted language that unduly narrows the criteria to be considered in determining whether there is a manifestation. The deleted language is not supported by the amended statute, and it is inconsistent with the statutory and regulatory provisions governing the manifestation determination at 20 U.S.C. §1415(k) (E); NPRM 34 C.F.R. §300.530(e)