



The Council of Parent Attorneys and Advocates, Inc.
Promoting excellence in special education advocacy nationwide

March 5, 2006

by electronic mail (comments@ed.gov)

The Honorable Troy R. Justesen
Deputy Assistant Secretary of Education
U.S. Department of Education
400 Maryland Avenue SW
Potomac Center Plaza, Room 5126
Washington, DC 20202-2641

Re: Paperwork Waiver Public Comment

Dear Dr. Justesen:

The Council of Parent Attorneys and Advocates (COPAA) is a nonprofit organization of parents, attorneys, and advocates who work to protect the civil rights of children with disabilities and ensure that they receive appropriate educational services. Many professional members work for public interest organizations that serve low-income parents and other nonprofit purposes; other are in private practice. Many of our members are family members of children with disabilities.

We appreciate the opportunity to submit comments in response to the Department's Notice of Proposed Requirements regarding the IDEA Paperwork Waiver Demonstration Program. Potentially, millions of children could be affected by the paperwork waivers, which may substantially alter the IDEA's requirements in up to 15 states.

It is essential that no pilot program impair the procedural safeguards in § 615, diminish the civil rights of children, or permit a child to receive less than a Free, Appropriate Public Education in the Least Restrictive Environment. It would be unconscionable to discover that any child had lost any educational benefit—even for several months—while the pilot program study was being conducted. **Special care must be taken to avoid subjecting children to an experiment in which they may receive an inferior education and lose educational rights based merely on the state in which they happen to reside.** Such an experiment would impose a severe cost on our nation's economy, as students fail to obtain the educational skills they need after graduation and the functional skills they need to live independently and succeed.

IDEA § 607(b) prohibits any regulations that are contrary to the IDEA. Section 609(a)(2)(C) prohibits plans that affect the obligation to provide a Free Appropriate Public Education to children; § 602(9) defines FAPE as including services as required under the IEP. Therefore, any regulation permitting waiver of the IEP requirements is impermissible. Moreover, paperwork reduction plans must strictly advance the statutory purpose of increasing time for instruction and improving educational and functional results for children. It is not enough to simply reduce paperwork. Thus, the greatest

P.O. Box 6767, Towson, Maryland 21285
Telephone (443) 451-5270 Facsimile (443) 451-2680 www.copaa.org

weight in plan selection must be given to whether proposals improve results for students, rather than whether the program is innovative or simply reduces paperwork.

We offer the following comments on the proposed requirements for the pilot.

Background for Proposed Requirements and Selection Criteria

Recommendation 1. The Department should contract with an independent outside agency to develop a research-based design that will produce reliable information about the effectiveness of the paperwork reduction IEP pilot.

Rationale. Congress established the pilot program to give the Department the opportunity to develop guidelines for the program and to gather data and information on the implementation of paperwork reduction plans. Without an independent agency conducting the evaluation with a proper protocol, the actual results could be incorrect and lead to statutory developments that are not helpful to parents, children or schools, and do not improve educational and functional results.

Recommendation 2. Of the assessment criteria to be considered, modify criterion (e) to measure the satisfaction of family members, as statutorily required and omit reference to the satisfaction of administrators and educators, which is not statutorily appropriate.

Rationale. The proposed regulation references evaluating the satisfaction of parents, administrators, and teachers. IDEA 2004 § 609(b)(5), however, specifically requires the Department to measure and assess the satisfaction of family members with the pilot program. The term "family members" goes beyond parents, and the regulations should use the statutory term. Among others, it includes satisfaction of students with disabilities themselves. The Act singles out, and places special value on, the satisfaction of family members for measurement and the regulation must comply with that requirement. It does not refer to evaluating the satisfaction of educators and administrators. **Whether administrators and teachers are satisfied with a paperwork reduction plan says little, if anything, about the quality of education children receive.** Rather, the appropriate issue to measure from the school district perspective is whether the pilot succeeds in reducing paperwork while increasing instructional time and improving educational and functional results for children. The statute places special importance on family satisfaction because of concerns about the rights of parents to participate in their children's education.

Recommendation 3. Amend the evaluation requirements to include measuring how the pilot program promotes collaboration among IEP members and how long-term educational planning will be enhanced for students, as required by IDEA 2004.

Rationale. Section 609(b)(2) and (4) of the IDEA require that these categories be assessed. The proposed assessment criteria enlarge the statutory measurement categories to include such things as administrator and teacher satisfaction. Yet, they do not include

these two statutorily-required assessment categories. Thus, the proposed regulations contradict the IDEA and violate § 607(b) of the IDEA. The IDEA's first purpose is to ensure that students with disabilities receive a free appropriate public education that prepares them "for further education, employment, and independent living." Hence, long-term educational planning is very important. Collaboration among IEP team members ensures that children receive needed special education and related services, and that parents are equals in the IEP process. Too often, IEP meetings are intimidating for parents. They are outnumbered by school district representatives, some of whom have attended hundreds of IEP meetings, and the school district controls the information and process. The lack of an even playing field may be worsened under the pilot programs and measuring team collaboration is important.

Recommendation 4. After listing items (a)-(e), the proposed regulation says "[T] these outcomes will be compared for students who participate in the Paperwork Waiver Demonstration Program, and students who are matched on disability and prior educational outcomes who do not participate in the paperwork waiver program." Add a sentence stating:

A State that submits a proposal for the Paperwork Waiver Program may choose to not require all of its LEAs to not participate in the State's Paperwork Waiver Project. These LEAs should act as a control group, and should be comparable in demographics to the LEAs that do participate in the project.

Rationale. The paperwork reduction program lacks a specified control group. LEAs must choose or be selected by the State to act as part of a control group. A control group is necessary to compare measurements of the experimental groups with an equivalent group. It is important that the only difference between the groups be the paperwork waiver program. Otherwise, an evaluation cannot measure whether it is the pilot program or other factors that is affecting the quality of education for children with disabilities or affecting the other criteria to be evaluated.

Recommendation 5. The evaluation of the pilot projects should include experimental designs that meet the requirements of the Department of Education's "What Works Clearinghouse" and follow its evaluative requirements.

Rationale. The What Works Clearinghouse is designed to provide researchers and others with scientific evidence of what works in education. Because so much is at stake with the pilot programs and they will have a substantial real-time impact on the education of children with disabilities, it is important that the evaluation design be scientifically-based and effective.

Proposed Additional Requirements for Paperwork Waiver Program

Recommendation 1. The proposed regulations should clarify that any proposed state plans must comply with IDEA 2004 § 612(19) requiring public participation (including hearings, notice, and an opportunity for comment) before the State proposes a plan to the Department of Education.

Rationale. The proposed paperwork reduction pilot directly implicates § 612, which sets out the State's obligations under IDEA. Among other things, these include providing FAPE; having in place an IEP for each child; and evaluation and Child Find requirements. Consequently, the State must comply with § 612(19) of the IDEA before putting in place any pilot. Any proposed requirement that permits a State to avoid this requirement violates IDEA § 607(b), and is impermissible.

Recommendation 2. Revise Additional Requirement 1(a)-(b) to require states to obtain input from all members of the public, including family members and advocates for children with disabilities.

Rationale. Section 612(19) of IDEA 2004 requires public participation in formulating state plans. It does not limit the input to school and district personnel and parents, as Additional Requirements 1(a) of the proposed regulation would. Requirement 1(a) should incorporate this mandate and broaden the group of stakeholders from whom input is sought. Advocates of children with disabilities, and organizations that work with children and families, should be included. Advocates and such organizations have years of experience with the system and the educational needs of children with disabilities. Their input will be of significant value in the formulation of a proposed state plan. The State should also obtain input from other family members, including children covered by the IDEA where appropriate (*e.g.*, children of transition age).

Recommendation 3. Revise Additional Requirement 1(a)-(b) to require the State to summarize the input that it received and the type of stakeholder who submitted the input.

Rationale: The State should describe the input it receives and identify from whom the input was provided. If a State fails to consider input or change its plan based on the input provided, the requirement would be an exercise in futility. States must seriously consider input of parents and other stakeholders and make changes as appropriate to meet the needs and concerns of those affected by the paperwork waivers.

Recommendation 4. Revise Additional Requirement 1(a) to require that States describe specific proposals they receive that would improve educational and functional results for children by reducing paperwork--not only proposals that would reduce paperwork.

Rationale. The proposed regulation requires States to describe any specific proposals it receives to reduce paperwork. Section 609 of IDEA places equal weight on the requirement that a proposed pilot program improve educational and functional results

for children. The proposed regulation impermissibly elevates the goal of simply reducing paperwork to give it greater weight than these results. Not every paperwork reduction proposal will increase time and resources for instruction—which is what IDEA 2004 § 609 requires—and some may even worsen children’s educational and functional results.

Recommendation 5. Amend proposed 1(c) to also require States to implement and describe in their applications comprehensive training programs on the waivers for administrators, educators, related services personnel, and parents.

Rationale. Great care must be taken to ensure that FAPE is provided to children. This requires training administrators, educators, related services personnel, and parents in the proper implementation of these waivers. Parents must be informed participants in the education of their child and have the information they need to protect their children’s rights, and teachers and administrators need to know what the law and waivers require.

Recommendation 6. Revise 1(d) to add the underlined language below:

(d) Assurances that parents will be given a full explanation, written in an easily understandable manner and in the parents’ native language, of any statutory, regulatory or State requirements that will be waived, as well as an explanation of the effect of such waivers and the protections that have been put in place to ensure the provision of FAPE in the Least Restrictive Environment, and protection of the child’s civil rights and procedural safeguards under Section 615.

Rationale. Parents need to receive notice of any waiver permitted under this Program, not just waivers of statutory requirements. Since regulatory and State requirements may be waived, parents must also receive notice about these waivers. In addition, it is meaningless to send a notice to parents with a list of references to statutory, regulatory and State requirements that will be waived, without an explanation of how these waivers will affect them and their children. The importance of parental participation and input in a child’s IEP and education are stressed repeatedly in IDEA 2004.

Recommendation 7. Amend proposed 1(e) to prohibit waiving any portion of the IEP requirements.

Rationale. IDEA Section 602(9) defines FAPE as “special education and related services that . . . are provided in conformity with the individualized education program required under section 614(d).” Section 609(a)(2)(C) prohibits any pilot program from “affect[ing] the right of a child with a disability to receive a free appropriate public education under part B.” Consequently, it is impermissible to waive the IEP requirements imposed by § 614(d), and the final requirements should specify this. If the final regulations permit waiving the IEP, they would contradict the IDEA, in violation of § 607(b)’s explicit prohibition. In addition, such a regulation is impermissible under § 607(a).

COPAA understands the Department's desire to ensure that parents who take part in the pilot give informed consent and fully understand the pilot and their right to revoke consent. Informed consent is very important for all aspects of a child's special-education program. But including an informed consent provision in the proposed requirements does not enable the Department to waive IEP requirements in violation of the IDEA. Section 607(b) and its requirements are explicit.

Furthermore, the IEP is critical for providing a "written record of reasonable expectations" and ensuring that appropriate services are provided to children with disabilities, as Congress observed when it enacted the EAHCA. S. Rep. No. 94-168 at 12 (1975). The Supreme Court has been equally firm. The IEP is the "centerpiece of the statute's education delivery system for disabled children," *Honig v. Doe*, 484 U.S. 305, 311 (1988). It is the "modus operandi" of the entitlement to a free, appropriate public education *Sch. Committee of the Town of Burlington v. Dept. of Educ. of Massachusetts*, 471 U.S. 359, 368 (1985). The provision of specially-designed instruction and related services in accord with an individually-designed IEP constitutes the "basic floor of opportunity" required by the Supreme Court in *Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 201 (1982).

Not only is waiving the IEP explicitly contrary to the IDEA, but there is other evidence that Congress did not intend to authorize the Secretary to waive this provision and other key portions of the IDEA. Section 617(e) directs the Secretary to [not later than the date of publication of final regulations] "publish and disseminate widely to States, local educational agencies, and parent and community training and information centers--

- (1) a model IEP form;
- (2) a model individualized family service plan (IFSP) form;
- (3) a model form of the notice of procedural safeguards described in section 615(d); and
- (4) a model form of the prior written notice described in subsections (b)(3) and (c)(1) of section 615 that is consistent with the requirements of this part and is sufficient to meet such requirements."

This directive demonstrates that Congress intended to assist all States in activities to streamline procedures associated with the implementation of the requirements related to IEPs, IFSPs, Procedural Safeguards Notice and Prior Written Notice while recognizing that these four components are among the core components of a FAPE. Hence, IEPs and IFSPs, like the Section 615 requirements, should not be marginalized through any activities designed to address paperwork reduction.

In addition, studies have shown that changes to the IEP requirements under IDEA are not appropriate mechanisms for reducing paperwork. The SPeNSE longitudinal study clearly showed varying levels of paperwork in different regions of the country even though IDEA requirements are the same in all the regions. Furthermore, participants at a 2002 NASDSE Special Education Paperwork Policy Forum indicated that district rules

were often the source of IEP paperwork burdens and that they did not favor changes to the IEP document or the IEP process under IDEA as solutions.

Recommendation 8 and Rationale. For the same reasons as stated in Recommendation 7, amend 1(f)(i) to delete the last sentence, which refers to waiving elements of the IEP process.

Recommendation 9 and Rationale. For the same reasons as stated in Recommendation 7, the language contained in 1 (e) should be deleted and replaced with a new provision stating:

States applying for a waiver must provide assurances that no requirements related to IEPs or IFSPs will be waived as part of the program. States should utilize the model forms developed by the U.S. Department of Education as a vehicle for addressing excess paperwork associated with these provisions created at the State or LEA level. The Secretary will terminate a State's waiver granted as part of this program if the Secretary determines that the State has violated any requirements related to IEPs or IFSPs.

Recommendation 10. Revise proposed 1(f)(v) to mandate that evaluations must include data from family members, including parents, and where appropriate, students with disabilities.

Rationale. Under IDEA § 609(b), the Department **must** evaluate the satisfaction of family members with the proposed waiver. This means the evaluator must obtain data from parents and other family members. It is not sufficient to simply study information from the school districts. The IDEA explains the importance of family input: "almost 30 years of research and experience" has shown that education of children with disabilities is more effective by ensuring that families have meaningful opportunities to participate in their children's education. In addition, the evaluation should include data from students with disabilities where appropriate. IDEA explicitly recognizes the role of students (*e.g.*, transition-age students are specifically included as IEP team members).

Recommendation 11. Add criterion 1(g) to require the pilot programs to have effective mechanisms for reporting adverse events (*e.g.*, the denial of FAPE).

Rationale. The pilot programs are experiments. As is standard practice for an experiment, there should be an effective mechanism for reporting adverse events to the evaluator and State. For example, if parents, teachers, or others believe that a child in the program is being denied FAPE or denied his/her civil rights, there must be way to effectively report this.

Recommendation 12. Revise proposed requirement 2, defining applicable civil rights requirements, to include the Individuals with Disabilities Education Act and the Constitution, and to add a detailed explanation of what procedures a State must maintain to ensure that children's civil rights are not violated or waived.

Rationale. The IDEA is a civil rights law. As Senator Michael Enzi, Chair of the Senate Health Education Labor and Pensions Committee observed recently:

On November 29, 1975, President Gerald Ford signed into law the Education for All Handicapped Children Act, a landmark piece of legislation that reflected America's fundamental and continuing concern for education and human rights. **This legislation reaffirmed the most basic values of our democracy by extending education and civil rights protections to individuals with disabilities.**

151 CONG. REC. S13400 (daily ed. Nov. 18, 2005).

Indeed, Congress created the IDEA in response to two cases which highlighted the discrimination faced by children with disabilities attempting to receive an education, *Mills v. Board of Education*, 348 F.Supp. 866, 878 (D.D.C.1972), and *Pennsylvania Association of Retarded Citizens v. Pennsylvania* (PARC), 344 F. Supp 1257 (E.D. Pa. 1971). Moreover, the IDEA is based on principles of equal protection embodied in the 14th Amendment. The IDEA embodies the concept that when government provides education to children, it must provide education to all children including those with disabilities. The Department should include the IDEA in its list of civil rights that States may not waive or infringe upon during the Paperwork Waiver process. Furthermore, the Constitution itself protects civil rights of all citizens, and must be included in the list. In addition, the proposed regulation should provide concrete, detailed guidance to States on what they should do to ensure that they do not waive or infringe upon these civil rights. Otherwise, there is too great of a danger that States, even those acting in good faith, may inappropriately restrict a child's civil rights.

Recommendation 13. Amend the first note at the end of this section to provide that the paperwork reduction pilot may not be used as a vehicle for implementing multi-year IEPs that do not comply with the terms of IDEA § 614(d)(5) (the multi-year IEP pilot).

Rationale. Congress laid out strict criteria for the multi-year IEP pilot including requirements for the multi-year IEP contents, informed consent, and other safeguards and protections. It permitted only 15 states to be approved for it. Congress did not intend states to circumvent the § 614(d)(5) requirements by permitting other kinds of multi-year IEP programs through the paperwork reduction pilot.

Recommendation 14. Add a new requirement that explicitly acknowledges that the Department cannot waive state laws or regulations, and that States assure the Department that they have complied with all requirements under State law.

Rationale. The Department lacks authority to waive State statutes or regulations. Many states have regulations and statutes that provide greater protection than IDEA's minimum floor. Moreover, any State changes to law or regulations must comply with

State law requirements, State Administrative Procedure Act requirements for amending regulations.

Recommendation 15. Add a requirement that any State permitted to participate in both Multi-Year and the Paperwork Reduction Pilot may not implement both programs in the same district or school.

Rationale. The pilot programs are experiments. This prohibition is necessary to ensure that the results of the evaluations are precise to the program being evaluated and not the result of the co-mingling of the two.

Proposed Selection Criteria

Recommendation 1. Revise the proposed "Significance" Selection Criteria so that increasing instructional time and improving educational and functional results for children with disabilities are given the greater weight that the IDEA demands.

Rationale. As worded, the Significance factor appears to give equal weight to the extent to which a proposed pilot demonstrates new strategies, reduces paperwork and improves educational results for children. This is inappropriate. Otherwise, a pilot could get a high score by including new strategies and reducing paperwork greatly, but doing very little to improve educational and functional results for children. IDEA § 609's specific 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." Moreover, 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.

Recommendation 2. Revise the proposed "Significance" Selection Criteria so they are aligned with the statutory requirements and eliminate any weight given simply because a strategy is new or innovative, a factor irrelevant under the statute.

Rationale. IDEA 2004 § 609 states that proposed pilot programs must reduce paperwork burdens that interfere with instructional time and other activities that improve educational and functional results for children. It says nothing about new strategies, and this criterion is wholly unrelated to the statutory requirement. By dividing the "Significance" criterion between (a) the newness of the strategy and (b) the statutory requirements, the proposed requirements improperly water down the significance of the latter in the scoring mechanism. It thus appears contrary to the requirements of IDEA 2004 and impermissible under § 607(b).

Recommendation 3. In the proposed "Significance" Selection criterion, replace the term "improve academic achievement" with "improve educational and functional results" so that the regulation does not contradict the IDEA.

Rationale. Section 609(a)(1) of the IDEA explicitly states that the purpose of the pilot program is to increase resources and time for "instruction and other activities aimed at improving educational and functional results for children with disabilities." Section 609(a)(2) authorizes the Secretary to approve pilot program waivers that reduce "noninstructional time burdens that do not assist in improving educational and functional results for children with disabilities." Functional goals include those related to all areas of development affected by the child's disability, including, but not limited to, functional life skills, behavioral, social-emotional, speech, and motor goals. By contrast, the term "academic achievement" is used nowhere in § 609 of the statute. To limit the scoring to proposals that improve academic achievement impermissibly narrows the pilot program, in violation of both §§ 607(a) and 607(b) of IDEA 2004.

Recommendation 4. We support inclusion of criterion 2, requiring the measurement of the extent to which the project's objectives and outcomes are clearly specified and measurable; the extent to which it successfully reduces excessive paperwork while increasing instructional time; and the extent to which it encourages consumer involvement, including parent involvement.

Rationale. The importance of involving parents in their children's education and IEP planning process is explicitly recognized in the IDEA. A pilot program that fails to safeguard the rights of parents and ensure their involvement is one that is contrary to the Act. It is likewise important to ensure that the State's plan actually effectuates better instruction and achieves better academic and functional results for children, and that only extraneous paperwork is eliminated.

Recommendation 5. Revise criterion 3(a) to include an evaluation of whether the pilot project has a mechanism for reporting adverse events and the effectiveness of that mechanism.

Rationale. As recommended on page 5 above, it is important to have an effective mechanism by which parents, teachers, and others can report adverse events if they occur (*e.g.*, a child in the program is being denied FAPE). The evaluation should likewise measure how effective these mechanisms are.

Recommendation 6. Revise criterion 3(c) to include among the perspectives considered those of family members and advocates for children with disabilities.

Rationale. Criterion 3 measures the extent to which the program ensures "that a diversity of perspectives are brought to bear in the operation of the proposed project, including those of parents, teachers, related services providers, school administrators, or others, as appropriate." Other than parents, all of the other named persons are school district employees: teachers, related services providers, and administrators. This enables the school districts' views to outweigh those of parents and other family members and minimizes the importance of their views.

It is the satisfaction of "family members" that the statute requires the Department to measure in § 609(b)(4). But § 609 assigns no importance to considering school district employees' views, and does not even mention them. Indeed, they are irrelevant. For example, a proposed program might eliminate extraneous paperwork for teachers and tremendously increase educational and functional results for children, yet administrators may dislike it. Furthermore, the perspectives of advocates for children with disabilities are important, as many have years of experience working with children with disabilities and their educational needs. Because § 609(b)(4) of the statute places a special emphasis on the satisfaction of "family members," the criterion should be revised to include all family members and to accord much greater significance to their perspectives.

Recommendation 7. Expand the scoring criteria to include a section that measures the extent to which the State has taken specific precautions to ensure that its proposed pilot program does not infringe upon the IEP rights of children, the procedural safeguards in § 615 of the Act or the civil rights of children, and that it provides all children with FAPE in the Least Restrictive Environment.

Rationale. Although this seems obvious, the proposed scoring system does not include it. Great care must be taken to ensure that plans do not affect a child's procedural safeguards or civil rights or fail to protect their right to a FAPE. The obligation to do so rests with the Department, if a State, even unknowingly, submits a proposal that would violate these requirements. Because these rights are so important, the proposed pilot program scoring should include this criterion. States that have taken specific, strong precautions to protect students and prevent adverse consequences to them should get higher scores. Of course, the Department cannot approve any programs that impair procedural safeguards, civil rights, or the right to FAPE, regardless of how high they may score otherwise.

CONCLUSION

Thank you for considering the comments of the Council of Parent Attorneys and Advocates about the proposed Paperwork Reduction Pilot. Please contact Robert Berlow, COPAA's Government Relations Chair, if COPAA may be of additional assistance or provide additional information.

Sincerely,
Barbara J. Ebenstein, Chair

Robert I. Berlow
Government Relations Chair
Council of Parent Attorneys and Advocates
robertberlow@comcast.net
301-912-2281