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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

The Consortium for Citizens with Disabilities (CCD) is a coalition of national consumer, advocacy, provider and professional organizations headquartered in Washington, D.C. Since 1973, the CCD has advocated on behalf of people of all ages with physical and mental disabilities and their families. CCD has worked to achieve federal legislation and regulations that assure that the 54 million children and adults with disabilities are fully integrated into the mainstream of society. CCD is comprised of more than 100 national organizations that promote the full participation of people with disabilities in society.

The Education Task Force is made up of more than 50 organizations representing parents, related services, special education teachers and administrators, and disability advocates. All are especially dedicated to ensuring that children with disabilities have full access to education at all levels – early childhood (Birth-5), K-12 and higher education. The Education Task Force monitors federal legislation and regulations affecting the education of children and adolescents with disabilities and their families, including the Individuals with Disabilities Education Act (IDEA) programs.

We are pleased to submit the following comments which cover seven major Sections of the law. They include more than 60 separate detailed recommendations, with 28 of those recommendations addressing aspects of Section 614, Evaluation, Eligibility and IEPs. In addition, our comments stress the importance of federal monitoring and enforcement of IDEA, so that the system works efficiently and appropriately for every child.

We hope that you will appreciate the perspectives of both parents and educators that are represented by our comments and that our sense of cooperation between all of the interested parties will be evident in the regulations that you will publish for our further review. Thank you for the opportunity to participate in this process and we look forward to working with the Department in the preparation of the regulations.

Sincerely,

Leslie Jackson, AOTA

Paul Marchand, The Policy Collaborative

Katy Beh Neas, Easter Seals

Steve Spector, CHADD

Jane West, HECSE/TED

[www.c-c-d.org](http://www.c-c-d.org)

## **SECTION 602**

### **Highly Qualified [Sec. 602(10)]**

**Recommendation:** The regulations should clarify that when a special education teacher is determined to be “fully certified” by the state in special education, that certification implies that the teacher is knowledgeable and skilled in the special education area in which certification is received.

**Rationale:** States have a range of requirements for determining special education certification. Whatever the state chooses for those requirements, they should send the message to parents that if the teacher is labeled as having obtained “full state certification as a special education teacher,” then the parent can assume that such a teacher is knowledgeable and skilled so that they can meet unique needs of the student with a disability. In eliminating the option for an “emergency, temporary or provisional” licensure, the law clearly sends the message that special education teachers should be fully skilled and knowledgeable in special education. . If an individual cannot demonstrate special education skill and knowledge, the individual should not be eligible for “full state certification as a special education teacher.”

**Recommendation:** The regulations should clarify that states are not to create new categories to replace “emergency, temporary or provisional” certification, or waivers for either special education teachers or related services personnel (e.g. ‘conditional’ or ‘interim’ certification, or other similar semantic devices designed to avoid the specific language contained in the statute). Clearly all special education teachers are to meet the full set of requirements for special education skill and knowledge represented by full certification, not a watered down set of expectations.

**Rationale:** Any practice that allows for the invention of new categories of certification that are lower standards than full certification and that are intended to undermine the prohibition against temporary, emergency, provisional or waived certification would be contrary to the law’s requirements.

**Recommendation:** Some states have developed HOUSSE standards for special education teachers. The regulations should explicitly state that states may not establish a lesser standard for content knowledge requirements of special education teachers compared to the standards for general education teachers. The provision of HOUSSE standards are to be used to address the content requirement of the statute only, NOT primary certification as a special educator.

**Rationale:** While this recommendation is included in report language, it is important to make it explicit in the regulations to ensure that teachers of students with disabilities, regardless of the setting, are as well qualified to teach content as general education teachers who are teaching the same content.

**Recommendation:** States should work collaboratively to ensure reciprocity of content areas standards, including HOUSSE provisions, across states.

**Rationale:** Ensuring reciprocity across states of the HOUSSE and other content area standards will ensure that teachers may move from state to state and maintain their highly qualified status, thus ameliorating the shortage of highly qualified teachers in core content areas.

**Recommendation:** The regulations should explicitly state that a special education teacher at the middle or high school level who provides consultative services only (such as adjustments to the learning environment, modifications of instructional methods, adaptation of curricula, the use of positive behavioral supports and interventions and the use of appropriate accommodations to meet the needs of individual children) to a general education teacher who is highly qualified in a given content area and does not provide direct instruction in core content areas, should not have to meet the highly qualified core content area standards in the given content area.

**Rationale:** The delivery of specially designed instruction to meet the unique needs of an individual with a disability requires involvement of a well-prepared special educator in the education of all individuals with disabilities. Assuring access to the general curriculum generally requires the skills and expertise of general and special educators working collaboratively. Regardless of teaching arrangements, the teacher who provides instruction in core academic subjects must be highly qualified. However, if the special education teacher's assigned role is to provide consultative services to a highly qualified general education teacher (e.g., accommodations and modifications for individual student needs, assessment of student achievement), the special education teacher should not be required to be highly qualified in the content area.

**Recommendation:** The regulations should clarify the meaning of the requirement that teachers who teach to alternate achievement standards above elementary school level have subject matter knowledge appropriate to the level of instruction being provided. This requirement must address the multiple instructional levels that can exist within one class. It should not be interpreted to permit subject matter knowledge appropriate only for the lowest level of instruction provided by a teacher in a class where various levels of instruction should be provided.

**Rationale:** Although the category of students who take assessments aligned to alternate achievement standards is limited under NCLB to the students with the most significant cognitive disabilities, there is still a wide range of ability and instructional levels within this group. The regulations for NCLB recognized this by permitting multiple alternate achievement standards. If there are students at various instructional levels in one class, the teacher must have subject matter knowledge appropriate for teaching content to all of these students.

**Recommendation:** the regulations should explicitly state that a special education teacher who provides consultation to a general education teacher shall not provide any instruction

via a “pull-out” or “self-contained” model of service delivery unless the special education teacher also meets the highly qualified requirements for the academic area.

**Rationale:** Special education teachers providing consultative services to a highly qualified teacher must restrict their services to areas that supplement not supplant the direct instruction provided by the highly qualified general education teacher. The intent of both IDEA 04 and NCLB is to provide all students, including students with disabilities, access to teachers who are qualified to teach the core academic content. The use of a “pull-out” or “resource” model of special education service delivery is common, particularly for students with high-incidence disabilities such as learning disabilities. Often, students are receiving intense instruction in a core academic, such as reading, via these types of arrangements, particularly at the elementary level. In such cases, the regulations should make it clear that special education teachers providing instruction in this manner should be highly qualified in the content area(s). Guidance from ED on the NCLB highly qualified provisions clearly states the activities that special education teachers can carry out that do not require them to be highly qualified in the particular subject. These include consultation on the adaptation of curricula, consultation with teachers on using behavioral supports and interventions or selecting appropriate accommodations, assisting students with study and organizational skills, and reinforcing instruction that was given previously by a teacher who was highly qualified. “Reinforcing” instruction should not include direct instruction in an alternative program, such as a reading program that is not used in the general education classroom and taught by a general education teacher highly qualified in reading/language arts.

**Recommendation: Universal Design [Sec.602 (35)].** The regulations should reference universal design of curriculum, instructional materials and assessments.

**Rationale:** This provision refers to the definition of universal design from the Assistive Technology Act of 1998. It is a general definition and may not be interpreted to apply to curriculum and instructional materials which are essential to educational improvement. Universal design of assessments is mentioned elsewhere in IDEA, but it makes sense to also reference it here.

## **SECTION 608**

### **State Administration**

**Recommendation: [Sec. 608(a)(2)].** The regulations should clarify the requirement that the State identify in writing any rule, regulation or policy as a state imposed requirement that is not required by this title and federal regulations.

**Rationale:** Without clarification, this provision could be interpreted as discouraging states from providing services and protections that exceed the requirements in IDEA 2004. Congress could not have intended such an

interpretation because it undermines State and local flexibility, the principle upon which IDEA 2004 was based. Historically, the fact that something is “not required” by IDEA has been interpreted to mean that it still remains an option for the States. In addition, it should be noted that this provision creates a new source of paperwork for the States.

**Recommendation:** The regulations should clarify that nothing in this section is intended to discourage States from exercising autonomy and from requiring LEAs, if they so choose, to set standards beyond the minimum requirements set by the Federal government.

**Rationale:** While there is no question that States and LEAs are required to meet minimal requirements of IDEA, as amended, the Federal government has no legal basis for precluding or suggesting that States are barred from exercising their right to do more. State legislators, administrators, policymakers, parents and other members of the school community who are committed to improving the educational outcomes for students with disabilities should not be discouraged from exercising their right to provide additional rights and protections for students with disabilities under their State's regulations or law. It is well-established law in almost every circuit that state law can be stronger, except if there are certain very specific conflicts.

## SECTION 609

**Recommendation:**

The regulations should clarify that if a State submits a proposal for the Paperwork Reduction Pilot under this section that also contains a multi-year IEP component, the State should be required to adhere to the requirements of Sec. 614(d)(5). In addition, States should be required to provide ample opportunity for parental input on the State's proposal.

**Rationale:** The changes to IDEA requirements in the States that are chosen to participate in this pilot are so significant and require so much scrutiny that a State should be allowed to undermine the purpose of having a multi-year demonstration.

**Recommendation:** The regulations should require public notice before the proposal is developed, stakeholder participation on any committee charged with the development of the proposal and public comment on the proposal before it is finalized and submitted for approval. The notice should have a particular emphasis on communicating to parents the potential impact of participating in this pilot program. The Secretary, in establishing the required deadline for the submission, should allow adequate time for this process to take place.

**Rationale:** IDEA requirements will be critically altered in any State that has its proposal approved; therefore parents should have significant participation at every stage in the development of the proposal. The Secretary should clearly define the level of stakeholder involvement required for the proposals under this provision.

## **SECTION 612**

**Recommendation: Obligations Related to and Methods of Ensuring Services [Sec. 612(a)(12)].** We strongly encourage the Department to emphasize the importance of developing, implementing, and enforcing state interagency agreements. State Medicaid agencies in particular should maintain a strong role in the reimbursement of eligible services for Medicaid eligible children.

**Rationale:** Such agreements, when effectively implemented, should improve collaboration across child-serving agencies and reduce disputes of responsibilities.

**Recommendation: Personnel Qualifications [Secs. 612(a)(14)(B)(i) and 612(a)(14)(C)]** Include regulatory language in the relevant section (Sec. 300.136 Personnel standards, or its successor) that details specifics on state educational agency (SEA) obligations and outlines some specific measurable steps that local education agencies (LEAs) could take to recruit, hire, and retain highly qualified personnel, such as the following:

SEAs shall:

- establish caseload/classroom size standards that take into account total workload activities required and performed by school-based personnel to engage in the broad range of professional activities necessary to meet individual student needs, both to attract and retain qualified personnel and to meet the educational needs of students; and other programs that may include, but is not limited to:
- funding intensive certification, licensing, or registration programs for personnel who are providing special education or related services to accelerate the preparation of qualified personnel, including distance learning opportunities;

LEAs shall:

- Establish reasonable workload requirements that allow special education teachers and related services providers to engage in the full range of professional roles and responsibilities so that students with disabilities receive the appropriate quality and quantity of services;
- Provide funds to ensure adequate working conditions, including appropriate facilities, necessary educational material, ongoing continuing professional development, and necessary clerical, technological support, and salary supplements for nationally certified personnel;

**Rationale:** There is concern about the potential changes in qualification standards and hiring practices that may result from changes in IDEA 2004. It is critical that state education agencies (SEAs) establish appropriate qualifications for related services personnel, as such a practice is in the best interest of the children in meeting educational goals, especially related to the Adequate Yearly Progress criteria for No Child Left Behind. Ensuring that related service providers have received adequate professional preparation to meet the needs of today's student population will ensure that students with disabilities receive the appropriate quality and quantity of services, which is consistent with the intent of Congress. It is essential that the Department of Education provide clear leadership at this point in time to direct efforts toward appropriate and effective initiatives for recruitment and retention of qualified personnel, rather than allowing states to take a path that will ultimately create crises and student failure that could have been avoided.

**Access to Instructional Materials [Sec. 612(a)(23)].**

**Recommendation:** The regulations should indicate that the meaning of 612(23) -- ACCESS TO INSTRUCTIONAL MATERIALS is that the NIMAS format is the preferred format for the provision of instructional materials by publishers. Further, the regulations must require that the NIMAS be reviewed periodically by a panel of experts to ensure that the latest accessible technology is being used.

IN GENERAL--The State adopts the National Instructional Materials Accessibility Standard for the purposes of providing instructional materials to blind persons or other persons with print disabilities,”

**Rationale:** Without the assurance that the NIMAS is the preferred format entities which convert the electronic files provided into the accessible versions of the materials will be unable to anticipate the resources necessary, such as having a sufficient number of appropriately trained transcribers to transcribe the electronic files into Braille. In addition, producers of assistive technology must be able to anticipate the needs by producing hardware and software which is compatible with the NIMAS files. For example, producers of the software used to convert electronic files into Braille and those who develop the hardware devices which make it possible to use the electronic files themselves to obtain speech output or refreshable Braille Output.

**Recommendations:** “(b) States Rights: ...If a State educational agency chooses not to coordinate with the National Instructional Materials Access Center, such agency shall provide an assurance to the Secretary that the agency will provide instructional materials to blind persons or other persons with print disabilities in a timely manner. The regulations should be modified in two ways. First, the states opting not to use the National Instructional Materials Center, need to develop procedures, similar to those established under section 674(e)(2). The regulations also must clearly set out the requirement for the timeliness of instructional materials to reflect that the materials must be provided in the alternative format, appropriate for the individual student, and at the same time as the other students who are not disabled receive their instructional materials

**Rationale:** Because of the Chafee amendments to the copyright laws it is critical that publishers copyright limitations be protected. Without this requirement the purpose of this section will have been forfeited. Furthermore, this is the intent of Congress as stated in the H.Rep. 108-77.

**Recommendation:** We recommend that the “specialized formats” as defined in 612(a)(23)(E) to include electronic digital files such as the NIMAS format.

**Rationale:** This would mean requiring that instructional materials be provided in the format adopted by the Department of Education and could mean significant savings in the conversion of electronic files since many of the assistive devices have now been upgraded so that the user with a disability can reap the full benefits from the navigational characteristics in the standard file format. For example, students with learning disabilities can use software to create outlines, dictionaries of terms and navigate quickly and easily through instructional materials with the addition of speech output to assist them in learning.

**Recommendation: Prohibition on Mandatory Medication [Sec. 612(a)(25)].** In any regulations pertaining to this new provision, we strongly encourage the Department to incorporate the complete statutory language, most importantly, the critical Rule of Construction (B) --

Nothing in subparagraph (A) shall be construed to create a Federal prohibition against teachers and other school personnel consulting or sharing classroom-based observations with parents or guardians regarding a student's academic performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services under paragraph (3).

**Rationale:** We believe that this language is imperative to ensure that the lines of communication between school personnel and parents remain open regarding the needs of the child. It remains our concern that, without this language, such policies would be interpreted as a prohibition on certain discussions between school personnel and parents and would create a chilling effect on the identification of students with mental health and behavioral needs. The data from the Surgeon General's Report on Mental Health (1999), the President's New Freedom Commission on Mental Health, and other sources indicate that the under-identification and misidentification of children and adolescents with mental disorders is already a huge problem.

## **SECTION 613**

**Recommendation: Purchase of Instructional Materials [Sec. 613(a)(6)].** The regulations should require LEAs to adopt the National Instructional Materials Accessibility Standard for the purposes of providing instructional materials to blind persons or other persons with print disabilities, consistent with requirements established for SEAs under Section 612(a)(23).

**Coordinated Early Intervening Services [Sec. 613(f)].**

**Recommendation:** The regulations should encourage LEAs to develop a systematic process to deliver scientifically-based (to the extent possible) academic and behavioral interventions -- making use of supplemental materials where appropriate -- for children determined to be at risk for referral to special education evaluation. Additionally, the process should specify a time frame in which the child will receive early intervention services and when a decision will be reached about the child's progress. Parental consent should be obtained before a child receives early intervening services. The regulations should clarify for schools that no services provided under this provision shall be the sole responsibility of a special education teacher funded by IDEA Part B, including scientifically-based literacy instruction. LEAs should be encouraged to utilize related services personnel in the development and delivery of services under this provision, including school-based mental health professionals are trained to develop behavioral interventions that are directly linked to improved academic achievement.

**Rationale:** The intent of this provision, as stated by Congress, is to reduce academic and behavioral problems in the regular education environment and the number of referrals for special education and the intensity of special education services required for some students. Only through careful coordination and documentation of activities provided under this provision will these results be realized. The Conferees believe that early intervening services should make use of supplemental instructional materials, where appropriate, to support student learning. Children targeted for early intervening services under IDEA are the very students who are most likely to need additional reinforcement to the core curriculum used in the regular classroom. These are in fact the additional instructional materials that have been developed to supplement and therefore strengthen the efficacy of comprehensive core curriculum. Per the requirements of NCLB, core curriculum must meet standards of scientific rigor. As supplementary materials to these core programs, they are aligned with and designed to reinforce the skills taught in these comprehensive research-based texts. Congress has also clarified that they do not intend for early intervening services 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. Additionally, the availability of IDEA funds to serve children not found eligible for services under the Act is a new, somewhat controversial provision. Given the inadequacy of the federal Part B funds available to States, provisions for use of these funds must ensure that IDEA-eligible students continue to be served by special education personnel who are already charged with the delivery of services and provision of FAPE.

**Recommendation:** The regulations should require LEAs to provide parents with information about the differences between early intervening services and special education services, and the process to be followed for each. Parental consent should be obtained before a child receives early intervening services.

**Rationale:** Congress has made it clear that parents are to be full participants in their child's education. To do so, parents must be able to make informed decisions when their child is experiencing academic and/or behavioral difficulties in school.

## **SECTION 614**

**Recommendation: Parent Refusal or Failure to Consent for Initial Evaluation [Sec. 614 (a)(1)(D)(ii)].** The regulations should require documentation that the local education agency has made a serious effort to inform parents of their rights and responsibilities under IDEA.

**Rationale:** Parents must have enough information to make an informed decision about what their child's education. In view of the consequences to the child who is not provided with FAPE, the LEA must demonstrate that a significant effort was made to inform parents about its importance.

**Recommendation: Absence of Consent – Effect on Agency Obligations [Sec. 614 (a)(1)(D)(ii)(III)].** The regulations should show the link between this provision and Section 614 (c)(3) to clarify that the LEA must make a reasonable effort to obtain consent from the parents before the LEA is freed from its obligations to convene an IEP meeting or to provide a free appropriate public education (FAPE).

**Rationale:** The LEA should have to demonstrate significant effort to obtain consent, in light of the consequences to the child if the LEA is excused from providing FAPE. Parental need for an interpreter, or to have consent forms in their native language, or to be contacted at a different time of day, for example, should not be allowed as reasons to free the LEA from its obligation to provide FAPE.

**Recommendation: Reevaluations [Sec. 614(a)(2)].** The regulations should clarify that parents must be notified of their right to request a reevaluation. This notification should be documented in writing and provide the information parents need in order to decide whether to request a reevaluation.

**Rationale:** The right to request a reevaluation is meaningless if parents are unaware of the right and/or have not been given the information they need to decide whether to exercise the right.

**Recommendation: Additional Requirements [Sec. 614(b)(3)(ii)].** The regulations should incorporate the report language which explains why the term “language and form” replace the term “in the child’s native language.”

**Recommendation: Additional Requirements [Sec. 614(b)(3)(ii)].** The regulations should clarify the notion of “not feasible” is a high standard that represents a rare set of circumstances.

**Rationale:** Lack of feasibility should be a very rare occurrence in the context of providing appropriate assessment and other evaluation materials. This must be illustrated by using examples of the unusual circumstances in which providing such assessment and other evaluation materials would not be considered feasible.

**Recommendation: Special Rule for Eligibility Determination [Sec. 614(b)(5)].** The regulations should set timelines to require evaluation of a child who continues to fail to make adequate progress in reading or math.

**Rationale:** If a child is not making adequate progress an evaluation may be needed to determine whether this failure is due to a disability, rather than the lack of appropriate instruction.

**Recommendation: Specific Learning Disabilities [Sec. 614(b)(6)].** CCD refers the Secretary to the recommendations of the 2004 Learning Disabilities Roundtable. In addition, the regulations should also clarify that parents always have the right to request an evaluation for their child.

### **Summary of Performance.**

**Recommendation: 34 CFR §300.534 Determination of Eligibility- Add new “(c)”**  
The regulation should require that, within at least 30 days of termination of a child’s eligibility for services under the Act, the LEA must provide a Summary of the child’s academic achievement and functional performance that includes:

- a statement containing the child’s disability, and a statement of the current nature and extent to which the child’s disability impacts academic and functional performance sufficient to establish eligibility under the ADA and Section 504;
- a statement of the program modification, accommodations and supports found to be essential to the child’s success, including how access produced positive gains for the child, and;
- a recommendation on how to assist the child in meeting the child’s postsecondary goals.

**Rationale:** IDEA 2004 makes it clear that LEAs are not required to conduct a re-evaluation when a child graduates from secondary school with a regular diploma, or ages out of eligibility under State law. However, the Congress has made clear that the information in the new Summary of Performance is to provide “specific, meaningful, and understandable information to the student, the student’s family, and any agency,

including postsecondary schools, which may provide services to the student upon transition.” In order to achieve these goals, it is imperative that the regulations explicitly require adequate information regarding the students’ disability, impact of the disability, and any needed modifications, adaptations, accommodations in order to have full access to postsecondary life. Since accessing these supports and services is dependent on establishing eligibility under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act, it is imperative that the information included in the Summary of Performance satisfies these requirements.

**Individualized Education Programs (IEPs) [Sec. 614(d).**

**Recommendation:** [Sec. 614(d)(1)(A)(i)(I)] requires a statement of the child’s present levels of academic achievement and functional performance. Guidance is needed on how to measure functional performance.

**Recommendation:** [Sec. 614(d)(1)(A)(i)(I)(cc)]. The regulations should clarify that the IEP team still has the option to use short-term objectives or benchmarks for any student, even though IDEA 2004 only requires these measurement tools for students who take alternate assessments aligned to alternate achievement standards.

**Rationale:** Short-term objectives are an appropriate way to measure progress toward annual goals, especially functional goals, for many students who take an assessment aligned to grade level achievement standards. The decision of whether to use short-term objectives or benchmarks for these students should be made by the IEP team, which includes the parents. The use of these measurement tools should not be prohibited or discouraged by any State, LEA or school.

**Recommendation:** [Sec. 614(d)(1)(A)(i)(I)(cc)]. The regulations should clarify that the short-term objectives and benchmarks are used to measure a child’s progress toward annual goals.

**Rationale:** This clarification is necessary to clear up any confusion created by the placement of this provision under the requirement for present levels of performance instead of under the requirement for measurable annual goals.

**Recommendation:** [Sec. 614(d)(1)(A)(i)(II) and (III)]. The regulations should give examples of appropriate measurable goals and require states to establish concrete procedures and timelines for progress reports, including concurrency with issuance of report cards, sufficiency of progress to be reported, and a description of how parents shall be notified.

**Rationale:** The current language in this section may be misinterpreted as an option, not part of the requirement. The only option is whether to use quarterly or other periodic reports, as long as these reports are concurrent with the issuance of report cards. The report cards are meaningless if the parents have to read them

without concurrent IEP progress reports. Parents must be able to measure whether or not their child is making adequate progress, as required by IDEA.

**Recommendation:** [Sec. 614)(A)(i)(IV)]. The phrase “peer-reviewed research” should be defined in the regulations as “research that has been published in a journal reviewed by the researcher’s peers.” The regulations should also clarify that in the absence of peer-reviewed research, professional clinical judgment, in conjunction with the best available evidence, is considered acceptable practice.

**Rationale:** The notion of “to the extent practicable” should not serve to undermine the provision of services that, in the clinical judgment of the provider or IEP team, have been deemed appropriate.

**Recommendation:** [Sec. 614)(d)(1)(A)(i)(VI)]. The regulations should clarify that accommodations must be based on the individual needs of the child as defined by the IEP. States should be required to develop and use assessments that cover the whole range of abilities of students.

**Rationale:** It is critical that the IEP clearly state the accommodations to be used in the administration of State or district-wide assessments and for measuring Sec. 612(a)(16)A), as well as for use during instruction. This information is a prerequisite for determining whether a student can take the grade level assessments with accommodations or whether an alternate assessment (on grade level or alternate achievement standards) is necessary. In order for IEP teams to make these decisions, it is important that the distinction between accommodations and modifications be clearly delineated in IDEA in a manner consistent with the use of these terms in the No Child Left Behind Act.

**Recommendation:** [Sec. 614)(d)(1)(A)(i)(VIII)]. The regulations should clarify that IEP Teams can begin transition planning prior to the first IEP to be effect when the child turns 16 as the team may find appropriate.

**Rationale:** Students with disabilities are experiencing significant difficulty providing adequate documentation to establish their disability status under the ADA and Section 504 for access to post-secondary opportunities. Postsecondary goals should address the necessary evaluations, assessments, and documentation requirements that will be needed by the child. Furthermore, the documentation requirements should be the same for all students eligible for services under IDEA. For example: a student with a learning disability who has been diagnosed with dyslexia should not be required to provide new neuro-psychological testing data to ensure eligibility under Section 504 or the ADA every 3-5 years. Students with

sensory or physical disabilities do not face the same re-occurring requirement to prove their disability status, suggesting that a higher standard of documentation is being required for some disabilities.

**Recommendations:** Regulations should clarify that a statement of inter-agency responsibilities and any needed linkages is included in the scope of “transition services.”

**Rationale:** This provision requires transition services to be listed in the IEP but no longer explicitly refers to a statement of inter-agency responsibilities and any needed linkages. Transition is an exceedingly complex and difficult time for parents and they rely on the statement of inter-agency responsibilities and linkages to help them navigate the transition maze.

**Comment: Rule of Construction [Sec. 614(d)(1)(A)(ii)(I)].** The need for clarification in the regulations of the scope of many IEP requirements under IDEA 2004 is heightened by the language in this provision which states that any information that is not *explicitly* required in Section 614(d)(A) should not be construed to be required in the IEP. The clarifications requested above which relate to required elements of the IEP, must be put into the regulations so that strict construction of the statute does not limit the scope of information that Congress intended to be required.

**Recommendation: IEP Team Attendance [Sec. 614(d)(1)(C)].** The regulations should clarify that when the IDEA provides that a parent can waive a right through “agreement” or “consent,” that the parent must be fully informed, and consent must be in writing, signed by the parent, and must be based on prior written notice.

**Rationale:** This and other sections of the IDEA provide mechanisms for parents of children with disabilities to “agree” or “elect” to follow certain alternative procedures in the evaluation and IEP process. The regulations must clarify: how these rights can be waived; that parents must be fully informed about what they are agreeing to; what prior notice parents must receive; and, that the parents’ agreement or consent must be in writing and signed by them. This position is supported by the language of IDEA and case law which requires that waiver of civil rights, including rights under IDEIA, must be “knowing and voluntary.”

**Recommendation: Excusal [Sec. 614(d)(1)(C)(ii)].** The regulations should clarify that the multidisciplinary scope of the meeting must be maintained and that this factor must be considered in determining whether the member’s area of curriculum or related services is being discussed at the meeting or whether written input is sufficient. The regulations should also make it clear that the parent has the right to change their mind about whether to excuse a team member from the meeting.

**Rationale:** Two essential elements of the IEP meeting are the depth and scope of the decision making process when service providers from all the disciplines share their ideas and expertise. Therefore, it is nearly impossible to predict that any

member's area of curriculum or related services will not be discussed. It also makes it difficult to provide written input that can substitute for the member's presence. If it turns out the member's attendance should have been required, the meeting will have to be stopped and rescheduled to have that member in attendance. If IEP team members are regularly excused under this provision there will be an increase in the number of IEP meetings, which is not consistent with the intent of Congress.

**Recommendation: Program for Child Aged 3 to 5 614(d)(2)(B).** The regulations should require that parents must be fully informed and agree in writing before the individualized family service plan can serve as the IEP.

**Rationale:** IDEA 2004 allows many former requirements to be changed or waived with parental agreement or consent. These decisions significantly impact the rights of children protected by IDEA. Therefore, it is essential that parents have the necessary information to make informed decisions and that their consent or agreement is required to be documented.

**Recommendation: Transmittal of records for children who transfer school districts (614(d)(2)(C)(ii).** The regulations should provide a time clarification that the transmittal should occur within 60 school days.

**Rationale:** The transmittal is required to be done promptly, but without a stated time period, parents have no clear recourse when the LEA has not transmitted the records in a timely fashion.

**Consideration of Special Factors [Sec. 614(d)(3)(B)].**

**Recommendation: [Sec. 614(d)(3)(B)(i)].** The regulations should include language specifying that behavioral intervention plans be "linked" to the results of functional behavioral assessments. The hallmark of a successful behavioral intervention plan is that the plan is developed based on the results of a functional behavioral assessment.

**Rationale:** Functional behavioral assessment attempts to determine the environmental variables that impact a child's behavior. Once these variables are identified, they can be strategically modified via the behavioral intervention plan. The use of functional behavioral assessment before developing a behavioral intervention plan allows one to be more confident that the plan will be successful in reducing problem behaviors. Numerous empirical studies have demonstrated that functional behavioral assessments lead to the development of successful behavioral interventions for children in school settings. Without conducting a functional behavioral assessment prior to developing and implementing a behavioral intervention plan, one has to rely on a best guess if the behavioral intervention plan will be successful. Furthermore, functional behavioral assessments identify what, if any, alternative, appropriate behaviors are in the child's repertoire. This information is crucial to the teacher and IEP team in order

to develop a behavioral intervention plan that employs positive based strategies to promote the child's learning.

**Recommendation: [Sec. 614)(d)(3)(B)(iii)].** The regulations should include the requirement that the IEP team consider instructional services related to functional performance skills, orientation and mobility, and skills in the use of assistive technology devices, including low vision devices, for students who are blind or visually impaired. The regulations should include, by way of explanation, the report language of the Senate which gives examples of "functional performance skills" to include independent living skills. S.Rep.108-185.)

**Recommendation: ([Sec. 614)(d)(3)(B)(iv)].** The regulations should include the requirements that the child's language and communication skills are assessed; that he or she receives educational programming and services designed to develop the child's language (expressive and receptive) and other academic skills; and that he or she has communication access to educational information and interactions with peers and professional personnel, including direct communication.

**Rationale:** Language assessment, development, and access are among the most important components of an educational program for a deaf or hard of hearing child. (National Deaf Education Project, The Educational & Communication Needs of Deaf and Hard of Hearing Children: A Statement of Principle Regarding Fundamental Systemic Educational Changes, Gallaudet University, 2000.) Case law requires LEAs to provide communication in the child's communication mode. This regulation will help guide IEP Teams as to how best meet the educational needs of deaf and hard of hearing children.

**Recommendation: Amendments [Sec. 614)(d)(3)(F)].** The regulations should clarify that parents must be informed that they have the right to request a copy of the revised IEP with the amendments. In addition, the regulations should require the LEA provide a copy of the revised IEP to all members of the IEP team.

**Rationale:** A right is meaningless if the parents do not know it exists. In our multi-cultural society it can not be assumed that all parents assume they have a right to make certain requests of a governmental entity.

**Multi-Year IEP Demonstration [Sec. (614)(d)(5)].**

**Recommendation:** The regulations should emphasize that participation of parents is voluntary and that the results of the program be made public. The regulations should require documentation that parents have been informed that their participation is voluntary.

**Rationale:** Parents sometimes are not told or are misinformed about their rights under the law.

**Recommendation: [Sec. 614(d)(5)(A)(iii)(I)].** The regulations should require public notice before the proposal is developed, stakeholder participation on any committee charged with the development of the proposal and public comment on the proposal before it is finalized and submitted for approval.

**Rationale:** The IEP process (and possibly the required elements in the IEP) will be critically altered in any State that has its proposal approved; therefore parents should have significant participation at every stage in the development of the proposal.

**Recommendation: [Sec. 614 (d)(5)(A)(iii)(II)].** The regulations should clarify that the State's assurances with respect to informed consent for the development of a multi-year IEP under subsection (bb) must include a requirement that the informed consent be in writing. These assurances also should contain a detailed explanation of how the State will communicate the information that parents need in order to make informed decisions with respect to multi-year IEPs.

**Rationale:** The impact of consenting to a multi- year IEP is too significant not to be clearly documented. The parents' signatures on a multi-year IEP does not mean that they were provided the information necessary for informed consent.

**Recommendation: [Sec. 614 (d)(5)(A)(iii)(II)].** The regulations should clarify that the proposal shall include all the required elements for IEPs under Section 614(d)(1)(A). In the alternative, the regulations should require that parents be provided with a written list of the required elements under Section 614(d)(1)(A) that are going to be omitted from their child's multi-year IEP if they consent to its development.

**Rationale:** Pursuant to subsection (cc), each State must include in its proposal, a list of required elements for each multi-year IEP including multi-year goals and annual goals for measuring progress toward the multi-year goals. These elements are specifically mentioned because they are not required in the typical annual IEP under IDEA. Although the statute does not explicitly mention other elements that must be included in the list of required elements for each multi-year IEP, it could not have been the intent of Congress to allow the States to eliminate all the other required elements for IEPs listed in Section 614(d)(1)(A) of IDEA 2004.

## **SECTION 615**

**Notification Requirements [Sec. 615(c)].**

**Recommendation: Due Process Complaint Notice [Sec. 615(c)(2)].** The regulations should interpret and clarify this section and the rest of the new due process provisions in a way that will allow parents to protect the rights of their children without undue hardship. In addition, the various timelines contained in this provision, which are exceedingly complex and confusing, need to be clarified.

**Rationale:** Parents may be put at a disadvantage from the outset of due process if Section 615(c)(2)(B)(i)(1) is interpreted to condone an LEA's failure to send written prior notice to the parents before the parent's complaint, by giving the LEA another opportunity under this section to send the notice within 10 days of receiving the complaint. In addition, if the due process complaint notice is insufficient parents will have to jump through more hoops to be allowed to amend it and the timeline for the resolution session and due process hearing will be extended.

This is a very complicated issue for parents and schools. Congress intended this provision simplify and reduce due process. However, it is more likely to make due process overwhelmingly complex for everyone involved. The extent to which this provision is clear to parents and school personnel can lead to decreased litigation. The due process provisions exist to allow parents to protect their children's rights and these provisions will not serve their intended purpose without much clarification in the regulations. Most parents have neither the power nor the access to legal representation that would put them on equal footing with the LEA in due process proceedings.

**Recommendations:** The regulations should require that parents be informed of their right to request a copy of the procedural safeguards notice at any time. Parents should also be informed when the procedural safeguards notice has been updated so they know to request the updated version immediately. If the LEA places a copy of the notice on its website, parents should be informed of its availability in this format. It should also be clarified that placing the notice on the website does not replace the requirement to provide a hard copy to the parents, unless the parents agree in writing.

**Rationale:** This notice contains critical information to help parents become full participants in their child's education. Therefore, it is necessary to ensure that parents receive the most up to date version of this notice, in a manner that is meaningful to them. This is especially important now that IDEA 2004 has reduced the frequency with which this notice will be distributed to parents.

**Recommendation: Mediation [Sec. 615(e)(2)(F)].** The regulations should provide a three day review period for mediation agreements so that parents can fully consider the consequences of the agreement and void the agreement if necessary.

**Rationale:** Since mediation agreements shall be legally binding and enforceable in any State court of competent jurisdiction or in a district court of the United States, a 3-day review period should be allowed for any proposed agreement, as under Sec. 615(f)(B)(iv). Many parents can not afford legal representation to prepare for or attend a mediation meeting because they are unlikely to receive reimbursement of their attorney's fees for this purpose. The LEA has constant access to legal advice and therefore does not need this review period.

**Recommendation: Resolution Session – Preliminary Meeting [Sec. 615(f)(1)(B)(i)].**

The regulations should require the LEA to waive the resolution meeting if the parents can provide evidence to show that, prior to the complaint, the LEA had specific knowledge of the facts later identified in the complaint and had reasonable time for a resolution. The regulations should also reflect the Conference Report language that the relevant members of the IEP team who must attend the resolution session are to be determined by *the parents* and the LEA.

**Rationale:** The intent of the resolution session is to give the LEA the opportunity to resolve the complaint before a due process hearing. This new step in the process is based on the premise that the LEA has not already had this opportunity. Parent groups objected to delaying due process with this required meeting because parents often file a complaint only after the LEA has been fully informed of the problem and has failed to resolve it.

If, prior to the complaint, the LEA had specific knowledge of the facts later identified in the complaint and had reasonable time for a resolution, the LEA should not be given another opportunity to resolve the matter. If the resolution session is permitted to be used in this manner it will discourage the resolution of issues when they first arise. It will be in the LEA's interest to force the parents to file a complaint before the LEA will consider a resolution. This scenario also unjustly delays the due process hearing.

**Recommendation:** The regulations should clarify that the LEA is only permitted to void the agreement within the 3-day review period for the Resolution Session if there is an unforeseeable problem with the terms.

**Rationale:** Parents are unlikely to be reimbursed for attorney's fees related to a resolution session. Therefore, many parents will not be able to hire an attorney to prepare for or attend this meeting. The LEA is not permitted to bring its attorney to the resolution session if the parents are not accompanied by an attorney, however, the LEA does have access to legal advice as it prepares any potential offer of resolution. This means that the LEA is usually fully informed of the consequences of any agreement it might sign while the same is not often true for the parents.

**Recommendation: Timeline for Requesting Hearing [Sec. 615(f)(3)(C)].** The regulations should clarify that IDEA only defers to the State statute of limitations if it is longer.

**Rationale:** Federal law sets the floor and states should not be allowed to by-pass this requirement. Congress did not intend states to enact shorter timelines if they already have a law on the books, as that would only exacerbate the inequity for parents.

**Recommendation:** In the case of “continuing violations” the regulations should clarify that the statute does not begin to toll until the violation ceases.

**Rationale:** This will provide incentive for the LEA to resolve the situation earlier.

**Recommendation:** Section 615 (f)(3)(D)

The regulations should clarify that “misrepresentations” encompass misleading as well as false statements.

**Rationale:** The timeline is not applied if parents were prevented from requesting a hearing due to misrepresentations by the LEA. Misleading statements create the same obstacle for parents as false statements, so they should also prevent the timeline from being applied.

**Recommendation: Right to Bring Civil Action [Sec. 615(i)(2)(B)].** The regulations should clarify that IDEA will only defer to the State time limitation if it is for a period longer than 90 days (**i.e., States may set time limitations that are more favorable to parents and children, but States are not permitted to set time limitations that are less favorable to parents and children**). It should also be clarified that the time limitation will not be applied if the parents are prevented from filing by false or misleading information or the withholding of required information by the LEA. Also, if the parent is not represented by counsel at the due process hearing, the LEA should be required to provide written notice at the end of the hearing with respect to the time limit for appealing to court after the hearing.

**Rationale:** There is a 90 day statute of limitation for filing appeals to court after due process hearings. To fully participate in the process parents must always be fully informed of their rights at the time they need to exercise those rights. A situation where parents are unaware of their rights usually leads to future litigation.

**Recommendation: Award of Attorneys’ Fees [Sec. 615(i)(3)(B)(III)].** The regulations should clarify that the SEA or LEA must affirmatively prove that the parent’s intent was improper in order to be awarded attorney’s fees under this provision.

**Rationale:** Conference Report indicates this provision codifies the standards set forth in *Christiansburg Garment Co. v. EEOC*. 434 U.S. 412 (1978). According to the Report, attorneys’ fees may only be awarded “to defendants in civil rights cases where the plaintiff’s claims are frivolous, without foundation or brought in bad faith.” The regulations should reflect this standard.

### **Authority of School Personnel**

**Recommendation: [Sec. 615 (k)(1)(A)].** The regulations should clarify that an LEA will not be allowed to use this provision to order a change in placement after they have failed to prove that the behavior is not a manifestation of the child’s disability.

**Rationale:** The Conference Report language is clear that this provision is intended to ensure that the manifestation determination is done with consideration of any rare or extraordinary circumstances presented. It is not intended to undermine the manifestation determination review.

**Recommendation: [Sec. 615 (k)(1)(B)].** The regulations should provide criteria with respect to applying the 10 day rule to in-school suspensions. In addition, the regulations should retain the current language in regulation Sec. 300.519 (b) describing a “pattern of removals.”

**Recommendation: [Sec. 615 (k)(1)(C)].** The regulation should clarify that before the same disciplinary procedures that apply to children without disabilities can be applied a child with a disability, the LEA continues to have responsibility to prove that the behavior giving rise to the violation is not a manifestation of the child’s disability.

**Rationale:** This provision clearly states that if school personnel seek to order a change of placement that would exceed 10 school days, the disciplinary procedures applicable to children without disabilities may only be applied to a child with a disability if the behavior is determined not to be a manifestation of the child’s disability. This language is the same as in IDEA 1997. Therefore, IDEA 2004 still requires the LEA to prove that the behavior is not a manifestation of the disability rather than shifting the burden to the parents to prove the behavior is a manifestation of the disability.

Unfortunately, IDEA 2004 Section (k)(1)(E) creates confusion around this significant distinction. Subsection (E) merely defines the elements that would preclude a finding that the conduct is not a manifestation of the child’s disability, but NDSS is concerned that LEAs will use this subsection to convince parents that they are expected to prove these elements as opposed to the LEA having the responsibility to disapprove them.

The LEA is the party with access to all the information about conduct which occurs while the student is at school or a school related activity and whether the IEP was being properly implemented. The LEA also has immediate access to psychologists and behavioral specialists who can explore the nexus between the disability and the conduct. It would not be equitable to shift the burden of proof to the parents.

Congressional leaders in both Houses have clearly stated that IDEA 2004 will not allow an LEA to punish a child for his/her disability. It therefore follows that Congress could not have intended for the manifestation determination to hinge on whether the child’s parents have the English proficiency, the education, the financial resources and the access to psychologists and behavioral specialists to protect their child from unjust punishment.

**Recommendation: Services [Sec. 615 (k)(1)(D)].** The regulations should clarify that the educational services to be continued include the educational and related services, the supplementary aids and services and the accommodations required by the child's current IEP unless the LEA can show that certain of these are not required to provide FAPE. Also, the LEA should provide any services required for FAPE that were not in the current IEP.

**Rationale:** Congressional leaders have made it clear that IDEA 2004 does not permit cessation of services to a child with a disability who is suspended or expelled and Section 612(a)(1) still explicitly states that these students have a right to a free, appropriate public education (FAPE).

**Recommendation: [Sec. 615(k)(1)(D)].** The regulations should include language specifying that behavioral intervention plans be "linked" to the results of functional behavioral assessments. The hallmark of a successful behavioral intervention plan is that the plan is developed based on the results of a functional behavioral assessment.

**Rationale:** Functional behavioral assessment attempts to determine the environmental variables that impact a child's behavior. Once these variables are identified, they can be strategically modified via the behavioral intervention plan. The use of functional behavioral assessment before developing a behavioral intervention plan allows one to be more confident that the plan will be successful in reducing problem behaviors. Numerous empirical studies have demonstrated that functional behavioral assessments lead to the development of successful behavioral interventions for children in school settings. Without conducting a functional behavioral assessment prior to developing and implementing a behavioral intervention plan, one has to rely on a best guess if the behavioral intervention plan will be successful. Furthermore, functional behavioral assessments identify what, if any, alternative, appropriate behaviors are in the child's repertoire. This information is crucial to the teacher and IEP team in order to develop a behavioral intervention plan that employs positive based strategies to promote the child's learning.

### **Manifestation Determination**

**Recommendation: [Sec. 615 (k)(1)(E)].** The regulations for the manifestation determination review should clarify that the child's IEP must be found to be appropriate and properly implemented before it can be determined that the child's conduct was not a manifestation of his/her disability.

**Rationale:** This is mandated by the FAPE requirement in Section 612(a)(1).

**Recommendation:** The regulations should clarify that the LEA is required to show that the child's disability did not impair his/her ability to understand the impact or consequences of the behavior or to control the behavior before it can be determined that the conduct was not a manifestation of the child's disability.

**Rationale:** Consideration of these factors is essential to a thorough examination of the relationship between the conduct and the disability and to fulfill the Congressional promise that a child would not be punished for his/her disability. For example, applying disciplinary procedures to a child who has an impaired ability to understand the consequences of his/her actions in the same manner applicable to children without disabilities is not “equal treatment,” it is punishing the child for his/her disability.

**Recommendation: Appeal [Sec. 615(k)(3)].** The regulations should clarify that the standard of proof for a hearing officer to remove a child to an interim alternative educational setting continues to be “substantial evidence,” which is defined in IDEA 1997 as beyond a preponderance of the evidence.

**Rationale:** A hearing officer can unilaterally remove a child with a disability to an interim alternative educational setting if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or others. It is critical that there be a high standard of proof with respect to such a significant determination. Although an expedited hearing is available, it can take up to 20 school days to have the hearing and an additional 10 school days to get the determination. Two-thirds of the maximum 45 school day removal may already have passed by the time an inappropriate determination has been overturned. IDEA 2004 is silent as to the standard of proof, therefore the regulations should clarify that the standard continues to be substantial evidence, which is defined in IDEA 1997 as beyond a preponderance of the evidence.

**Recommendation:** The regulations should clarify that a hearing officer is required to determine whether the child’s current placement is appropriate and whether the LEA has made reasonable efforts to minimize the risk of harm in the child’s current placement, including the use of supplementary aids and services before ordering a change of placement.

**Rationale:** If the current placement is not appropriate, or the LEA has not made reasonable efforts to minimize the risk of harm, how can it be determined that injury to the child or others is substantially likely to occur? All that may be required is a move to a less restrictive setting and/or the use of supplementary aids and services to minimize the risk of harm. IDEA 2004 continues to require placement in the least restrictive environment therefore, unilateral removal by a hearing officer to an alternative educational setting should be a last resort *after* the LEA has made reasonable efforts to minimize the risk of harm and these efforts have failed to resolve the danger.

**Recommendation: [Sec. 615(k)(7)(D)].** The definition of serious bodily harm under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code, should be reprinted in the IDEA regulations.

**Rationale:** The addition of “infliction of serious bodily injury upon another person” as a special circumstance under Section 615 (k)(1)(G) is a significant change in the law. Parents need easy access to the definition of this new category under special circumstances. Looking for this definition in the IDEA regulations will be a simpler process for most parents than looking for it in an unfamiliar statute.