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by electronic mail (comments@ed.gov)
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U.S. Department of Education
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Washington, DC 20202-2641

Re: Comments on IDEA-2004

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## Introduction

The Council of Parent Attorneys and Advocates (COPAA) is a nonprofit organization of attorneys, lay advocates, and parents who work to secure appropriate educational services for children with disabilities. Some lawyers and lay advocates are in private practice; others work for nonprofit public interest groups and organizations. COPAA members see the successes and failures of special education and the Individuals with Disabilities Education Act (IDEA) through thousands of eyes, every day of every year. Some of us are new to the system and work to improve the life of a single child. Others have years or decades of experience working for and with hundreds of children.

This year marks the 30th anniversary of the IDEA, the main law protecting the civil rights of children with disabilities, including the rights to a free appropriate public education (FAPE) and to be educated with their non-disabled peers to the maximum extent possible. The Department of Education's regulations must ensure that all of the rights given to children by the IDEA are protected. The regulations must preserve the strong voice and role parents play in their children's lives, including advocating for their children with the assistance of counsel and advocates as necessary. They must preserve the strong procedural safeguards in Section 615. They must preserve IEPs that provide specially-designed instruction to meet the unique needs of the child with related and supplementary services. The regulations should further IDEA 2004's goals: to improve educational outcomes for children with disabilities and to strengthen accountability. Attempts to lessen accountability and weaken educational outcomes in the name of paperwork reduction should be rejected. The regulations must preserve the level playing field for parents and educators that IDEA has created, so that children receive appropriate educations--not weak, ineffectual ones.

Parents want to collaborate with teachers in planning their child's education. Negotiations successfully resolve most disputes; due process hearings are rare. Yet, even now--three decades after IDEA was enacted--there are many children with disabilities nationwide who are denied their right to a free appropriate education, or whose other rights under IDEA are violated. A majority of states have failed to implement IDEA and are out of compliance with its most basic, essential requirements. The IDEA is designed to ensure that children are not deprived of educational opportunity because schools fail to hold up their end of the bargain. As Senator Judd Gregg, then Chair of the Senate Health Education Labor and Pensions Committee, recognized, "We do not want to discourage parents from seeking redress when they believe their child is not getting what is promised under IDEA." Critical to IDEA is its enforcement scheme, and the right of parents to bring an IDEA enforcement action when the school district has violated this vital federal law. The regulations must protect the rights and procedural safeguards related to this enforcement. School districts should not be able to engage in arcane, hyper-technical manipulations of the new due process procedures to deprive children of FAPE, their due process and 615 rights, or any other rights under the IDEA.

In promulgating the IDEA 2004 regulations, the Department should be guided by the IDEA's first two purposes: "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." Sec. 601(d).

**Sec. 602(23) – Foster Parent.** New section 602(23) defines parent to include foster , as well as natural and adoptive parents. It is not clear whether all foster parents may serve as parent, even if the birth/adoptive parent still has rights, and even if the foster parent is short-term or even temporary. The

regulations should make clear that a foster parent may act as the parent only if the foster parent has a long-term, ongoing relationship with the child; he/she has no conflict of interest with the child; and the birth or adoptive parents' educational rights have been terminated. These are the requirements of the current 34 C.F.R. §300.20(b). Retaining the regulation would clarify the priority between natural/adoptive parents and foster parents. It would ensure that foster parents must have, or plan to have, a long-term relationship with the child in order to get educational decision-making authority. Giving temporary and short-term foster parents this authority would risk creating disruption in the child's educational program as foster parents change. Moreover, retaining the regulation will make clear which foster children are "wards of the State" in need of a surrogate parent under 615(b)(2)(A) and (B).

**Sections 615(b)(2) and 639(a)(5) – Appointment of Surrogate Parents.** As amended, the IDEA will allow judges overseeing a child's care, as well as LEAs (or SEAs) to appoint surrogate parents. Current regulations establish standards for appointment of surrogates, which should be retained. In addition, because the law requires states to adopt "procedures to protect the rights of the child" when the parent is not known, cannot be located **OR** the child is a ward of a state, the Department should clarify that the parent retains all rights provided to parents under this Act unless and until the parent knowingly and voluntarily waives those rights or they are extinguished by a court. However, it is essential to protect children in state abuse and neglect systems, whose needs too often go unmet when their IDEA rights are not pursued by their parents. In such cases the children have guardians, guardians ad litem or other representatives appointed, and the regulations should clarify that they can exercise parental rights. Therefore, federal regulations should specify that if a child is (a) in the neglect/abuse system (b) the parent of that child is not exercising the rights afforded parents under the IDEA and (c) a guardian, guardian ad litem, or other individual has been appointed by a court to represent the best interests of the child, that guardian or other such appointee may exercise the parent's rights under the Act if he or she determines that it is in the best interests of the child to do so. To further protect parents, the regulations should specify that the guardian or other appointee who exercises any right granted to a parent must provide actual notice to the parent, parent's counsel, parent guardian, or other individual appointed by a court to represent the parent.

**Sec. 607(b) – Preserving Regulations.** In section 607(b) Congress instructed the Department

The Secretary may not implement, or publish in final form, any regulation prescribed pursuant to this title that–

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(2) procedurally or substantively lessens the protections provided to children with disabilities under this title, as embodied in regulations in effect on July 20, 1983 (particularly as such protections related to parental consent to initial evaluation or initial placement in special education, least restrictive environment, related services, timelines, attendance of evaluation personnel at individualized education program meetings, or qualifications of personnel), except to the extent that such regulation reflects the clear and unequivocal intent of Congress in legislation. (Emphasis added).

Examples of regulations that this provision protects are the regulations guaranteeing independent educational evaluations (34 C.F.R. §300.502), requiring states to establish complaint management

systems (34 C.F.R. §§300.660-.662), and establishing timelines for Hearing and Review Officers to issue decisions (34 C.F.R. §300.511).<sup>1</sup>

**Sec. 608 – State Administration.** Section 608 (a) requires that state regulations and policies conform to IDEA’s purposes. IDEA 2004’s purposes, set out in Section 601(d), are very similar to those of IDEA ‘97. The first two are the identical requirement to provide FAPE through special education and related services meeting the child’s unique needs and to protect the rights of children and their parents. Thus, state policies and regulations that provide greater rights for parents conform to the purposes of IDEA 2004, as they did to those of IDEA ‘97. Section 608 also requires states to identify regulations, rules, or policies imposed by states and not by the IDEA, and to minimize the number of rules, regulations, and policies to which LEAs are “subject under this title.” This does not prohibit states from exceeding the requirements of IDEA in their own special education regulations and rules, which actually are interpretations of state education statutes, and are promulgated under state education and administrative law statutes. While states must at least comply with the IDEA minimum, it is well-established case law that states may exceed the IDEA minimum in their own laws and regulations.<sup>2</sup> This is the “cooperative federalism” Congress intended; the law did not presume to require a nationally uniform approach to the education of children with disabilities.<sup>3</sup>

**Sec. 609 – Pilot Program Waivers of Statutory Requirements.** The Department of Education may waive certain statutory and regulatory requirements for 15 states (30% of all states). Potentially, millions of children could be affected by these pilot plans, which may substantially alter the IDEA’s requirements. Stringent, thorough Department oversight is essential. Section 609’s purpose is to allow states to reduce paperwork burdens and other administrative duties “to increase the time and resources available for instruction and other activities aimed at improving educational and functional results for children with disabilities.” Paperwork reduction plans must be required to strictly advance this purpose; they cannot simply reduce paperwork or teacher overtime. The regulations should specifically define the measures to ensure that the state’s plan actually effectuates better instruction and achieves better academic and functional results for children.

Instruction and achievement are measured by documenting progress. The regulations must distinguish between wholly extraneous paperwork that should not take teachers away from their teaching responsibilities, and instructional paperwork requirements critical to ensuring that students are learning what they need to learn and that schools are accountable for their progress. States should not be allowed to undermine IDEA’s focus on academic and functional achievement through broad paperwork reduction schemes. Paperwork that ensures that schools comply with the IDEA should not be waived. Accountability is the cornerstone of the No Child Left Behind Act, and it is equally important under the

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<sup>1</sup> Sec. 607(a) states that the Secretary will issue regulations only to the extent necessary to ensure compliance with IDEA requirements. Although some may think this is new language, it is the same as section 617(b) in IDEA ‘97; it has simply been moved.

<sup>2</sup> *Town of Burlington v. Dept. of Educ. of Massachusetts*, 736 F.2d 773 (1st Cir.1984), *aff’d sub nom. Burlington Sch. Comm. v. Dept. of Educ.* 471 U.S. 359 (1985); *David D. v. Dartmouth School Comm.*, 775 F.2d 411 (1st Cir. 1985); *Johnson v. Independent School Dist. No. 4*, 921 F.2d 1022 (10th Cir. 1990); *Burke Co. Bd. of Educ. v. Denton*, 895 F.2d 973 (4th Cir. 1990); *Board of Educ. v. Diamond*, 808 F.2d 987 (3rd Cir.1986). State laws that are wholly inconsistent with the federally-mandated IDEA cannot be enforced. But state statutes and regulations that are not wholly inconsistent with the IDEA may exceed it. *Town of Burlington*, 736 F.2d 773.

<sup>3</sup> *Town of Burlington*, 736 F.2d 773 (1st Cir. 1984); *Converse County School Dist. v. Pratt*, 993 F.Supp. 848 (D. Wyo. 1997); *Evans v. Evans*, 818 F.Supp. 1215 (N.D. Ind. 1993).

IDEA. The IEP, with its clearly measurable goals and accommodations that provide the child with specially-designed instruction to meet his/her unique needs, must be preserved, in accord with the statute. Moreover, what may appear to some as unnecessary paperwork is actually the protection of essential rights that should not be waived. Teachers have expressed concern about paperwork. Much of the paperwork is not driven by IDEA, but by state, local, or other federal requirements.

All of the Department's requirements for pilot program participation must be part of the proposed regulations, so the public may comment. The regulations should require that all stakeholders, including parents, their advocates, and educators, be fully and equally involved in creating their states' plans, and that parents and their advocates serve on all committees and groups working on them. Collaboration and teaming make for good education. Furthermore, the plain language of 612(a)(19) requires that before any policies are adopted, the State must ensure that there is notice, hearings, and opportunity for comment. This includes comment on any proposed state plan before the state finalizes and submits its plan to the Department. In addition, the Department should give the public notice of each actual waiver it proposes to grant and an opportunity for comment. No one should fear doing these plans in the sunshine.

Moreover, states participating in the paperwork reduction pilots should not be allowed to propose optional multi-year IEPs, as this would undermine the purpose and strict limits of the IEP pilot. It also could result in 30 states using multi-year IEPs, contrary to Congress' express limit of 15, or multi-year IEPs outside the explicit terms Congress decreed for that pilot program. In addition, section 609(a)(2)(B) prohibits the Department from waiving "applicable civil rights requirements." The regulations should clarify that these are the same rights as those under the Civil Rights Acts enumerated in Section 615(l): "the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities."

**Sec. 614(d)(5) – Multi-year IEP Pilot.** Three years is a long time in the life of a child. The regulations should make clear that SEAs and LEAs must explain to parents that participation is completely voluntary, that parents must give informed consent, the rights that parents are giving up and what it may mean for their child's education, and that the results of the program will be made public. The state's plan must explain in detail the information to be communicated to parents. As noted in the 609(a) waivers/pilot program discussion above, the public must be given notice of the plan and an opportunity for hearing and comment. All stakeholders, including parents and their advocates, must be full and equal partners in creating the plan. The regulations should specify that multi-year IEPs comply with all other IEP content requirements in 614(d)(1)(A). The purpose of the pilot is to have IEPs covering natural transition points; it is not to create weaker or ineffective IEPs. Parents who choose the multi-year plan should still receive annual procedural safeguards notices, like all other parents. . Furthermore, it is essential that an evaluation be provided annually when the nature of a child's disability necessitates evaluation more than once every 3 years. Furthermore, if the child fails to make sufficient yearly progress, a regular annual IEP review and revision must be performed.

**Sec. 612(a)(19) – Public Participation.** The regulations should make clear that before any SEA or LEA policies or procedures needed to comply with the section 612 go into effect, including any amendments to such policies, the SEA must ensure that there are public hearings, notice of the hearings, and an opportunity for comment, including by individuals with disabilities and parents of children with disabilities. This is required by Section 612(a)(19). Section 612 is broad and far-reaching, and implicates almost all state and local obligations to comply with the IDEA.

**Sec. 613(f) – Early Intervening Services.** The regulations should clarify that Section 613(f), which allows use of Part B funds for "early intervening services" for children not identified as eligible for FAPE, in no way prevents parents or educators from requesting or performing an initial evaluation that must be completed within the 60-day timeline in Section 614(a)(1)(C)(ii). Early intervening services should not become a barrier to a child's obtaining needed IDEA services and protections. The regulations must make clear, in conformity with clear Congressional intent, that providing early intervening services to a child or developing an early intervening program does not relieve the LEA of its obligations under 612(a)(3) to identify, locate, and evaluate children. Likewise, they should make clear that providing such services may not delay performing the evaluations or delay the beginning or running of the 60 day clock. The Senate Report explicitly recognized that "[t]he Committee does 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 for special education and related services" and that the 60-day evaluation timeline "will discourage a local educational agency from unnecessarily delaying an evaluation in cases where a child is receiving early intervening services under section 613(f)."<sup>4</sup> The House Report was equally clear: "[T]he Committee does not intend for the provision of these services to delay or deny, in any way, the appropriate referral and evaluation of a child to determine whether the child has a disability. Local Educational agencies are not authorized to delay the implementation of a requested evaluation by providing services under this section."<sup>5</sup>

Moreover, the regulations should set a timeline after which, if early intervening services fail, the child must be evaluated for special education. The regulations should likewise require documented systematic monitoring of classroom performance to determine whether early intervening services are working, and to determine whether the child appears to have a disability.

The regulations should also clarify that children receiving early intervening services for behavioral issues are entitled to disciplinary protections under 615(k)(5)(B)(iii), deeming an LEA to know that a child has a disability when personnel have expressed concerns about the child's pattern of behavior. A request for early intervening services clearly meets this criterion. Finally, school districts should be prohibited from inappropriately "graduating" children from special education into early intervening services to avoid IDEA protections.

**Secs. 614(a)(1)(C) – Evaluation Time Frame; 614(a)(1)(D) – Consent for Services.** Under 614(a)(1)(C), there is an exception to the 60-day evaluation timeframe if the parent "repeatedly fails or refuses to produce" the child for the evaluation. The regulations should clarify that this exception does not apply if the child is attending school, and the evaluation can be completed during the school day. The parent does not need to "produce" the child for such an evaluation; indeed, such evaluations are routinely conducted during the school day now. The regulations should also define "repeatedly fails" and "refuses to produce." The LEA should be required to document in the child's permanent file that it made serious, repeated efforts, both orally and in writing, to contact the parents to cause them to produce the child, including explaining the evaluation, the 60-day clock, and the effect of failing to produce the child.

Moreover, under new 614(a)(1)(D), if a parent "refuses to consent to services," the school district need not provide FAPE or services. The regulations should require that, before an LEA is freed of its obligation to provide services or FAPE, that it has documented in the child's permanent files that it

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<sup>4</sup> SENATE REPORT 108-185 at 23-24 (2004).

<sup>5</sup> HOUSE REPORT 108-77 at 104 (2003).

has informed parents of their rights and responsibilities under the IDEA, of the rights they will give up if their child does not receive services, including the right to FAPE and the discipline protections under 615(k), and that the LEA has made serious, repeated efforts, orally and written, to obtain consent from parents (including documentation of each of those efforts). It is not sufficient that a parent simply does not sign the consent form; the parent must have actually refused consent. This provision should not become a loophole to deny children needed services and IDEA protections.

**Secs. 614(b)(6) – Specific Learning Disability; 614(a)(1)(C) – Evaluation Time Frame** Sec. 614(b)(6) allows LEAs to “use a process that determines if the child responds to scientific, research-based intervention as part of” the Specific Learning Disability evaluation. To prevent this process from indefinitely delaying the evaluation, the regulations should clarify that the same 60-day deadline applies to this evaluation as applied to all evaluations under 614(a)(1)(C). This is clearly the statutory requirement; section 614(b)(6) sets no different deadline. The regulations must also define the criteria for “scientific, research-based interventions” that may be used as part of the evaluation procedure. In addition, under the new 614(b)(6), LEAs are not required to use the severe discrepancy formulas to determine SLD eligibility. Likewise, the regulations and/or policy guidance should clarify that states should not urge LEAs to use the formula as the primary criterion to determine if there is a Specific Learning Disability.

**Sec. 614(d)(1)(C)(ii)(II) – Excusing Team Members** Parents and LEA may agree to excuse team members if “the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.” Of course, the new IDEA provision requires parent consent before a team member may be excused. The regulations should require that any team member seeking to be excused must submit his/her input to parents at the same time he/she gives it to other team members. This ensures that the process is equitable, since parents are being asked to give up the right to have the team member present. Not all parents have access to email, and not all parents will choose to receive communications via email. For those parents who don’t, the team member must print out the email and give it to the parent at the same time it is given to other team members. Likewise, schools must be required to mail or deliver the input to parents so that they receive it sufficiently in advance of the IEP meeting to adequately consider it; a document mailed a day or two before the meeting simply is not appropriate. Such communications should not be sent home with the child unless the parents have authorized that method of communication in advance. One simply cannot rely on children to deliver such important messages. Many parents take time off work or arrange child care to attend IEP meetings, and there will be a great deal of pressure on parents to go through with a meeting, even if only the LEA representative (an administrator) attends, and asks the parent to agree that teachers and therapists need not be there.

**Sec. 614(c)(5)(B) – Regular Diplomas Terminating Special Education** Under 614(c)(5)(A), the LEA must evaluate a child before determining that he/she no longer has a disability. Under 614(c)(5)(b), the LEA may terminate the child’s eligibility without an evaluation if he/she graduates “with a regular diploma.” IDEA 2004 appears to assume that a child with a disability who graduates with a regular diploma has a competency level similar to his/her non-disabled peers. Many school districts award “regular diplomas” to children with disabilities based on their attendance--even if they were never taught to their achievement level. The regulations should define “regular diploma” as requiring student achievement comparable to that required of non-disabled graduating peers. No student under 21 should be forced to graduate and end services unless they have reached this level.

**Sec. 614(d)(1)(A) – Measurable Goals and Regular Reporting.** IDEA 2004 eliminated the requirement that IEPs contain short-term objectives and benchmarks, except for those students taking the alternate assessments aligned to alternate achievement standards. For these students, the requirement appears to have inadvertently been placed under the present levels of performance portion of 614(d)(1)(A)(i)(I). The regulations should make clear that, where required, short-term objectives and benchmarks represent stepping stones to achieving annual goals that are sequentially presented and can be used to measure progress toward annual goals. Furthermore, the regulations should clarify that IEP teams can choose to use short-term objectives and benchmarks if appropriate for any child. In addition, IDEA 2004 requires “a statement of measurable annual goals.” The regulations should make clear that annual goals must be well-defined and objectively measurable with clear evaluation criteria that are specified explicitly in the IEP. The regulations must also identify short-term objectives or benchmarks as one mechanism for showing how progress toward meeting annual goals will be measured and reported.

Section 614(d)(1)(A)(i)(III) states that LEAs must use quarterly or another kind of regular, periodic report. The regulations should clarify that progress reports must be provided concurrent with report cards. The “periodic progress updates must provide parents with specific, meaningful, and understandable information on the progress children are making.” on each of the annual goals on the IEP,<sup>6</sup> and whether he/she will achieve the goal by year end. Waiting until the end of the year for this kind of report prevents teachers and parents from identifying children who are making little or no progress, or falling further behind, and who need different teaching strategies during the year.

Furthermore, the regulations must define “academic and functional” goals to include goals relating to all areas of development affected by the child’s disability, including social-emotional, behavioral, speech and motor, functional life skills and others. Nothing has changed in the IDEA to relieve LEAs and SEAs of their obligation to provide specially-designed instruction and related and supplementary services related to these areas, and IDEA 2004 has strengthened the role of positive behavioral interventions.<sup>7</sup>

**614(d)(1)(A)(IV) – IEP Requirements; Peer-Reviewed Research; Unique Needs of Child; 636(d)(4) – Same for IFSP.** IEPs must state the special education and related services and supplementary aids and services to be provided “based on peer-reviewed research to the extent practicable.” The new provision, 614(d)(1)(a)(IV), clearly makes the instructional methodology part of the IEP, and an important consideration in determining what constitutes an appropriate education for a child with a disability. Research-based methodologies must be provided where they exist, so that children receive the required benefit under the law. It is likewise important that the Department interpret this provision to ensure that children receive the free appropriate public education required by IDEA. This includes providing the legally-mandated “specially-designed instruction, at no cost to parents, to meet the unique needs of a child with a disability,” sec. 602(29), and all related services “as may be required to assist a child with a disability to benefit from special education,” sec. 602(22), and all supplementary aids and services in accord with sec. 602(33). There will be related and other services for which peer-reviewed research is lacking, and yet the child needs the service to benefit from special education. The IEP must meet the unique needs of the child, and must provide these services. To the extent practicable means that if a special education strategy, related service, or supplementary aid or

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<sup>6</sup> SENATE REPORT 108-185 at 29.

<sup>7</sup> See also SENATE REPORT 108-185 at 18 (“The Committee also recognizes that functional performance is critical for many children with disabilities in order to improve educational outcomes.”).

service works for a particular child, the LEA must provide it, even if it has not been validated for all children, or if peer-reviewed research is absent. The interpretation of 636(d)(4), Individual Family Service Plans under Part C, should be similar.

**Secs. 614 and 615 – Consent.** The Department should clarify that the IDEA 2004 provisions allowing parents to waive rights by agreement require informed consent and a parent signature to the agreement. These include 614(a)(1)(C)(ii)(I) (agreement to a different timeline for evaluations), 614(a)(1)(D)(i) (initial evaluation consent), 614(a)(2)(B)(iii) (consent delaying reevaluation), 614(d)(1)(C)(iii) (written agreement excusing IEP team member), 614(d)(3)(D) (written agreement modifying IEP), 614(d)(5) (allowing parents to agree to the option of the multi-year IEP), 615(f)(1)(b)(ii) (resolution session waiver), 615(j)(pendency), 615(k)(1)(F)(iii) (manifestation and agreement to change in placement), 615(n)(electing notices via email). As the current regulations, 34 CFR §300.500 mandate, "consent" requires that the parent be fully informed of all relevant information, and the parent understands and agrees in writing to the activity, and that he/she understands that consent is voluntary and can be revoked. Requiring a parent signature will prevent mistakes and miscommunications and reduce litigation; the courts are full of general contract cases in which the parties disagree about what was said, understood, and agreed to. This is even more important under IDEA 2004 which gives school districts new opportunities to ask parents to agree to waive certain rights. Furthermore, it will minimize those rare situations where administrators change an IEP without parental permission, *see, e.g., Jaynes v. Newport News School Board*, No. 00-2312 (4th Cir. July 10, 2001). As the House Report pointed out, "Parents should be active participants in their child' s education experience. However, often under the current Act, parents of students with disabilities are not fully informed or are often given limited options of where or how their child can be educated."<sup>8</sup>

**Secs. 614 and 615 – Days.** IDEA 2004 uses the term "days" in Sections 614 and 615, as did IDEA '97. Some have asked to define days as working days. This would be contrary to the statute. Congress can be presumed to say what it means and mean what it says. The plain meaning of "days" is "calendar days," as it was in 1997. Indeed, when Congress meant "school days" or "business days" in IDEA 2004, it used those words, in 10 different places. Defining days as working days would wrongly extend the initial evaluation period from 60 days to almost 3 months (and even longer over holidays), further delaying the child' s ability to obtain services, and the period for holding a hearing as allowed the responding party under the resolution session provision from 30 days to 42 or more days. *See* 614(a)(1)(C)(i)(i); 615(f)(1)(B)(ii).

**Sec. 615(b)(7)(A); Sec. 615(c)(2)(A) – Complaint Sufficiency and Amendment.** By law, notices that meet the requirements of 615(b)(7)(A) are sufficient and the hearing officer can require no more. The regulations should clearly state that hearing officers cannot require anything more. They should also include a sample form in an appendix that is included in any notice of rights sent to parents. Section 615(b)(7)(A)(ii) states that a complaint is sufficient if it provides the child' s name, address/contact information, school, "a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem," and "a proposed resolution of the problem to the extent known and available to the party at the time." All of this, except for the new contact information requirement for homeless children, is identical to IDEA '97, and must be interpreted the same way. If the hearing officer determines that the complaint is not sufficient, the parent has the opportunity to resubmit a new complaint and the timelines start over. IDEA's core right

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<sup>8</sup> HOUSE REPORT 108-77 at 84-85.

is the right to FAPE. The sufficiency provisions are intended to ensure that the parties obtain the information they need--not to erect insurmountable barriers to parents.

The due process notice requires parties to suggest a resolution to the problem to the extent known at the time of filing. If parties discover new information after filing, they may update the proposed resolution without going through the formal 615(c)(2)(A) amendment process (which prohibits amendment unless the other party or hearing officer agrees). LEAs and SEAs must not be allowed to manipulate the new due process requirements in arcane, hypertechnical ways to prevent children from obtaining FAPE or enforcing their other IDEA rights.

**Sec. 615(b)(3); Sec. 615(c)(2)(B)(i)(I) – Prior Written Notice.** Sec. 615(b)(3) requires the LEA to give prior written notice whenever it proposes, refuses to change, or initiates a change in the child’s identification, evaluation, placement, or provision of FAPE. The new 615(c)(2)(B)(i)(I) requires the LEA to give prior written notice in response to a due process complaint if it hasn’t already been given. The regulations should clarify that an LEA may not delay prior written notice until the due process complaint is received unless it is "learning of a dispute for the first time in parent’s due process complaint," as the Senate Report made clear.<sup>9</sup>

**Sec. 615(b)(6) and (7) – Due Process Complaint Notices.** The regulations should clarify that the party who initiates due process may provide a single document containing the information required in the “complaint,” 615(b)(6), and the “due process complaint notice,” 615(b)(7). Nothing is gained in clarity or completeness by requiring two separate documents. One document reduces paperwork.

**Sec. 615(d)(1)(A) – Notice of Procedural Safeguards.** This section requires LEAs to provide the procedural safeguards to parents once a year, upon initial referral or request for evaluation, upon the first filing of a complaint, and upon parent request. The regulations should clarify that such notices must be provided to parents each time they initiate due process by filing a complaint. This is what is meant by the term “first filing” of the complaint. School districts should not be permitted to provide only one notice when a parent files their first due process action, and then not provide any others if the parent files for due process again, even years later. Not all parents have access to the internet, particularly parents who are disadvantaged or low income. Notices must be provided in hard-copy, not by placing them on the LEA’s internet site, although LEAs should be encouraged to also post them on websites in addition to providing the required hard copies.

**Sec. 615(e)(2) & 615(f)(1) – Mediation & Settlement Agreements.** Under 615(e)(2)(F) and 615(f)(1)(B)(iii), mediation agreements and settlement agreements resulting from the dispute resolution meetings are “legally binding” and “enforceable in any State court . . . or in a district court of the United States.” Because the agreements are legally binding, the regulations should clarify that they can also be enforced through the state complaint resolution process if they are violated.

**Sec. 615(f)(1)(B)(i) – Resolution Session.** Under IDEA 2004, prior to a due process hearing, the parties must meet and the school district is given an opportunity to resolve the parent’s complaint. The settlement agreement is reduced to writing and is enforceable in court. The regulations should make clear that parties can choose to use the mediation process instead. The resolution agreements may be voided within 3 business days of execution. The regulations should require that parents be informed orally of this, and that it be printed in bold on each such agreement. As the Conference Report requires,

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<sup>9</sup> SENATE REPORT 108-185 at 36.

parents and LEA together will select the IEP team members who shall attend the meeting. The regulations must state clearly that agency representatives with authority to decide for and bind the agency shall physically attend the meeting and not simply be on call. This will assure meaningful discussions in the shortest amount of time and avoid the necessity for parents to have to come to more than one meeting.

**Sec. 615(f)(3)(A) – Hearing Officer Qualifications.** IDEA 2004 sec. 615(f)(3) requires hearing officers to be impartial and also to know and understand the IDEA, all federal and state regulations pertaining to it, and the legal interpretations of the IDEA by federal and state courts. It also requires hearing officers to know and have the ability to conduct hearings and render and write decisions “in accordance with appropriate, standard legal practice.” The regulations must ensure that states implement these requirements. Hearing officers must be thoroughly familiar with and knowledgeable about the IDEA, regulations under it and state law, and all relevant case law. They must be thoroughly knowledgeable about current best practices in special education and educational interventions supported by science and by peer-reviewed research. Hearing officers must have the ability to interpret the case law and apply it. This requires a high degree of legal training. Because hearing officers must conduct hearings in accord with standard legal practice, they must thoroughly know and understand rules of evidence, all state rules for hearing procedures, the state’s Code of Judicial Conduct (since hearing officers are serving as a type of judge in these administrative proceedings) and other appropriate legal standards applied to hearings.

Furthermore, to ensure impartiality, the regulations should state that hearing officers should not be current employees of any LEAs or SEAs, even if not directly involved in providing care to the child; hearing officers must be appointed by a public official outside of the LEA; that written statements of each hearing officer’s qualifications, background, and experience be available at no charge to parents; and that hearing officers comply with state standards of judicial conduct including, but not limited to, rules barring *ex parte* communications with parties or counsel for parties.

**Sec. 615(i)(2)(B) – Court Action Timelines/State Review Officer.** Parties filing a civil action in court “shall have 90 days from the date of the decision of the hearing officer” to bring the civil action. Many states require appellate state officer or panel review of hearing officer decisions before parties can go to court. The regulations should clarify that the 90 days begins to run from the final administrative decision, be it by hearing officer or reviewing officer/panel, and that the 90 days is tolled if a motion for reconsideration is filed.

**Sec. 615(i)(3)(B)(i) – SEA/LEA Recovery of Attorneys’ Fees.** Under Sec. 615(i)(3)(B)(i)(II) and (III), SEAs and LEAs may recover their attorneys’ fees from parents and counsel under very limited circumstances. The Department need not issue regulations setting out the standards as they are already clear in current case law, and this issue is best left to the courts. But, if the Department does issue regulations, they must accurately reflect the standards in the case law. IDEA 2004 permits courts to make such an award if the school district prevails and if the parents’ complaint or subsequent cause of action filed in court is “frivolous, unreasonable, or without foundation,” or if it is “presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.” This codifies the standard developed by *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), as the Congressional Conferees made clear.<sup>10</sup> There is over 25 years of case law under the

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<sup>10</sup> See 150 CONG. REC. S11547 (daily ed. Nov. 19 2004) (statement of Floor Managers Senators Gregg and Kennedy) (setting out *Christiansburg* standard and noting that it should have been in Conference Report); 150 CONG. REC. H10011 (daily ed. Nov. 19, 2004) (statement of Conference Chair Congressman Boehner) (same).

*Christiansburg* standard. Under the new improper purpose prong in 615(i)(3)(B)(III), fees may also be shifted in the very rare situations where the LEA or SEA demonstrates that the parents intended to bring their complaint in subjective bad faith, as the conferees also made clear.<sup>11</sup>

**Sec. 615(k) – Manifestation Review & Unique Circumstances.** Congress explicitly described the circumstances under which the team can determine that misconduct is a manifestation of a disability: if the conduct in question was caused by, or had a “direct and substantial relationship” to, the child’s disability; or if the conduct in question was the direct result of the local educational agency’s failure to implement the IEP. 615(k)(1)(E)(i). This language is clear on its face; the Department of Education does not need to supplement it further. Section 615(k)(1)(A) states, “School personnel may 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.” This provision allows the rare or extraordinary circumstances to be considered as part of determining whether the child’s misconduct was a manifestation of his/her disability, and even if a child’s misconduct is not a manifestation of the disability, to be a basis for allowing the child to remain in his/her current placement.

**Sec. 615(k)(1)(D) – Alternative Education Setting Placements.** The regulations should make clear that SEAs and LEAs are legally obligated to continue to provide a free appropriate public education to each child excluded from school or placed in interim alternative educational settings. The alternative placements to which many students are removed are often parking lots, where they are simply babysat until they drop out or graduate. Students with disabilities are already overrepresented among students who are expelled from school. The regulations should make clear that this obligation, under 612(a)(1), may not be changed or altered simply because placement is changed.

**Sec. 615(k)(1)(F) – Functional Behavioral Assessment.** The regulations for sec. 615(k)(1)(F) should clarify that if a child’s misbehavior is a manifestation of his/her disability, and the child’s most recent Functional Behavior Assessment is over a year old, or if he/she has none, the IEP team must conduct a new FBA and write an up-to-date Behavior Intervention Plan. An out-of-date, inappropriate FBA or BIP can cause the child to misbehave in a way that is a manifestation of his/her disability. Everyone benefits if the child has up-to-date plans and assessments. The IDEA requires educating children with disabilities in the least restrictive environment and with their non-disabled peers to the maximum extent possible. Up-to-date FBAs and BIPs can help ensure that this will happen. In addition, positive behavioral supports should be the first-line discipline strategy in classrooms.

**Sec. 615(k)(1)(G) – Serious Bodily Injury.** 615(k)(1)(G) permits school districts to remove a child for up to 45 school days without regard to whether the behavior is a manifestation of the disability if the child has a weapon at school, has or sells drugs at school, or "(iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency." These provisions came from the Senate bill. As the Senate Report states, "The definition of ‘serious bodily injury’ is taken from 18 U.S.C. 1365(3)(h), and means bodily injury which involves a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or

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<sup>11</sup> See 150 CONG. REC. S11547 (daily ed. Nov. 19 2004) (statement of Floor Managers Senators Kennedy and Gregg) (parent’s claims must be ‘brought in bad faith;’ inadvertently omitted from Conference Report); 150 CONG. REC. H10011 (daily ed. Nov. 19, 2004) (statement of Conference Chair Congressman Boehner) (same).

mental faculty."<sup>12</sup> This definition should be reprinted in the regulations so parents and educators have easy access to it.

**Sec. 615(k)(5) – Protections for Children Not Yet Eligible.** Under 615(k)(5)(A), a child not yet eligible for special education is given a manifestation review and other 615(k) discipline protections if specified criteria are met that deem the school to have knowledge of the disability. Under 615(k)(5)(C), an LEA may not be deemed to have knowledge if the child was evaluated and found not to have a disability. The regulations should clarify that this does not apply to children whose evaluations were more than 3 years old. Evaluations in the distant past should not be used to prevent children from receiving these protections. This exception follows language deeming schools to know of the disability if the parents have requested an evaluation or have written, expressing concern that the child has a disability/needs special education, or if a teacher expresses certain concerns to his/her supervisors. 615(k)(5)(B). This language describes present circumstances, the here-and-now. Certainly, if the child was evaluated and found not to have a disability last year or in the last few months, the school district should not be deemed to have knowledge of the disability. But stale, old evaluations cannot be used to deprive a child of discipline protections now. An outdated evaluation finding the child not eligible simply has no real relevance to educating a child in the present.

### **Conclusion**

As we approach the 30th anniversary of the IDEA, it is important that the Department of Education preserve the rights of children with disabilities through its regulations under the IDEA. The regulations should ensure that schools are held accountable and further the first two purposes of the IDEA: to ensure that children with disabilities receive a free, appropriate education and ensure that the rights of children and their parents are protected. They must preserve IEPs that provide specially-designed instruction to meet the unique needs of the child with related and supplementary services. The regulations must advance the IDEA' s fundamental premise that effective educational programs for children with disabilities are created when parents and educators collaborate together as equals. Many children receive good special education services that make the difference between school success and failure. Yet, Congress recognized that disputes may arise between parents and schools, and there are times that schools violate the law by failing their obligations under IDEA. In these situations, the regulations must protect the parents' procedural safeguards, due process, and other rights provided by IDEA. The regulations must maintain the level playing field between parents and school districts, so that children with disabilities receive truly meaningful, beneficial educations.

Sincerely,

Jodi Siegel  
Chair  
Council of Parent Attorneys and Advocates, Inc.

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<sup>12</sup> SENATE REPORT 108-185 at 43.