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## **OSEP's Interpretation of a "modified" concept of FAPE for disciplinary removals for more than 10 school days**

In its commentary accompanying the 2006 final IDEA regulations, OSEP included an extensive discussion with respect to its interpretation of section 615(k)(1)(D)(i) of IDEA 2004 as "modifying the concept of FAPE" for students who are removed from their current placement for more than 10 school days for disciplinary reasons. OSEP stated that "while children with disabilities removed for more than 10 school days in a school year for disciplinary reasons must continue to receive FAPE, we believe the Act modifies the concept of FAPE in these circumstances to encompass those services necessary to enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child's IEP." 71 Fed. Reg. 46716. Moreover, the Department explicitly commented: "An LEA is not required to provide children suspended for more than 10 school days in a school year for disciplinary reasons, exactly the same services in exactly the same settings as they were receiving prior to the imposition of discipline." *Id.*

In contrast to OSEP's interpretation, there is nothing in the statute to suggest that students who are removed from their current educational placement should receive a "modified" concept of FAPE. To the contrary, section 615(k)(1)(D)(i) of the Act explicitly references section 612(a)(1)(A), which states that FAPE must be provided to all students with disabilities residing in the State, aged 3-21, including students who have been suspended or expelled from school. FAPE is defined in section 601(9) as special education and related services that, *inter alia*, "meet the standards of the State educational agency" and "are provided *in conformity* with the [child's IEP]." The Department's interpretation of a "modified" concept of FAPE with respect to 34 C.F.R. § 500.530(d)(1)(i) is most detrimental to low-income students and students from racial/ethnic minority backgrounds. Research has long shown that students with disabilities and students of color, in particular African American males, are overrepresented in disciplinary exclusions. The Department's decision that these students are entitled to only a "modified" version of FAPE opens the door for LEAs to provide them with limited services, thereby denying these students the opportunity to meet state standards.

**Recommendation: Reverse OSEP's interpretation that IDEA "modifies" the provision of FAPE with respect to students who have been removed from their current educational placement for more than 10 school days for disciplinary violations.**

OSEP erroneously concluded that, although section 1412(a)(1)(A) of the statute requires the provision of FAPE to students who have been suspended or expelled, the use of the phrase "continue to participate in the general education curriculum" in section 615(k)(1)(D)(i) means that these students are entitled to merely a "modified" concept of FAPE. The 2006 regulation at 34 C.F.R. § 300.530(d)(1)(i) represented a change from the prior language found at 34 C.F.R. § 300.522(b)(1) (1999), which had stated that an interim alternative educational setting in which a child is placed must "enable the child to continue to progress in the general curriculum." In response to public comments that the shift from "progress" to "participate" represented a lower standard, the Department noted that it believed that the statute's use of the word "participate" in section 615(k)(1)(D)(i) signifies a different relationship to the general education curriculum for children who are removed for disciplinary reasons than for services that children receive through their regular IEPs in section 614(d)(1)(A)(i)(IV). 71 Fed. Reg. 46716. As described above, the Department's conclusion that students who are removed for more than 10 school days for disciplinary reasons are entitled to only a "modified" version of FAPE (i.e., special education and related services that meet state standards and are provided in conformity with the student's IEP) has no basis in the language of the statute and should be reversed.