CENTER FOR LAW AND EDUCATION

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February 28, 2005

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

Re: Notice of Request for Comments and Recommendations on Regulatory Issues re: Individuals with Disabilities Education Act, as Amended

Dear Dr. Justesen:

Attached are comments submitted by the Center for Law and Education in response to the Request for Comments and Recommendations on Regulatory Issues Concerning the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Educational Improvement Act of 2004, published in the Federal Register on December 29, 2004. We have attempted to identify areas of concern where we believe that Department guidance and/or clarification may be especially helpful in effectively implementing this important law.

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

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

Yours truly,

Kathleen B. Boundy
Co-Director

Comments Submitted by the Center for Law and Education

In response to

Notice of Request for Comments and Recommendations Dec. 29, 2004
on Regulatory Issues re: Individuals with Disabilities Education Act, as Amended

§602 DEFINITIONS

Related services – exempting a surgically implanted medical device

The statutory definition of "related services" has been amended to expressly except "a medical device that is surgically implanted, or the replacement of such device."

Proposed regulation/recommendation: The Department needs to clarify that this narrow exception does not limit the definition of related services from including "mapping a cochlear implant" or "adjusting levels on an insulin pump" or, other services associated with maintaining or servicing devices, e.g., a gastrointestinal tube or tracheotomy tube that may be surgically implanted and may require monitoring or attention during school hours.

Proposed regulation/recommendation: At current regulation, 34 C.F.R. §300.24 b)(1), under "audiology" explicitly add, "provision of mapping services for a child with a cochlear implant."

Rationale: The above proposed regulations are consistent with case precedent and Congressional intent.

Related services – school nurse services §602( )

The statutory definition of "related services" has been amended to include "school nurse services designed to enable a child with a disability to receive a free appropriate public education."

Proposed regulation/recommendation: Through regulation, the Department needs first, to clarify that the list of related services defined by statute, consisting of transportation and such other developmental, corrective and other supportive services, is not exhaustive. Second, the Department needs to retain in current regulation, 34 C.F.R. §300.24(a), (b)(12), provision for "school health services," "social work services in schools" and "parent counseling and training" despite these three services not being expressly referenced in the statute. 34 C.F.R. §300. 24(a), (b)(7),(13).

Rationale: These regulatory provisions that are not expressly referenced in the statute that has now been amended by adding "school nurse services …" are critical to students with disabilities being given the kind of targeted help and support they need to access school and the general education curriculum, to participate with their non-disabled peers, and to benefit from special education, including through parent training, on-going support services at home delivered in a manner consistent with the goals identified in the child's IEP.

The addition of "school nurse services designed to enable a child with a disability to

receive a free appropriate public education" is not a replacement for "school health services" that are defined as "services provided by a qualified school nurse or other qualified person" to ensure that the school nursing provision does not unduly narrow the nature or provider of services. Significantly, the majority of schools do not have a "school nurse" on staff, and there is well established case precedent upholding the obligation of the SEA and LEA to provide student's health related services that are not provided by a licensed physician when necessary to benefit from their special education. It makes little sense to make this issue once again a matter of legal controversy and to call into question the commitment of a Congress and an Administration to the right of children, who often from birth are likely to have had the greatest health related needs, to attend public school with their siblings and other non-disabled peers.

Highly qualified - §602(10)(A) Rule of Construction

Proposed Comment/Recommendation:: Clarify that a parent may bring a cause of action challenging the failure of an LEA to provide FAPE to their child based, in part, on evidence that the teachers are not "highly qualified" as defined by statute. Similarly there is nothing to prevent a parent from filing an administrative compliance complaint with the state that alleges the failure of an LEA to provide highly qualified teachers, as defined by the IDEA, as amended. The language at issue if the statute states: "Notwithstanding any other individual right of action that a parent or student may maintain under this part, nothing in this section [602] or part [B]shall be construed to create a right of action on behalf of an individual student or class of students for the failure of a particular State educational agency or local educational agency employee to be highly qualified."

Secondary education – §602(27)

Proposed regulation/recommendation: Clarify with respect to NCLB and use of high stakes' assessment that the reference to grade 12 refers to the regular education 12th grade curriculum aligned to state academic and achievement standards established for all students enrolled in that curriculum, not as a limitation based on number of years in school for students with disabilities.

§607 REQUIREMENTS FOR PRESCRIBING REGULATIONS –

Protections Provided to Children §607(b)

Proposed regulation/recommendation: Based on the statutory provision that expressly bars promulgation of any regulation that procedurally or substantively lessens the protections provided to children with disabilities under this title, as embodied in regulations in effect on July 20, 1983, except to the extent that such regulation reflects the clear and unequivocal intent of Congress in legislation, the Department needs to review the regulations and delete misleading regulatory provisions that undermine the statute.

For example, clarify that students with disabilities who are excluded from school or placed in interim alternative educational settings, must be provided FAPE pursuant to §612(a)(1)(A) and as defined by statute at §602(9).

Clarify that regulations, e.g., 34 C.F.R. §300.121(d), §300.522(b) CANNOT be read

independent of the statutory mandate to provide FAPE but must, based on rules of statutory construction and the definition of FAPE at §607(b), be read so as to be consistent with these statutory requirements. The existing regulations must be read in conjunction with, NOT instead of the statutory mandate of §612(a)(1)(A). This means that the components set forth in these regulations "to make progress ." CANNOT, as is current practice, be read to diminish the statutory mandate to provide FAPE (i.e., at no cost; in accord with prescribed curriculum, consistent with state education agency standards, and the student's IEP).

Rationale: Consistent with §607, the statutory obligation to provide FAPE under §612(a)(1)(A) and as defined by §602(9) has not been modified to authorize promulgation or interpretation of regulations that procedurally or substantively lessens the protections provided to children with disabilities.

Nevertheless, this Department's obfuscation of the statutory mandate is one of the primary reasons that thousands of students with disabilities are being deprived an adequate education in spite of the SEA and LEA obligation to ensure FAPE, including based on the "no cessation" clause, during the period of any exclusion from school, and despite the Congressional mandate through No Child Left Behind for a single system of State academic content and achievement standards. Thousands of children with disabilities are sent home from school or euphemistically placed in an "interim alternative education setting" – and provided from 5-7 hours of education per week based on applying regulations without reference to or in the context of the statutory mandates of both §612(a)(1)(A) and § 1111(b) of ESEA/NCLB.

Despite the longstanding evidence of an achievement gap between students with and without disabilities, schools continue to deny students their on-going right to FAPE consistent with state education standards, to limit services based on inadequately written IEPs that are not integrated with the academic content and achievement standards set for all students. Schools, school districts and States seek to justify providing such limited education, whether at home, in interim alternate education settings, or in alternative schools or programs, on the basis that they are meeting the regulatory mandate of "[p]roved[ing] services to the extent necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the child's IEP." Students with disabilities are entitled to FAPE – meaning an education that meets the standards that the State is expected to be teaching all students, including during the period of their suspension or expulsion from school.

§608 STATE ADMINISTRATION

This new provision at §608(a)(2) and (3) require each recipient State to identify in writing and report to local educational agencies located in the State and the Secretary any such rule, regulation, or policy as a State imposed requirement that is not required by this title and Federal regulation; and to minimize the number of rules, regulations, and policies to which the local educational agencies and schools located in the State are subject under this title.

Proposed regulation/recommendation: To ensure that the purposes of the statute are accomplished and Congress's intent to ensure alignment between IDEA and Title I of the ESEA/NCLB, then the Department needs to clarify that the purpose of this provision is not to target the States for criticism but to encourage best practices through state law, regulation and policies that go beyond the minimal federal requirements. This interpretation is consistent with §608(b) that requires all participating States to "support and facilitate local educational agency and school –level system improvement designed to enable children with disabilities to meet the challenging State student achievement standards." (emphasis added).

Proposed regulation/recommendation: Clarify that education is traditionally a matter of State and local concern, and a field in which States have significant autonomy and discretion. Given that this language left unexplained may have a chilling effect on state legislatures to the detriment of children who are the intended beneficiaries of federal and state laws on behalf of students with disabilities, the Department ought to explain –if only through comment – that the new amendments can only be expected to override a stronger or more protective State law when it is not possible to comply with the requirements of both Federal and State law, or when the State law is an obstacle to accomplishing the purpose of the Federal legislation. There is a presumption against preemption.

§609. PAPERWORK REDUCTION

This provision authorizing the Secretary to grant waivers to up to 15 states of statutory and regulatory requirements related to Part B for up to 4 years based on a proposal to reduce excessive paperwork and noon-instructional time burdens that do not assist in improving educational and functional results for children with disabilities represents a radical departure from the prescriptive and protective IDEA given that NCLB mandates that all public schools and school districts are held accountable for teaching all students, including those with disabilities, to meet their respective State's academic and achievement standards.

Proposed regulation/recommendation: The Department needs to establish through regulation a definition of paperwork that, consistent with the exception described at subsection (B), is based on a premise that such "paperwork" falls within the ambit of 'non-instructionally relevant' paperwork that is inappropriately being performed by teachers and/or related service providers who are responsible for instruction and other services necessary for students with disabilities to benefit from the specialized instruction they need to meet the educational outcomes set for all.

Proposed regulation/recommendation: Establish through regulation basic criteria that must be met as a condition precedent by any State qualifying for said waiver, including, evidence that:

- at least 85% of the schools and school districts in the State are making AYP for students with disabilities;
- the State has in place evidence of capacity to provide technical assistance and support to those schools and school districts identified as "in need of improvement" as a result of the disaggregated population of students with disabilities;
- a plan exists in each school and school district identified as "in need of improvement" for involving parents in the school and district's plan for meeting the needs of the population of children whose educational needs have not been met;
- the State Parent Training and Information Center and Statewide Advisory Council support the State's application for a waiver;
- there is evidence that institutions of higher education are working in collaboration with the State to build the capacity for providing and improving professional development opportunities, identifying and implementing best practices targeted at improving the teaching and learning of students with disabilities.

Proposed regulation/recommendation: Establish through regulation a requirement that each State has a plan in effect for ensuring on-going SEA oversight, responsibility and annual review to ensure that children with disabilities are effectively learning what all other students are expected to learn, and that necessary data is collected, analyzed, and shared with the Secretary and the public.

§ 611. AUTHORIZATION: ALLOTMENT; USE OF FUNDS; AUTHORIZATION OF APPROPRIATIONS.

Proposed regulation/recommendation: Although funds for direct services and to assist LEAs in addressing personnel shortage are identified as activities for which the State set-aside may be used, clarify through regulation that the State's obligation to ensure that all students with disabilities receive FAPE is not discretionary.

Distinguish and prioritize among those activities that the State is mandated to undertake to ensure that individual students with disabilities are provided their statutory entitlement to FAPE.

Local Education al Agency High Risk Pool - Sec. 611(e)(3).

Up to 10% of the funds reserved for State activities or 1-1.05% of the overall state grant, can be reserved by the State to create a high risk pool to assist LEAs serving high-need students with disabilities.

Proposed regulation/recommendation: Clarify that if a State chooses not to reserve funds for this purpose, neither the LEA nor the State, if the LEA, is unable to pay, is exonerated from their obligations to provide FAPE to every eligible child with a disability, regardless of the cost or severity of the child's disability related educational needs.

States creating such a pool with federal monies reserved for this reason must develop and annually review a state plan in which the State determines which students are eligible as high need, establish procedures for LEA participation in the high risk pool, and how the funds are distributed.

Proposed regulation/recommendation: Clarify that LEAs that do not benefit from the pool must, nonetheless, meet their lawful responsibility to provide each eligible child within their respective jurisdiction FAPE regardless of cost or severity of the child's disability related needs.

Proposed regulation/recommendation: Establish by regulation a requirement for LEAs to report the placements for high-need students whose direct services are paid for from the high-risk pool so as to ensure that they are reviewed and there is no funding incentive for placing students in more restrictive placements.

Proposed regulation/recommendation: Clarify at subsection (G) that the language "notwithstanding the provisions of subparagraphs (A) through (F)" does not authorize States to implement a placement neutral cost sharing and reimbursement program of high need, low incidence, catastrophic or extraordinary aid" to LEAs that do not provide FAPE to students pursuant to subparagraph (F) and §612(a).

§611(e)(7); §643(e) FLEXIBILITY IN USING FUNDS FOR PART C

The statute was amended to authorize any state eligible to receive a preschool grant under Section 619 to develop and implement a state policy jointly between the lead agency under part C and the state educational agency that would authorize the continued provision of early intervention services to children with disabilities who are eligible for services under Section 619, and who previously received services under Part C, until such children enter, or are eligible under state law to enter, kindergarten, or elementary school, as appropriate.

Proposed regulation/recommendation: Clarify that parents of eligible children participating in the State's Part C program who chose to stay in the Part C program, instead of enrolling in the Part B early education program, must give informed consent attesting to their understanding that the early intervention services are not free and without cost and need not meet the definition of an "appropriate public education" as is required by part B.

Proposed regulation/recommendation: Through regulation, the Department needs to specify that all LEAs must provide notice in writing, in the parents' native language, and in the mode of communication most feasible for reaching parents of children enrolled in Part C programs and/or otherwise eligible for Part B services, that the LEA is required to provide and has a program for providing FAPE to those children eligible for Part B programming and services.

Proposed regulation/recommendation: Through regulation require the SEA to develop policies and procedures to mitigate the disproportionate enrollment/isolation of racial and ethnic minority children and economically disadvantaged children from 3 though 5 years of age who can be anticipated to enroll in the Part B early education program that must be provided without cost in lieu of the Part C early intervention program that is not without cost. The Department might also consider addressing the policy issue that, contrary to research based findings, minimizes the importance of the early education component for young children otherwise eligible for Part B preschool programs.

§ 612. STATE ELIGIBILITY

At sec. 612 (a) new language requires as a condition of eligibility that each State "submits a plan that provides assurances to . . ." The Senate Report states that the change from "demonstrates to the satisfaction of" the Secretary was made because the former had been interpreted as "requir[ing] the States to submit thousands of pages of documents" –an outcome not in keeping with the goal of reducing paperwork (S.Rept. 185, 108th Congress, 1st Sess. 14 (2003)) .

Proposed regulation/recommendation: Clarify that policies, laws and procedures identified in the plan as evidence of compliance with the requirements of IDEA, as amended by the Amendments of 2004, must be provided to the Secretary in electronic format and made available to the public via the respective SEA's website.

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

Free Appropriate Public Education §612(a)(1)(A)

Proposed regulation/recommendation: Clarify that to comply with the statutory mandates of §612(a)(1)(A) and §1111(a)(2)(b) of the ESEA/NCLB, the existing regulations at 34 C.F.R. §§ 300.121(d), 300.12zz must be read in conjunction with the substantive statutory provisions of IDEA and ESEA/NCLB.

Proposed regulation/recommendation: Clarify that every child with a disability must be provided a free appropriate public education, as required by law and *as defined by the statute* - even during the period of a suspension or expulsion from school. As defined by law, a free appropriate public education means without cost to the parent, consistent with the prescribed preschool, elementary or secondary curriculum, meets the standards of the SEA, including, the state's academic content and achievement standards required by NCLB, and is provided in accordance with each child's individualized education program (IEP). §612(a)(1)(A), §602(9).

Proposed regulation/recommendation: Clarify that when the regulations are read in conjunction with – meaning consistent with, not instead of, the statutory requirements for providing FAPE. This means that students with disabilities, who are removed from their educational placements, must continue to be provided educational programming and services necessary to enable them to make progress in the general curriculum and advance toward achieving the goals necessary for them to meet the single set of state standards established for and expected to be met by all students.

Rationale: The 1999 regulations have been seriously misinterpreted by the SEAs and LEAs who wrongly believe that they can meet their obligations to provide FAPE to all eligible children with disabilities, including those who have been suspended or expelled from school [§612(a)(1)(A)], by providing minimal programming and services (often no more than 2 hours

of education per day) that they contend enables the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals identified in the child's IEP. 34 C.F.R. §300.121(d). Such a limited reading of what is required to meet a child's right to FAPE seriously erodes the explicit entitlement set forth at §612(a)(1)(A) and as defined at §602(29), is inconsistent with the requirement of the No Child Left Behind Act, §1111(a) (2)(b) whose mandatory, single set of state standards are incorporated by reference in the SEA's education standards that define FAPE. See, e.g., Town of Burlington v. Commonwealth of Massachusetts, 1st Cir.(1985).

Unless the Department clarifies that FAPE means what it says at §612(a)(1)(A) and §602(9) -consistent with and encompassing state academic and achievement standards required by ESEA/NCLB, based on current practice, innumerable students with disabilities, who are disproportionately poor and minority students, will continue to be suspended/ expelled or otherwise excluded from school and provided from 5 to 10 hours of education per week. The Department needs to make clear to States and school districts that this limited amount of services is NOT consistent with FAPE. The regulatory requirement that students must be provided services "to the extent necessary to enable the child to appropriately progress in the general curriculum" must be read consistent with the duty to provide FAPE –i.e, consistent with the prescribed elementary or secondary education curriculum that is aligned to the State's standards established for all students.

By not holding States and school districts accountable for providing the statutorily mandated right to FAPE that is statutorily defined as consistent with a prescribed curriculum and in accordance with the SEA's standards, including academic and achievement standards required by NCLB, school districts have no incentive for developing IEPs that represent high expectations and the same rigorous high standards set for all other students – standards that are aligned with the curriculum, which students with disabilities must be given the opportunity to learn through provision of specialized instruction and supportive, corrective and developmental services. So long as these students are not being provided an education to enable them to meet the single set of standards established by the state and, at a minimum, to make Adequate Yearly Progress, they are not being provided FAPE. Few students without disabilities could expect to meet their State standards if provided only 5-10 hours of education per week.

State Flexibility §612(a)(1)(C) Current law was modified to authorize "a state that provides early intervention services in accordance with Part C to a child who is eligible for services under section 619 [preschool], is not required to provide such child with a free appropriate public education." (emphasis added)

Proposed regulation/recommendation: While allowing greater flexibility and choice, at least to parents who have the economic means to obtain early education through alternative means, the Department needs to clarify that its intent is not to encourage a policy outcome that is contrary to documented, validated research about the importance of early education for young children – especially those who are developmentally delayed. It is critical that the Department take steps through regulation to ensure that this provision does not undermine the Department's own efforts to improve Headstart and promote universal early education.

Proposed regulation/recommendation: Clarify that parents of eligible children participating in the State's Part C program who chose to stay in the Part C program, instead of

enrolling in the Part B early education program, must give informed consent attesting to their understanding that the early intervention services are not free and without cost and need not meet the definition of an "appropriate public education" as is required by part B.
Proposed regulation/recommendation: Through regulation, the Department needs to specify that all LEAs must provide notice in writing, in the parents' native language, and in the mode of communication most feasible for reaching parents of children enrolled in Part C programs and/or otherwise eligible for Part B services, that the LEA is required to provide and has a program for providing FAPE to those children eligible for Part B programming and services.

Proposed regulation/recommendation: The Department needs to require States and LEAs to engage in childfind activities, to actively work with PTIs and local CRCs to ensure that parents of all eligible children who are receiving 0 to 3 early intervention services, are apprised of their children's right to receive FAPE, understand the benefits of participating in early childhood programs under §619 that are required to provide an educational component consistent with FAPE [free, specialized instruction and related services, as needed, individually designed to enable the child to learn to the preschool standards adopted by the State] to improve their school readiness.

Proposed regulation/recommendation: Clarify that while parents of an individual child not of compulsory school age may elect not to partake of these services, it does not alter the obligation of the school district and the State to ensure through outreach and childfind efforts that parents of eligible children are fully informed of their children's right to FAPE, provided notice in their native language or other mode of communication, and directed to PTIs and CRCs and program providers with knowledge of early childhood education.

Full Educational Opportunity §612(a)(2)

Proposed regulation/recommendation: Through regulation, identify specific steps that each State and school district must take to implement the statutorily mandate under IDEA at §612(a)(2) and (5) to ensure that all students with disabilities are provided a full, meaningful opportunity to participate in the general education curriculum, and to learn the State and school district's standards set for all students with the sole exception of the less than 1% of all students, who are so cognitively disabled that even with the best instruction and support they are unable to make progress toward learning the standards set for all, who are to be taught to an alternate/different standard.

Proposed regulation/recommendation: Clarify how such steps might include providing students with disabilities effective, validated programming and services; extended school-year or summer school programming that incorporates specialized instruction taught by highly qualified special educators and Highly qualified core academic subject matter teachers, tutoring and other supplemental educational services which address the student's special educational needs, etc.

Proposed regulation/recommendation: Clarify that the SEA is responsible for collecting and disseminating state of the art knowledge and research, and providing technical assistance to LEAs responsible for providing FAPE to individual students with disabilities who are identified as needing specialized instruction to achieve the State's challenging academic and achievement standards.

Rationale: Both IDEA and NCLB require such assurances and descriptions be provided. Although Congress spoke in terms of aligning IDEA with NCLB, the Department needs to provide specific instruction and directions for ensuring that students with disabilities are not left behind.

Children in Private Schools §612(a)(10)(B).

Proposed regulation/recommendation: Clarify with respect to children with disabilities placed in, or referred to, private schools by public agencies under §612(a)(10)(B)(i) and (ii) that SEAs and LEAs shall develop and implement procedures to ensure that all such students are provided instruction and learning to enable them to meet the same academic and performance standards as all students who attend public schools.

Proposed regulation/recommendation: Clarify further how the State will assist LEAs that fund the placement of students with disabilities in private schools to develop the capacity to comply with each of the requirements of §612(a) necessary to ensure that these students receive FAPE as defined by §602(29) , a high quality effective curricula aligned with those standards, and taught by "highly qualified" teachers, full educational opportunity, through provision of IEPs individually designed to address each student's additional instructional needs requiring their private placement, and such additional assistance necessary to enable them to achieve state standards and address any other factor necessary to provide these students an opportunity to learn and achieve the knowledge and skills described in those standards.

Proposed regulation/recommendation: Clarify through regulations how the State and the LEAs will be held accountable, including through the required participation and public

reporting of publicly placed private school students in the state assessment, for ensuring they are taught by "highly qualified" teachers, that the curriculum being taught is aligned with the respective state's standards, and these particular students are provided effective intervention, including through specialized instruction and related services, when needed, to close the achievement gap between these publicly placed private students in need of special education.

Personnel Qualifications §612(a)(14)

The State requirement for a comprehensive system of personnel development has been repealed, and the recently enacted 2004 amendments make substantial changes to state requirements by defining "highly qualified" special education teachers. Under §612(a)(14)(A) States must continue "to ensure that personnel necessary to carry out this part are appropriately and adequately prepared and trained," and now teachers serving students with disabilities must have "content knowledge and skills."

Proposed regulation/recommendation: The Department needs to identify specific steps for States to collaborate with institutions of higher education.

Prior to the 2004 amendments to IDEA, the law authorized paraprofessionals and assistants who were appropriately trained and supervised, in accordance with State law, regulations, or written policy,...to be used to assist in the provision of special education and related services to children with disabilities…" However, prior law held paraprofessionals and related service providers to the highest State approved or State recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel provide special education or related services. According to the Conference Report, these provisions were deleted from P.L. 108-446 because the Conferees were "concerned that the language calling for the highest standards" was responsible for the shortage of service providers.

Proposed regulation/recommendation: As under Title I of ESEA distinguish paraprofessionals who provide instructional support services from individuals who perform only non-instructional duties. Apply the same qualifications for paraprofessionals under Title I [34 C.F.R. §200.58] to paraprofessionals who assist in a program receiving Part B and C funds. Describe the duties and limitations of a paraprofessional assisting in the provision of special education to students with disabilities so they are consistent with those set forth at 34 C.F.R.§200.59.

Rationale: As all other students without disabilities, students with disabilities are entitled under §504 and the ADA to be taught by qualified and properly trained instructional personnel. This measure is essential to ensure that students with disabilities are not provided instruction by unqualified persons lacking the knowledge and skills of highly qualified teachers, as defined by P.L.108-446. Deletion of the highest State approved or recognized certification, licensing, or registration from prior law cannot be used to justify the inappropriate use of unqualified persons to perform instruction and instruction related activities.

Similarly, for related service providers responsible for providing eligible children with disabilities supportive, corrective and developmental services necessary for the child to benefit from the specialized instruction he/she receives, the Department must distinguish those who are

providing professional services, such as speech-language therapy, occupational therapy, physical therapy, psychological services, nursing services, counseling, mobility training, etc. from those who may be providing purely supportive services that do not require professional education, training, and/or licensing and certification.

Proposed regulation/recommendation: Through regulation the Department must ensure that States document evidence that individuals providing related services possess the necessary credentials in their field.

Proposed regulation/recommendation: Clarify that elimination of the reference to the highest State standards shall not be used to justify the inappropriate use of unqualified persons to provide related services.

Proposed regulation/recommendation: Define the term "paraprofessional" consistent with Title I of the ESEA, 34 C.F.R.§200.58. In addition to distinguishing those who provide instructional services from those who do not, distinguish between related service providers based on those required to meet licensure or possess certification in their field.

New statutory language makes mandatory what had previously been left to the discretion of the States – adoption of a policy that LEAs "take measurable steps [instead of "ongoing good faith efforts"] to recruit, hire, train, and retain highly qualified personnel to provide special education and related services" to students with disabilities.

Proposed regulation/recommendation: Through regulation, the Department needs to help States identify measurable objectives and effective strategies for accomplishing this outcome, including specifically steps for collaborating with institutions of higher education, and for engaging in outreach to diverse racial and ethnic population groups.

Rule of Construction §612(a)(14)(D)

Explicit statutory language has been added that expressly precludes anything in this paragraph concerning 'personnel qualifications' [§612(a)(14)] from being construed "to create a right of action on behalf of an individual student for the failure of a particular State educational agency or local educational agency staff person to be highly qualified, or to prevent a parent from filing a complaint about staff qualifications with the SEA…" However, language has also been added that expressly states that nothing in this particular paragraph shall be construed "to prevent a parent from filing a complaint about staff qualifications with the SEA as provided for under part B."

Proposed regulation/recommendation: Clarify that this provision in essence bars a party from challenging per se the failure of a particular individual to be highly qualified by filing an action under IDEA.

Proposed regulation/recommendation: However, further clarify that nothing in this provision bars a parent from filing either a state administrative compliance complaint under EDGAR or an administrative due process complaint under Part B or IDEA challenging a denial of FAPE that may, in part, be based on evidence that a child's teacher is not "highly qualified" as defined by law to provide specialized instruction and/or instruction in a core academic subject area.

Performance Goals and Indicators §612(a)(15)

New statutory changes made to the provision relating to performance goals and indicators expressly require that the State "(A) has established goals for the performance of children with disabilities that - . . . (ii) are the same as the State's definition of adequate yearly progress, including the State's objectives for progress by children with disabilities under Section 1111(b)(2)(C) of the Elementary and Secondary Education Act of 1965. . . .(B) has established performance indicators the State will use to assess progress toward achieving the goals described in subparagraph (A), including measurable annual objectives for progress by children with disabilities under Section 1111(b)(2)(C)(v)(II)(cc) of [ESEA]; and (C) will annually report to the Secretary and the public on progress of the State toward meeting the goals…, which may include elements of the reports required under Section 1111(h) of [ESEA]."

Proposed regulation/recommendations: The Department needs to make the connections between the 'annual measurable objectives' referred to here and the objectives addressed in 34 C.F.R. §200.13(b)(7).

Proposed regulation/recommendation: Clarify that the requirement that the State goals "are consistent, to the extent appropriate, with any other goals and standards for children established by the State" means "consistent, to the maximum extent appropriate" [see §612(a)(1)(A), (2), (5); current regulation 34 C.F.R. §300.137(a)(2)] for purposes of compliance with NCLB [see 20 U.S.C. §1111(b)(1)] and Section 504 of the Rehabilitation Act, 29 U.S.C. §794, 34 C.F.R. §104.4.

Proposed regulation/recommendation: Explicitly state that parents of children with disabilities shall receive progress reports consistent with those required by 34 C.F.R. §200.8 and in order to assess progress to "annual measurable objectives" require that parents must also be informed through these regularly issued progress reports the "extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year."

Participation in Assessments §612(a)(16)

New statutory language provides that all students with disabilities shall be included in all state and district-wide assessment programs, including those specifically required by NCLB [§1111(b)(2)(C)(v)(II)(cc) of the ESEA], with appropriate accommodations and alternate assessments, where necessary.

Proposed regulation/recommendation: Through regulation the Department of Education needs to restate that all students are expected to participate in the assessment program with the sole exception being a student with a disability, who is so medically fragile that she is unable to withstand the stress of virtually any assessment.

At §612(a)(16) new statutory language recognizes that based on the prior timetable established by the IDEA amendments of 1997, guidelines have been developed for providing eligible students reasonable accommodations.

Proposed regulation/recommendation: The Department needs to clarify that the accommodation guidelines are to be used, in large part, by IEP teams to consider the appropriateness of using those accommodations deemed necessary and reasonable to enable the student to participate meaningfully in the assessment program and to demonstrate what the student knows and can do.

Proposed regulation/recommendation: The Department should encourage schools and school districts, to provide a student with a disability who needs reasonable accommodations to participate in the assessment, the same accommodations, to the extent possible and as appropriate, in her instructional program.

At §612(a)(16)(C) new statutory language requires States to develop and implement guidelines for the participation of students with disabilities in alternate assessments who cannot participate in regular assessments with accommodations.

Proposed regulation/recommendation: The Department needs to make clear that alternate assessments are not limited to only those students with the most significant cognitive disabilities.

Proposed regulation/recommendation: The Department needs to ensure that the regulations under IDEA, as amended in 2004, are consistent with the regulations promulgated under Title I of the ESEA at 34 C.F.R §§200.6. As the latter, regulations under IDEA must ensure that for those students who even with accommodations are unable to participate in the regular standardized assessment, that the State develops an alternate assessment based on the same academic achievement standards. 34 C.F.R. §200.6. ; 34 C.F.R. §200.1(c).

Proposed regulation/recommendation: Clarify that for those students with the most significant cognitive disabilities, the State may choose to modify those same standards or, alternatively, develop another type of alternate assessment that is based on alternate , academic achievement standards [34 C.F.R §200.6(a)(2)(B); 34 C.F.R. §200.1(d)] defined by the state through a documented and validated standards-setting process. 34 C.F.R.§200.2(d).

The Title I regulations seek direction from the IEP team at 34 C.F.R.§200.6(A)(ii)(B) to establish and ensure implementation of clear and appropriate guidelines for making a finding that a child's significant cognitive disability "justifies assessment based alternate academic achievement standards. "

Proposed regulation/recommendation: We suggest that the Department clarify through specific regulation that "students with the most severe cognitive disabilities" are the very limited portion of students "who will never be able to demonstrate progress on grade level academic achievement standards even if provided the very best possible education and accommodations."

Proposed regulation/recommendation: Moreover, because the term, "significant cognitive disabilities" is not one of the classifications of disability defined in IDEA, we suggest that the Department might further clarify that for purposes of eligibility for the alternate assessment that uses different achievement standards, "students with the most significant cognitive disabilities" must have been evaluated by qualified personnel under the IDEA and

determined through valid and reliable evaluations consistent with §614(a) to have both very limited intellectual functioning and adaptive behavior; and determined on the basis of a full evaluation and reevaluation, as appropriate, even with the best instruction, not to be capable of making progress toward the achievement standards set for all.

Proposed regulation/recommendation: Consider promulgating a regulation, specifying that in no case shall IEP teams (absent the participation of a qualified school psychologist or other qualified evaluator), or other school personnel be permitted to make determinations about a student, who has not previously been identified as having such a significant cognitive disability and, who, even with the best instruction, is unable to make significant progress toward the achievement standards set for all, to be eligible for participation in the alternate assessment that uses different/lower achievement/ performance standards. [This is not to suggest that the IEP team, including the parent and student, as appropriate, is not the appropriate body to identify those students with significant cognitive disabilities who qualify for participation in an alternate assessment that is not measuring them based on the same standards set for all other students. §200.13(c)(1)]

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

Proposed regulation/recommendation: Consider promulgating a regulation that bars an IEP team from finding that a 3 year reevaluation is not needed for any child determined to be eligible, as a student with a significant cognitive disability, to be assessed based on alternate academic and achievement standards. The reevaluation shall be used to review the child's disability related needs, including whether the student, even with the best instruction, has been correctly identified as incapable of learning to the regular standards, and to consider based on any other evaluative information whether the child is, to the extent possible, being educated based on alternative standards in the general curriculum and being assessed by instruments aligned with that curriculum.34 C.F.R §200.6(a)(2)(C).

Proposed regulation/recommendation: Clarify that as Title I of ESEA, the 2004 Amendment to IDEA and Section 504 require the State to ensure full participation by students, who because of their disabilities, need a different form/type of assessment to measure validly and reliably the same knowledge and skills a non-disabled student is expected to demonstrate. Alternate assessments are not limited to students with significant cognitive disabilities.

Alternate assessments encompass those instances where a student with a disability cannot be validly assessed using the regular State or district assessment, even with accommodations, but can be meaningfully assessed in relation to the same standards, but with a different, alternative form of assessment –i.e., she/he is capable of demonstrating some level of performance in regard to some or all of the knowledge and skills in the State's content standards, but requires a different form of assessment to determine that level of performance.

Many students with disabilities can be assessed with accommodations using the same assessment used for students without disabilities. Of those who cannot participate in the state or district-wide assessment even with accommodations, many can, and therefore, must be assessed with using a different instrument (e.g., a performance based assessment, a portfolio) whose use has been validated to measure the same knowledge and skills as the standardized assessment being used for all students –even, if, at least initially, these students disproportionately fail to reach proficient levels.

Proposed regulation/recommendation: Clarify through regulation that an "alternate assessment" that measures different or alternative standards, including out-of-grade level standards, is also necessary for that very small percentage of students with the most significant cognitive disabilities to participate in the State's accountability system.

Proposed regulation/recommendation: Through regulation, clarify, lest there remain any doubt, that even for these students with the most significant cognitive disabilities who are participating, with accommodations, as needed, through an alternate assessment that measures the different standards that they are learning, those standards must also be aligned with the State's academic content standards, albeit, which may be set at a different level of achievement /performance than established for all other students. Through a documented, validated standards-setting process, these achievement standards must be determined to be aligned with the State's academic content standards. They shall reflect professional judgment based on valid, documented evidence of the highest learning standards possible for the students with significant cognitive disabilities being assessed against these different standards.

Rationale: These provisions are consistent with the regulations implementing Title I of the ESEA, the IDEA, as amended, and §504.

Proposed regulation/recommendation: Cross reference to §34 C.F.R. §200.13 and separately promulgate regulations consistent with the reporting requirements under Title I of ESEA, including reporting all students who participated in taking the alternate assessment based on alternate achievement standards, although no more than 1% of all students assessed may be counted as proficient on the basis of their performance on the alternate achievement standards.

Proposed regulation/recommendation: The Department needs to clarify that reasonable accommodations must, as needed, be provided students participating in the regular assessment and the alternate assessment based on the same achievement standards established for all students; and accommodations must be provided, as needed, for those students with the most significant cognitive disabilities, who are assessed based on the alternate achievement standards, so as to enable any student with a disability to participate effectively in the assessment program, and in particular, to work toward increasing the number of students tested against grade level academic achievement standards.

Reports §612(a)(16)(D).

Proposed regulation/recommendation: Require that reports of student performance shall be made available at the same time, with the same frequency and in the same detail as reports on the assessment of nondisabled students, in the aggregate with all other students who participated in the regular assessments; disaggregated by the number of students with

disabilities participating in the regular assessments; and disaggregated by those receiving standard accommodations, and by those receiving non-standard accommodations.

Proposed regulation/recommendation: Require that reports of student performance similarly be made available for students with disabilities who participated in an alternate assessment aligned with the same academic content and achievement standards as their nondisabled peers, disaggregated by those receiving accommodations ;

Proposed regulation/recommendation: Require that reports be similarly made available of the performance of those students with the most significant cognitive disabilities who participated in alternate assessment aligned to the State academic content standards but to different achievement standards; and disaggregated by those receiving standard and non-standard accommodations.

State Advisory Panel §612(a)(21)

Proposed recommendation/recommendation: Consider adding regulatory language that encourages States to ensure that there is representation by high school and post secondary education age students with disabilities.

Rationale: Disability remains one of the few areas in which those who are the presumed beneficiaries of a civil rights statute, here public school students, are virtually invisible with limited voice. Given the full range of disabling conditions, it is hard to fathom a reason why those who are most affected by the Act, its policies and practices, have been given so minimal a voice. The State Advisory panel could become an authentic source for student learning, growth, skill building and leadership development while tapping a virtual pool of knowledge and experience and expertise.

Over identification & Disproportionality - §612(a)(24); Suspension and Expulsion Rates - §612(a)(22).

Proposed recommendation/recommendation: Through regulation clarify that the new language requiring the data "to include data disaggregated by race and ethnicity" means that such rule shall apply for each disability.

Rationale: Only by disaggregating such data by disability type and race and ethnicity is it possible to monitor over-representation and disproportionality by race and ethnicity, for example, with respect to African American students who are identified as having mental retardation or a specific learning disability and being in need of special education.

State Educational as Provider of Free Appropriate Public Education or Direct Services - §612(b).

Proposed recommendation/recommendation: Through regulation link this provision with the SEA's duty to oversee the implementation of this statute to ensuring that all eligible children and youth with disabilities are provided their substantive and procedural rights under §612(a)(11).

Proposed recommendation/recommendation: Through regulation clarify that whenever any state or local educational agency is unable or unwilling to provide a child with a disability the right to a free appropriate public education –whether in detention or correctional institutions, other residential placements, home or hospital, the SEA shall assume responsibility until responsibility is delegated or otherwise determined.

Proposed recommendation/recommendation: Through regulation, make explicit that the SEA shall ensure that all school age children and youth with disabilities who are under the permanent or temporary jurisdiction of the State, receive FAPE in accordance with their IEPs, in a timely manner, and participate in all state and district wide assessments and report such results to the public consistent with §612(a)(16).

§613(A)(5) - TREATMENT OF CHARTER SCHOOLS AND THEIR STUDENTS

The statute clarified that the LEA must serve children with disabilities attending public charter schools in the same manner it serves children in other schools, including providing supplementary and related services on site at the charter school to the same extent to which the local educational agency has a policy or practice of providing such service on the site to its other public schools and provides funds under IDEA to those charter schools on the same basis as the local educational agency provides funds to its other public schools, including proportional distribution based on relative enrollment of children with disabilities and at the same time as the agency distributes other federal funds to the agency's other public schools, consistent with the state's charter school law.

Proposed regulation/recommendation: Clarify that as publicly placed students with disabilities in private schools, students with disabilities who attend public charter schools must be provided the same substantive and procedural rights, benefits and protections as all other students with disabilities within the jurisdiction of the public school district and the SEA.

Proposed regulation/recommendation: Clarify that as publicly placed students with disabilities in private schools, students with disabilities who attend public charter schools must be taught by "highly qualified" teachers as defined by the IDEA, as amended.

§613 (f) - Early Intervening Services

A new provision in P.L. 108-446 permits LEAs to use up to 15% of their Part B funding to develop and implement "coordinated early intervening services" for children and youth who have not been identified as having a disability and "who, by reason thereof, is in need of special education. " Such students in grades K- 12 (with a particular emphasis on those in K – grade 3), must not be identified as needing special education and related services under Part B, but identified as in need of additional academic and behavioral support to succeed in a general education environment. A construction clause provides that nothing in this subsection shall be construed to limit or create a private cause of action under this part. A reporting provision requires each LEA developing and implementing coordinated, early intervening services to report annually to the State the number of students served; and the number of such students who subsequently receive special education and related services during the preceding 2 year period.

Of particular concern –especially for students from grades 7-12 – is that this provision may be highly subject to abuse. For example, students who were previously identified as needing special education, may be removed form their IEPs, and denied the protections of IDEA (including the non-cessation of FAPE during suspension/expulsion), accountability provided by use of their IEPs as tools for ensuring outcomes aligned to NCLB/ESEA academic and achievement standards, and accountability of their schools to them as members of the subpopulation group needing to make AYP. In addition to losing their substantive and procedural protections under IDEA, they may become pawns in the game of who gets counted for purposes of disaggregating data to determine whether the subgroup of students with disabilities at the school level attain AYP.

Proposed regulation/recommendation: Through regulation the Department needs to specify that this provision shall not be used to cover the costs of educating students in grades 7 - 12 who were previously identified as having a disability and being in need of special

education under IDEA.

Proposed regulation/recommendation: The Department by regulation needs to require supplemental information to be reported annually to the State by school, grade, race, ethnicity, and LEP status about the number of such students not identified under Part B but receiving services paid for by these funds; also, the number of such students previously identified as having a disability and with an IEP; for each reporting year, the number of such students by school, grade, race, ethnicity, LEP status, retained in grade; similarly by school, grade, race and ethnicity, and LEP status, the aggregate performance achievement levels of such students on the state and district assessment; and by school, grade, race, ethnicity, LEP status, the number of these non-Part B funded students suspended/expelled during the year reported.

Rationale: Such step is necessary to ensure that students are NOT being identified as having an education related disability that requires the provision of specialized instruction and related services – especially for students in grades 7 – 12 – and, especially students who were previously identified, for a variety of reasons, including denying procedural safeguards and protections under the Act, thereby subjecting these students with behavioral issues to suspension and expulsion with no duty to provide FAPE; preventing parents from holding schools accountable for not educating their children consistent with their right to FAPE, including compensatory education, when they fail to make state standards; allowing schools to remove this new subset of students from the subpopulation of students with disabilities who are failing to make AYP and resulting in schools and districts being identified as "in need of improvement"; allowing schools and school districts to "correct" data showing overidentification and disproportionatity of minority students receiving special education –with no enforceable right to FAPE or compensatory education now, when schools can be held accountable to parents for providing their children with FAPE consistent with the State's academic and achievement standards.

Further Comment regarding Construction Clause. The Department needs to clarify that whether or not any one of these students has a right to FAPE will be determined based not on this provision but the obligation to identify, evaluate, and provide FAPE in the general education curriculum with the student's non-disabled peers. Whether or not the school and school district student shall be found to have denied an eligible child his/her right to FAPE will be determined based on the facts, the school districts policies and practices, and the what was known by the school and when.

Proposed regulation/recommendation: The department needs to underscore that provision of so-called "early intervening services" shall not be used to deny or delay an LEA's response to a parent's request for a referral for evaluation.

§614 - EVALUATIONS, ELIGIBILITY DETERMINATIONS, IEPS, AND EDUCATIONAL PLACEMENTS

Evaluations, Parental Consent, and Reevaluations

Initial Evaluations Before any child can initially be provided special education and related services, the child must be provided a full, individual evaluation as prescribed by the statute. The statute expressly states that the initial evaluation may be requested by a parent of

the child [clarify person acting as parent],or a State educational agency, other State agency, or LEA.

Proposed regulation/recommendation: Clarify that a person acting in place of a parent as defined by §602(23) may file such a request for an initial evaluation.
Procedures. Within 60 calendar days of obtaining parent consent for the evaluation or, an alternative time, if one exists under state law, such initial evaluation is conducted to determine if a child is a child with a disability as defined at §602, and the educational needs of such child. This 60 day requirement or alternative state established timeframe does not apply if the child transfers from one LEA (school district] to another after the timeline has begun to run (i.e., following parent's consent to evaluation) provided that the subsequent LEA is making sufficient progress to ensure a prompt completion of the evaluation [albeit not within 60 days], and the parent and that LEA agreed to a time when the evaluation will be completed. Nor does the 60 day timeframe apply if the parent "repeatedly fails or refuses to produce the child for the evaluation."

Proposed regulation/recommendation: The Department needs to clarify that unless State law prescribes a lesser period of time, the federal standard must as a matter of policy apply. This marks the first time that the federal law has mandated a timeframe; because it reflects a new federal policy favoring completion of an evaluation within a specified, limited timeframe, the federal standard should trump state laws that exceed 60 calendar days.

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

Parental Informed Consent for Initial Evaluation. The statute requires that the State or local agency proposing to conduct an evaluation to determine if a child has a disability and is in need of special education, must obtain informed consent from the parent before conducting said evaluation.

Proposed regulation/recommendation: The Department needs to clarify that though ambiguous, the language of the statute, also requires an agency that will conduct an initial evaluation of a child at the request of the parent, to obtain the informed consent of the parent. Specify that informed consent cannot be implied even if the parent made the request for an initial evaluation.

Proposed regulation/recommendation: The Department through regulation ought to define the term "informed consent" which though introduced by the IDEA Amendments of 1997 has never been defined by the Act. We suggest that in addition to the definition of consent under the current regulation 34 C.F.R. §300.500(b)(1), informed consent requires additional documentation by the agency that the parent understands the nature and scope of the activity for which the initial evaluation is sought.

To ensure that the parent understands the evaluation process so as to provide informed consent, the Department, through regulation, should require the LEA to take such affirmative steps as necessary to reach out to the parent, to engage in discussion about the evaluation process and the rights of children identified as needing special education to be educated in the general education curriculum and to learn to high standards, to direct the parent to available resources.

At a minimum, the Department should direct LEAs to refer the parent, whose informed consent is being sought, to the state PTI and/or CRC, in order to obtain such consent in a timely manner following the request for an initial evaluation.

Proposed regulation/recommendation: We suggest that the Department require said documentation of being "informed" and "comprehension" of the activity for which consent is being requested in addition to the requirements set forth in current regulation 34 C.F.R.§300.500(b).

Therein, parental consent means that the parent has been fully informed of all information relevant to the proposed action –here an initial evaluation – for which parental consent is sought, in his or her native language or other mode of communication; the parent understands and agrees in writing, unless the parent is unable to provide consent using that mode of communication, in which case, the alternative mode of communication used by the parent shall be relied upon.

Furthermore, the consent shall describe the activity for which consent is sought, identify the tests and other forms of evaluation that will be used in assessing the child's condition and educational needs, any records and information that will be released or shared and to whom.

Moreover, "consent" to an initial evaluation is voluntary and may be revoked at any time prior to the event occurring; consent to an initial evaluation does not constitute consent to receipt of special education or a placement other than in the class to which the child would be served but for his/her receiving special education.

Informed Parental Consent for Services -- Informed parental consent is separately required prior to an SEA, other state agency, or an LEA initiating provision of special education to a child who has been determined to be a child with a disability and in need of special education under §602(3).

Proposed regulation/recommendation: Clarify through regulation that the statute does not limit the requirement to obtain informed consent from the parent to only the initial provision of special education services.

Proposed regulation/recommendation: Clarify as above, what steps an agency must affirmatively take to demonstrate that it has obtained "informed consent" from a parent.

Absence of Consent for Initial Evaluation and Effect on Agency Obligations.

Proposed regulation/recommendation: Through regulation restate the criteria for the absence of initial consent from a parent to an evaluation – a parent who has been informed or

provided an opportunity to be fully informed by an agency that has initiated the type of affirmative steps set forth above, including referral of the parent to the state PTI or CRC, refuses to provide consent to an initial evaluation of a child to determine eligibility and educational needs, or despite documented overtures from the agency, fails to respond to a request to provide consent.

Proposed regulation/recommendation: The Department needs to clarify that the LEA and SEA or other agency responsible for providing direct services has the discretion to pursue the initial evaluation of a child by utilizing the administrative due process procedures described in §615, "except to the extent inconsistent with State law relating to parental consent. Failure to include other agency providers incorrectly suggests that it is not necessary for them to obtain informed consent from parents.

Proposed regulation/recommendation: Although the statute at §614(a)(1)(D)(iii)(II) recognizes certain limited instances where informed parental consent may not be required from the parent of a child who is a ward of the state, the Department needs to clarify that children who are wards of the state still must have a person acting as parent provide informed consent to an initial evaluation.

Rationale: Informed consent to an initial evaluation is not required to be obtained from the parent of a ward of the state when the parent cannot be located, or whose parental rights have been terminated, or whose right to make educational decisions has been subrogated by a judge and consent given by an individual appointed by the court to represent the child. Thus, the LEA or other direct service provider must seek informed consent from the person who is acting in place of the child's parent [including a guardian ad litem appointed by the court] prior to an initial evaluation being conducted.

Proposed regulation/recommendation: The Department must make clear that such child, as a ward of the state, is also entitled to have a knowledgeable surrogate parent appointed to speak on behalf of the child's educational interests.

§614(1)(D)(ii)(II),(III) Absence of Consent for Services and Effect on Agency Obligations

If the parent refuses to consent to his/her child receiving specialized instruction and related services, or the parent refuses to respond to a request for consent, new statutory language expressly states that the LEA or other direct service provider "shall not provide special education and related services to the child by utilizing the procedures described in section 615." Nor, based on the language of the new statute that appears to override inconsistent state law, "shall the LEA be required to convene an IEP meeting or develop an IEP under this section for the child for the special education and related services for which the local educational agency requests such consent." [Note, this latter clause can only apply to students who have already been identified as needing specialized instruction and for whom these services have been provided.]

Proposed regulation/recommendation: Through regulation the Department needs to clarify that for students already identified and receiving services, the LEA and any other direct service provider agency has a responsibility to continue providing those services agreed to by the parent, and not in dispute.

Proposed regulation/recommendation: Expressly state that in any instance in which a parent refuses to consent to the services identified in the student's proposed IEP, the school district shall bear the burden proof to demonstrate that the IEP is appropriate, and the provision of specialized instruction proposed for the child can be supported by scientifically validated evidence.

Proposed regulation/recommendation: Through regulation the Department needs to clarify that if the denial of parental consent to services or refusal to respond to a request for consent has the effect of denying FAPE to the eligible child, the LEA or other direct service agency must utilize the procedures available under §615 [mediation, due process] to attempt to override the parent's failure to consent.

Rationale: The LEA and ultimately the SEA are responsible under §612(a)(1)(A) and §612(a)(11) for providing FAPE to all eligible students with disabilities in need of specialized instruction.

Unless properly construed by regulation, this provision will effectively deny eligible students their right to a free appropriate public education, including the right to learn what all other students are expected to know and be able to do.

For some students, this failure to provide specialized instruction and related services will result in their constructive exclusion from education and raise state and federal constitutional claims. CLE supports the right of parents to consent to receipt of special education and related services for their children, but also believes that the rights of all eligible children with disabilities to FAPE must be preserved and protected by the LEA and State which has ultimate responsibility.

Rule of Construction §614(a)(1)(E) A new provision of the statute at §614(a)(1)(E) expressly says that screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services.

Proposed regulation/recommendation. The Department needs to clarify and to define the terms being used in different contexts. The Department should distinguish between a "specialist" who is identifying "appropriate instructional strategies for curriculum implementation" tailored to address a child's arguably special needs and a specialist who is determining appropriate instructional strategies independent of a particular child.

Proposed regulation/recommendation.: Specify in the former instance, if different methodologies are being explored to teach a child than those that were identified in the IEP by the IEP team, including the parent, then the parent ought to be informed of the proposed change in methodology.

Reevaluations -§614(b)(2) A reevaluation shall occur not more frequently than once a year, unless the parent and the local educational agency agree otherwise.

Proposed regulation/recommendation: Clarify that upon the request of a parent or teacher with the consent of the parent, a child shall be reevaluated but not more than once in a

school year, unless the parent and LEA agree otherwise.

Proposed regulation/recommendation The Department should reaffirm that if a parent seeks a reevaluation within a year, and the school district disagrees, that the district shall provide prior written notice to the parent of its refusal to re-evaluate the child consistent with current regulation 34 C.F.R.§300.504-300.505 and the parent has a right to file a complaint to challenge such refusal.

The school district's notice must include: a description of the agency's refusal to conduct a re-evaluation of the student; an explanation of the why the agency refuses to conduct the re-evaluation; a description of any other options that the agency considered and the reasons why those options were rejected; a description of each evaluation, procedure, test, record, or report the agency used as a basis for the refused action; a description of any other factors relevant to the agency's refusal, a statement that the parents have procedural safeguards, and the means for obtaining a copy of same –which identifies parent's right to file a complaint; sources to help the parent understand the notice. The statute requires that a reevaluation shall be conducted at least once every 3 years, unless the parent and the local educational agency agree that a reevaluation is unnecessary, and more frequently if the local educational agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation OR if the child's parents or teacher requests a reevaluation.

Proposed regulation/recommendation: While the statute appears to place a new emphasis on encouraging students to exit from a program of study that relies upon specialized instruction, the Department, through regulation, should encourage regular review of student's programming and services, at least through the annual IEP process, that ought necessarily entail review, consideration and analysis of student's state and/or districtwide performance assessments, thus providing another means to examine what is working and what is not for any student with a disability attempting to learn the academic content standards established for all and to meet the state achievement standards.

Proposed regulation/recommendation: The Department should require those LEAs not conducting reevaluations at least every 3 years to justify in writing a decision not to do so ----especially if there is evidence based on a report of the student's performance with respect to the state's achievement standards that the student has not yet learned the knowledge and skills expected of all other students.

(a) The Department should further require that LEAs and other publicly funded agencies providing direct services to student report to the State the number of students with disabilities who qualified for, but were not given a 3 year re-evaluation.

(b) The Department through regulation needs to send a clear message that the purpose of reevaluation is not primarily to determine if a child with a disability still has a disability and is still in need of special education, but to reexamine the student' s learning and instructional needs in the context of his/her physical, social, cognitive, and emotional development so as to make any adjustments and modifications in the student's program based on the findings of the reevaluation to improve the likelihood of the student's attaining the standards set for all.

© Studies have shown that for a significant number of students with disabilities from low-income families, 3 year re-evaluations result in previously undiagnosed conditions that impede their learning. For many of these children the 3 year re-evaluation is their only assessment of their physical well being in a 3 year period.

Evaluation Procedures, Conduct of Evals, Additional Requirements §614(b)(1)- (3)

One significant addition was made to this section of the IDEA that should be explicitly related to the outcome determinations for all students with disabilities, and in particular, to the child with a significant cognitive disability who is determined not to be able, even with the best instruction, to make progress toward the regular achievement standards set for all other students, and thus, may be taught and assessed to alternate achievement standards.

Consistent with NCLB, the language of the statute has been modified to require "assessments and other evaluation materials used to assess a child under this section - are provided and administered in language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer;"

Proposed regulation/recommendation: Clarify that the State must assess all students with disabilities using a variety of assessment instruments, each which has been properly validated for its particular use, and is reliable.

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

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

These clarifying provisions are critical when considering the use by an LEA of any assessment for the purpose of determining that a child is so significantly cognitively disabled as to be taught to different achievement standards because he/she is unable, even with the best instruction, to make progress toward meeting the academic content and achievement standards set for all other students.

Proposed regulation/recommendation: Clarify that the State and LEA shall ensure that all students with disabilities who are unable to participate in an assessment instrument without reasonable accommodations, are provided reasonable accommodations, and any such assessments and other evaluation materials used to assess a child are provided and administered in language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide

or administer.

The statute was also amended to require "assessments of children with disabilities who transfer from 1 school district to another district in the same academic school year are coordinated with such children's prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations."

Proposed regulation/recommendation: Clarify that the statute at §614(b)(3)(D) seeks to ensure that despite the exception to the 60 calendar day requirement being applied when a student with an evaluation pending transfer from one district to another, that there is a clear mandate to facilitate and expedite completion of an evaluation for eligibility for special education within the 60 calendar day period.

Determination of Eligibility & Educational Need; Special Rule §614(b)(4), (5)

As under current law, the determination of eligibility shall be made by a team of qualified professionals and the parents of the child based on a full assessment of the child in all areas of suspected disability, using a variety of assessment instruments, used for purposes for which their measures are valid and reliable. The child's eligibility shall be made only after ruling out as the determinant factor for eligibility, lack of appropriate instruction in reading, including the essential components of reading instruction (as defined in the ESEA); lack of instruction in math; or limited English proficiency.

Proposed regulation/recommendation: Clarify that the multi-disciplinary evaluation team shall focus on the disability related educational and other than educational needs of the child in order to fully inform the IEP Team that will need to address the child's educational needs as well as those other needs, e.g., health related needs that unless addressed will impede the child from accessing education or benefiting from her special education program.

Proposed regulation/recommendation: Drawing from language in the Conference Report, clarify that the IEP Team shall consider all evidence, including information presented by the evaluation process and information offered by the parents, independently review any determinations made by the evaluation team, and utilize the information gathered during the evaluation and through the IEP team's review of said information to appropriately inform the development of the IEP for the child.

SPECIFIC LEARNING DISABILITIES

The language of the amended statute expressly addresses the manner in which LEAs determine whether a child has specific learning disabilities:
Specifically, a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual disability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.

In determining whether a child has a specific learning disability, a local educational agency may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedures.

Proposed regulation/recommendation through policy guidance: Clarify that use of the severe discrepancy formula, though arguably never mandated by federal law, has been discredited. See Senate Report. "There is no evidence that the IQ-achievement formula can be applied in a consistent and educationally meaningful (i.e., valid and reliable) manner. In addition, this approach has been found to be particularly problematic for students living in poverty or culturally and linguistically different backgrounds, who may be erroneously viewed as having intrinsic intellectual limitations when their difficulties on such tests really reflect lack of experience or educational opportunity." This message should be sent to the States as well as the LEAs.

The Department needs to establish criteria to define "scientific, research-based interventions" that are or may be used as part of the evaluation procedure. The Department needs to clarify that a student shall not be found ineligible for having a specific learning disability because the student either did not respond to a "scientific, research –based intervention" during a truncated evaluation, or was not provided an opportunity to respond to such an intervention.

Evaluations before Change in Eligibility

No change was made from the 1997 IDEA amendments stating that an LEA "shall evaluate a child with a disability . . . before determining that the child is no longer a child with a disability." Language was added to this section of the statute from the regulations at 34 C.F.R. §300.534(c)(2) that states the exception to this general rule: "Such an evaluation is not required before the termination of a child's eligibility under Part B due to graduation from secondary school with a regular diploma, or due to exceeding the age eligibility for FAPE under state law."

Proposed regulation/recommendation: The Department needs to clarify through a regulation that a parent may request a reevaluation of their son/daughter to inform the youth's decision to leave school with less than a regular high school diploma instead of continuing to further his education and to benefit from transition services until aging out or receipt of a regular high school diploma.

Proposed regulation/recommendation: The Department needs to clarify that consistent with regulations promulgated under Title I of the ESEA, as amended, a regular high school diploma does not include a GED or any other diploma that reflects anything but achievement of the same standards set for all students. [34 C.F.R. §200.]
A new statutory provision was added that says: For a child whose eligibility under this part terminates in the above described manner, an LEA "shall provide the child with a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's postsecondary goals."

Proposed regulation/recommendation: The Department might encourage States and LEAs to identify specifically the areas and degrees of proficiency that the student has attained (e.g., English language arts, proficiency 9th grade; mathematics, proficiency, grade 10) so as to assist him/her in pursuing post secondary learning or employment.

Individualized Education Programs (IEPs) --§614(d)

IEPs Defined --§614(d)(1)(A). Some changes were made to this section that appear to make the language of the statute more consistent with parallel provisions under Title I of the ESEA, as amended by NCLB.

While "a statement of measurable annual goals" now "including academic and functional goals," designed to (aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and (bb) meet each of the child's other educational needs that result from the child's disability"; "benchmarks and short term objectives" are no longer required except for "children with disabilities who take alternate assessments aligned to alternate achievement standards".

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

.

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

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

Proposed regulation/recommendation: A description is required of how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided.

Proposed regulation/recommendation: The department needs to clarify that because the annual goals for all but those students with the most significant cognitive disabilities must by definition be aligned with the achievement standards set for all, LEAs through the progress reports must indicate the student's performance based on those standards. For students with disabilities, the Department needs to ensure that the progress report indicates "the extent to which that progress is sufficient to enable the chilled to achieve the goals by the end of the year" so that the parent and member so the IEP team can assess the outcomes and determine what, if any, additional specialized instruction, related services, or other interventions will be necessary to enable the student to meet the annual goals.

Section 614(d)(1)(A)(i)(III) requires a statement of the special education and related services and supplementary aids and services "based on peer-reviewed research to the extent practicable," "to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child…"

Proposed regulation/recommendation: The Department shall hold the SEA accountable for collecting and disseminating "state-of-the-art" knowledge and validated research to support the nature and use of specialized instruction and related services being utilized by the LEAs that should be encouraged to carefully document their findings.

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

Proposed regulation/recommendation: Failure to identify peer reviewed research and evidence of a child's continued failure to learn to the state's standards, shall constitute evidence that the child is not being provided FAPE and may require compensatory education.

At §614(d)(1)(A)(i)(VI)(aa), the IEP is now required to include a statement of "any appropriate accommodations that [the IEP team determines] are necessary to measure the academic achievement and functional performance of the child" on state and districtwide assessments consistent with §612(a)(16)(A);"

Proposed regulation/recommendation: The Department needs to clarify that such accommodations should, in most instances, be being used in the child's classroom instruction and learning. Use of the accommodations for the child's teaching and instruction should improve the validity and reliability of using such accommodations.

Consistent with the requirements of Title I of the ESEA, as amended, new language has been expressly added to make clear that every child shall be assessed. Now the provision at § 614(d)(1)(A)(i)(VI)(bb) requires the following explicit statement to be included in a child's IEP: "if the IEP Team determines that the child [with a disability] shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why - (AA) the child cannot participate in the regular assessment; and (BB) the particular alternate assessment selected is appropriate for the child."

Proposed regulation/recommendation: The Department needs to clarify that only students identified as having the most significant cognitive disabilities, who even with the best instruction, are unable to make progress toward the achievement standards set for all, may participate in an alternate assessment that is aligned to different achievement standards; whereas any student with a disability, who is unable to participate in the regular assessment even with accommodations, may participate in the State's alternate assessment that is aligned to the same achievement standards expected to be met by all students except those with the most significant cognitive disabilities.

At §614(d)(1)((A)(i)(VIII), new statutory language provides that the IEP beginning "not later than the first IEP in effect when the child is 16" and updated annually thereafter, include "appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;" "transition services (including courses of study needed to assist the child in reaching those goals;" and "beginning not later than 1 year before the child reaches the age of majority under state law, a statement that the child has been informed of the child's rights, if

any, that will transfer to the child on reaching the age of majority.

Proposed regulation/recommendation: The department through regulation should clarify that there is nothing in this requirement to preclude the transition process from starting earlier when necessary to meet the needs of particular students, e.g., a student whose subsequent courses of study will be affected by whether or not the student has taken a prerequisite course; or for a student whose disability related educational needs requires taking fewer courses over an extended period of time, to be able to adequately plan so he might cover the full range of curricula offerings needed to graduate before reaching the mandatory age.

Section 614(d)(1)(A)(ii) contains a rule of construction that no additional information is required for the IEP beyond what is explicitly required by this section [i.e., §614(d)] of the law, and information contained in one part of the document need not be repeated elsewhere.

Proposed regulation/recommendation: The Department should consider clarifying that nothing in the provision limits a State from adding its own mandatory components of the IEP, in particular, if said components are consistent with §608(b) "designed to enable children with disabilities to meet the challenging State student academic achievement standards."

IEP Team and Team Attendance – § 614(d)(1)(B), (C)

No changes are made in the required composition of the IEP team. Significant changes are made by statute with respect to IEP team attendance.

Proposed regulation/ recommendation: The Department needs to address either through regulation or guidance the foreseeable problem of parents feeling under pressure and ultimately coerced to consent to educators being excused from attending the child's IEP – against their better judgment and the interests of the child.

Proposed regulation/recommendation: Clarify that there is an expectation that all members of the IEP team shall attend meetings, that excusing members from attending IEP meetings generally convened once a year, should be the exception, not the rule; that the purpose of all members being present is to ensure the multidisciplinary nature of the input, a rich exchange of ideas, opportunities for the regular education teacher who is presumably most knowledgeable about the general education curriculum to better understand the child's disability related educational needs, how the special education teacher and regular education teachers might more effectively collaborate in meeting the student's academic and other education related needs, to learn more about the child, the parent's concerns, issues, and insights.

Clarify that the burden is quite minimal, for although a child participating in the general education curriculum often has 3-4 subject matter teachers – only one is required to attend the IEP meeting.

Proposed regulation/recommendation: Under the changes to the law, underscore that a parent's agreement that another member's attendance is either not necessary because of the subject area to be discussed or a parent's consent excusing a member who will submit written input should also be in writing.

IEP in Effect, including Children 3-5 & Student Tranfers - § 614(d)(2)

The following modifications were made relating to programs for children aged 3-5: the "IEP Team shall consider" the IFSP…and the "IFSP" may serve as the IEP of the child if using that plan as the IEP is consistent with state policy and agreed to by the agency and the "child's parents."

Proposed regulation/recommendation: The department needs to clarify consistent with the language from the conference report that "ensuring that a smooth transition from the Part C system to the Preschool Program or to school is vital for a child's educational success. . . .The Conferees do not intend that a State or district reduce any service a child would be otherwise eligible for under Part B." (emphasis added) Given what we know from early education research underscoring the importance of young children receiving an educational component to their development, the Department needs to emphasize that children who continue to receive services under an IFSP shall be provided the educational programming and services to which they would otherwise be entitled to as part of their right to FAPE under Part B.

Miscellaneous Provisions Providing Additional Flexibility §614(d)(3)

Provisions were added to allow greater flexibility to parents and local educational agencies, in particular, for making changes to a child's IEP after the annual IEP meeting for a school year, in which case the parent of a child with a disability and the local educational agency may agree not to convene an IEP meeting for the purposes of making such changes, and instead may develop a written document to amend or modify the child's current IEP. Under the new statutory provision, changes to the IEP may be made by the entire IEP Team or by amending the IEP rather than having to redraft the entire IEP.

Proposed regulation/recommendation: Clarify that any changes to the IEP require written consent by the parent who must be informed of the right to receive a full copy of the revised IEP with the amendments incorporated.

Multi-Year IEP Demonstration §614(d)(5)

The following multi-year IEP demonstration authority was added:
States are provided the opportunity to allow parents and local educational agencies the opportunity for long-term planning by offering the option of developing comprehensive multi-year IEP, not to exceed 3 years, that are designed to coincide with the natural transition points for the children.

The Secretary is authorized to approve not more than 15 proposals. The proposal must include, among other things, assurances that the development of a multi-year IEP is optional for parents, informed consent, and a list of required elements, the process for the review and revision of each multi-year IEP.

Proposed regulation/recommendation: The Department needs to clarify through regulation that irrespective of any State's being selected for the Multi-Year IEP Demonstration Pilot that no individual parent can be required to accept a 3 year IEP for their child.

Proposed regulation/recommendation: Especially in light of the improved outcomes expected through alignment of the curriculum with the State standards set for all children, including those with disabilities, parents of students with disabilities must be provided full notice of their right to an annual IEP developed by a multi-disciplinary team based on evaluations, and other relevant information; that any participation in a multi-year IEP is purely optional, and can be developed and implemented only with the written informed consent of the parent, who should be referred to the PTI or CRC, and that such consent to a multi-year IEP can be revoked at any time, and a parent may request that the IEP team shall be reconvened.

Proposed regulation/recommendation: The Department needs to ensure that parents considering participating in a multi-year IEP for their child, are apprised of their rights in writing or other mode of communication that most effectively meets their needs, including the manner in which the IEP team will use any progress report, such as that issued pursuant to 34 C.F.R.§200.8, or any other indicator that a child is not on target to meet his/her expected annual goals and /or making effective progress toward the achievement standards set for all, to reconvene the IEP team to review and to consider modifying the IEP, to communicate or otherwise meet with parents.

Alternative Means of Meeting Participation §614(f)

The following additional authority was included regarding alternative means of meeting participation: When conducting IEP Team meetings and placement meetings, mediation, and resolution session, and carrying out administrative matters related to due process hearings, "the parent of a child with a disability and a local educational agency may agree to use alternative means of meeting participation such as video conferences and conference calls. "

Proposed regulation/recommendation: The Department needs to cross reference this provision with the above provisions that pertain to easing the attendance requirements at annual IEP meetings. Clarify that this provision shall be used only when necessary and in general, when becomes necessary to hold multiple IEP meetings. The Department should underscore that the expectation is -given the few required members necessary to attend a child's IEP meeting - that at least an annual in person meeting shall be held, especially given the emphasis on improving teaching and learning so that all these students also attain proficiency.

Proposed regulation/recommendation: The Department might suggest convening IEP meetings through other than in-person meetings, for such reasons as scheduling, exchanging documents and witness lists, sharing updated information.

Proposed regulation/recommendation: The Department needs to take steps to reinforce the utility of the IEP as a critical tool for ensuring that all students learn to high standards through specialized instruction and supportive services provided by highly qualified school based teachers. Unless otherwise indicated on an IEP, students are to be taught to the same academic and achievement standards set for all students.

Rationale: To the degree the IEP is viewed as a meaningless tool, it is being misunderstood and inappropriately used in this critical era of standards-based education.

§615 PROCEDURAL SAFEGUARDS

Surrogates and Wards §615(b)

Specific procedures were added regarding surrogates and wards of the state.

Proposed regulation/recommendation: The Department of Education should through regulations clarify that every child who is not living with a parent or person acting in place of the parent who has a legal responsibility for the child, who may or may not be a ward of the State as that term is defined by state law, ought to be assigned a surrogate parent pursuant to 20 U.S.C. §1415(b)(2).

Proposed regulation/recommendation: Clarify that if a child's parents or guardian are not known or cannot be located after reasonable efforts, or if the child is a ward of the state (as defined by State law), a surrogate parent must be appointed to fulfill the role otherwise played by parents under the IDEA. The surrogate parent must be provided necessary training so as to ensure that he/she has the knowledge and skills to adequately represent the child's educational interests.

Proposed regulation/recommendation: The Department needs to clarify that while any of the persons acting in the place of a natural or adoptive parent who fall within subsection (III), and (IV), subsection (ii), or subparagraph (B) (foster parents who meet the prescribed conditions), may be appointed as "surrogate parents," the State has an obligation to ensure that any "person acting as parent" "has knowledge and skills that ensure adequate representation of the child." Once appointed, the surrogate is responsible for representing the child in all matters related to Part B and Part C rights. 20 U.S.C. §1415(b)(2).

Complaint and Time Limitations for Presenting Complaint §615(b)(6)

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

Proposed regulation/recommendation: The Department should provide through regulation that the state law shall apply only if it provides for a period that exceeds the federally mandated 2 year period for a party to file a complaint.

Rationale: Otherwise, there are basic issues of fairness and equity given that some states have statutes of limitation of 120 days, 6 months, and one year.

Rationale: As a matter of public policy, no state should bar a complaint that is brought under the IDEA within the statutorily established 2 year period.

Proposed regulation/recommendation: Through regulation, clarify that the 2 year statute of limitations does not apply if the parent was prevented from presenting the complaint by actions or behavior of the LEA.

Proposed regulation/recommendation: Explain that such action or behavior includes misrepresentation by the LEA that it has resolved the problem, or withholding of information from the parent that was required to be provided.

Proposed regulation/recommendation: The Department needs to clarify through regulation that the timeline is tolled upon either party serving a complaint notice upon the other with a copy to the SEA. It is important to clarify this point, because time could be wasted if a complaint is challenged as and/or found insufficient. There is reason for some confusion given that there is no right to a due process hearing until the party, or the attorney representing the party, files a notice that meets the specified requirements, including sufficiency.

Due Process Complaint Notice §615(b)(7);(c)(2)

The changes to due process complaint requirements were purportedly made to minimize the burden on schools and reduce paperwork. Unfortunately they are overly prescriptive and raise concerns about parents being placed at a significant disadvantage by school personnel who by routinely challenging the sufficiency of the notice complaint will have a chilling effect on use of due process.

Proposed regulation/recommendation: Clarify that the SEA developed form must be provided as part of the notice of procedural safeguards provided to parents once a year, and upon an initial referral for evaluation,

Proposed regulation/recommendation: The Department should through regulation require that any party who alleges that a notice complaint it has received is insufficient, to state in writing and with specificity the basis for that determination, including the type of

information that is missing or inadequate.

Proposed regulation/recommendation: The Department ought to develop a model complaint that shall be appended to every state's notice of procedural safeguards that must be given parents at least at the beginning of each year.

Response to Complaint - §615(c)(2)(B)

New language in the statute provides that an LEA must respond to a parent's due process notice complaint within 10 days, a response by the LEA does not preclude the LEA from asserting that the parent's due process complaint notice was insufficient.

Proposed regulation/recommendation: Consider incentives for encouraging this response by the LEA as it is likely in the child's educational interest to have the matter resolved quickly.

Proposed regulation/recommendation: As noted above, clarify through regulation require that any party who alleges that a notice complaint it has received is insufficient, must state in writing and with specificity the basis for that determination, including the type of information that is missing or inadequate.

Timing §615(c)(2)(C) and Sufficiency §615©(2)(D) of the Complaint

The party providing a hearing officer notification that the due process complaint notice has not met applicable sufficiency requirements must provide the notification within 15 days of receiving the complaint.

Proposed regulation/recommendation: The Department needs to clarify that an administrative hearing officer has the authority to consider whether there have been efforts to delay due process and discourage timely resolution when it subsequently deliberates on any issue pertaining to said complaint and in granting relief.

Proposed regulation/recommendation: As noted above, the Department can discourage undue delay by requiring any party, who alleges that a notice complaint it has received is insufficient, must state in writing and with specificity the basis for that determination, including the type of information that is missing or inadequate.

Proposed regulation/recommendation: Clarify that within 5 days of receipt of the notification alleging that the complaint notice is inadequate, the hearing officer shall make a determination on the face of the notice of whether the notification meets the applicable requirements, and shall identify with specificity what information, if any, is missing or incomplete, and shall immediately notify the parties of such determination.

Amended Complaint Notice - §615(c)(2)(E)

Need for clarification and to minimize undue delays.

Proposed regulation/recommendation: Clarify through regulation that a hearing officer cannot authorize a party to amend a complaint within 5 days of when a due process hearing occurs.

Proposed regulation/recommendation: The Department needs to underscore that after a hearing officer has found a complaint notice insufficient, the applicable timeline for a due process hearing shall start again after the party files an amended notice, including the timeline for a resolution session.

Procedural Safeguards Notice - §615(d)

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

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

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

Proposed regulation/recommendation: Clarify that parents notice must be in lay language and in the parents' native language or mode of communication most likely to be understood. The notice must include, among other things, the opportunity to present and resolve complaints, including the time period in which to make a complaint, the opportunity for the agency to resolve the complaint, opportunity for mediation, due process hearing, state level appeals, and civil actions, including the time period in which to file such actions, and attorneys fees.

Mediation §615(e)

The following additions and clarifications were made relating to mediation:

Proposed regulation/recommendation: Clarify that mediation should involve matters arising before as well as after the filing of a complaint.

Proposed regulation/recommendation: Clarify that when the parties have resolved the matters pertaining to the complaint through the mediation process, there shall be an expectation by the parties that the agreement shall be legally binding.

Proposed regulation/recommendation: Clarify that courts of competent jurisdiction shall, if necessary, and the matter is brought before them, determine whether the agreement is binding in that it represents a meeting of minds between the parties, the terms are fair in that it does not eliminate or dissolve rights belonging to the beneficiary of the Act –i.e., the child, and the agreement is not unconscionable.

Proposed regulation/recommendation: The Department needs to clarify through regulation that if a confidentiality agreement is signed during the course of the mediation, it is intended to operate consistent with rules of evidence not as a gag order. As settlement discussions, the parties may agree in mediation that the terms or orange of considerations raised shall not be admissible should the matter not be resolved. Such an agreement shall not act as a gag order on the parties, and must not e used to stifle parent collaboration to address systemic issues.

Proposed regulation/recommendation: The Department needs to promulgate a regulation that expressly sets forth required qualifications for mediators. It is not sufficient –in instances in which parents, especially unrepresented parents, may be giving away their children's rights, for the mediator to be fair, impartial, skilled in mediation, and ignorant of the law and what is at stake. There is not likely to be an equitable balance of power between experienced school administrators and parents.

Consider, as hearing officers, that mediators shall not be a person having a personal or professional interest that conflicts with the person's objectivity in the hearing.
Consider requiring that a mediator must possess:

- Substantial prior knowledge of, and an understanding of the provisions of IDEA, federal and state regulations, and legal interpretations by federal and state courts,
- The knowledge and ability to conduct the mediation session in accordance with appropriate, standards of the practice, and
- The knowledge and ability to work with the parties openly and fairly, ensuring that no party is taken advantage of and that the outcome is fair, and consistent with the legal rights and protections belonging to the child.

Resolution Session §615(f)(1)(B)

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

Proposed regulation/recommendation: Clarify through regulation that when prior to the opportunity for an impartial due process hearing, the LEA convenes a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint that the parents participate in selecting the so-called "relevant" members of the IEP team.

Proposed regulation/recommendation: Clarify that resolution session shall be scheduled with the mutual agreement of the parties within 15 days of the LEA's receiving notice of the parents' complaint; that the resolution session shall include a representative of the agency who has decision-making authority on behalf of the agency; that the session shall not include an attorney of the LEA unless the parent is accompanied by an attorney; and that the purpose of the session is for the parents of the child to discuss their complaint, and the facts that form the basis of the complaint, with the LEA provided the opportunity to resolve the complaint.

Proposed regulation/recommendation: Clarify that the parents and the local educational agency may agree in writing to waive the resolution meeting and go directly to due process or agree to use the mediation process.

Proposed regulation/recommendation: Clarify that the LEA has 30 days from receipt of the complaint to resolve the matter to the satisfaction of the parents, prior to a due process hearing being triggered.

Proposed regulation/recommendation: Clarify as above that while the goal of the parties is to enter into a legally binding agreement, such determination is a matter within the jurisdiction of any state court of competent jurisdiction or in a district court of the United States.

Proposed regulation/recommendation: The Department needs to underscore that where the parties have execute an agreement in writing, either party may void the agreement within 3 business days of the agreement's execution. The Department needs to further clarify that failure to void the agreement does not override the independent jurisdiction of a court of law to void an agreement that is not binding on its face because it is unconscionable or . Furthermore, the Department ought to consider extending the timeframe for voiding the purported agreement when there are extenuating circumstances, e.g., indigent parents unable to access legal counsel.

Timeline for Requesting Hearing - §615(f)(3)(C), (D)

Additions were made by the statute to the timeline for requesting a hearing.

Proposed regulation/recommendation: Clarify that a parent or agency must request an impartial due process hearing by filing a notice complaint within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint.

Proposed regulation/recommendation: Clarify that filing a complaint requesting an administrative due process hearing tolls the statute of limitations pending the outcome of the resolution session and/or resolution of any challenge to the sufficiency of the complaint.
Proposed regulation/recommendation: Clarify that if the state has an explicit time limitation for requesting a hearing, state law applies only if the timeframe is greater than the 2 year period.

Proposed regulation/recommendation: Clarify that the 2 year timeline shall not apply if the parent did not request a hearing based on the LEA's or other agency's misrepresentation that the issue in dispute was resolved, or the agency otherwise misled the parent or withheld information from the parent that was relevant to the parent's pursuing an action or complaint.

Decision of Hearing Officer - §615(f)(3)(E)

Modifications have been made to the decision-making authority of the hearing officer that warrant attention of the Department.

Proposed regulation/recommendation: Clarify that a hearing officer is authorized to hear a complaint about any matter pertaining to the identification, evaluation, educational placement or provision of FAPE.

Proposed regulation/recommendation: Clarify that when a complaint raises

procedural issues pertaining to the denial of FAPE, the HO must be make a substantive determination of whether the child received FAPE, and may find that a child did not receive FAPE only if the procedural inadequacies:

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

Proposed regulation/recommendation: Clarify that nothing in subparagraph (3) of §615(g) shall be construed to preclude a hearing officer from ordering an LEA to meet the procedural requirements set forth in §615.

Proposed regulation/recommendation: The Department needs to expressly note through regulation that a parent retains the right to file an administrative [non due process] complaint with the state educational agency about any matter pertaining to a child's identification, evaluation, educational placement or provision of FAPE.

Limitation on Right to Bring Civil Action - §615(i)(2)

For the first time the federal statute has been expressly amended to limit the right of a party to bring a civil action within 90 days of an administrative decision being issues in writing.

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

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

A number of additions were made to the provisions regarding the awarding of attorneys fees. Including that the prevailing party may be an SEA or LEA in certain instances, as well as the parent.

Proposed regulations/recommendations: The Department needs to clarify that Sections 615(i)(3)(B)(I)(II) and III) seek to codify the standards set forth in Christiansburg Garment Co. v. EEOC. 434 U.S. 412 (1978). Based on the holding of Christiansburg, attorney's fees may only be awarded to defendants in actions where the plaintiffs' claims are frivolous, without foundation or brought in bad faith. [Since both school districts and parents can bring complaints, the principles of Christiansburg should not only apply in favor of school districts.]

Proposed regulations/recommendations: Explicitly clarify that if the parent's complaint is resolved at the resolution meeting pursuant to §625(f)(1)(B)(i), the parent is not entitled to attorneys fees for their counsel's participation in such session.

Stay Put - § 615(j))

The statutory language authorizing students to remain in their then current educational placements during the pendency of any proceedings conducted pursuant to this section, unless the parents and the agency agree otherwise, has been modified by adding the following explicit exception to the 'stay put' provision: "except as provided in the subsection (k)(4)" – the provision relating to 'placement during appeals.'

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

Proposed regulations/recommendations: To further mitigate significant possible harm, the SEA shall also be required to monitor all IAES so as to ensure that all students are being effectively taught the knowledge and skills they are entitled to learn and being assessed so as to assess the effectiveness of the school's program. Without affirmative mitigation of the harm, there is little recourse for a student who is wrongly excluded for so-called "code violations" other than compensatory education after the fact.

Placement in Alternative Educational Setting (Discipline Provisions) - § 615(k)

Authority of School Personnel §615(k)(1)(A),(B))

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

Proposed regulation/recommendation: The Department needs to flatly deny that this provision authorizing school officials to act on a "case by case basis" gives carte blanche to school officials, whose authority is otherwise expressly limited by statute not to sanction a child with a disability, whose conduct is a manifestation of disability, except when the child's conduct involves possession or use of dangerous weapons, controlled drugs, or bodily injury to others.

Proposed regulation/recommendation: Rather, clarify that this authorization to school personnel to act on a "case-by-case" basis, shall be read as a grant of broad discretion to school administrators to utilize professional and educational judgment NOT to order a "change in educational placement" of a student with a disability, who has violated a student code of

conduct for a period in excess of 10 days cumulatively or consecutively because, e.g., there are extenuating circumstances or removing the student from his/her placement is not in the child's educational interest, and for whom a manifestation of behavior related to disability was not found.

Proposed regulation/recommendation: Clarify that consistent with the corrected §615(k)(1)(B), a 'change in educational placement' consists of an exclusion from school for more than 10 school days consecutively or cumulatively in the school year. See also §615(k)(1)(C).

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

Additional Authority - §615(k)(1)(C)

Proposed regulation/recommendation: Clarify that school personnel may seek a 'change in placement' that exceeds 10 school days if the student's behavior at issue that gave rise to the school code violation is determined not to be a manifestation of the child's disability.

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

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

Services - § 615(k)(1)(D)

New statutory language more clearly sets out in one section the continuing obligation of school personnel to provide FAPE to those students with disabilities who have been removed from their current educational placement for up to 45 school days irrespective of whether the behavior was found to be a manifestation of disability for carrying or possessing a weapon at school, on school premises, or at a school function; knowingly possessing or using illegal drugs, or selling, soliciting the sale of a controlled substance at school, on school premises, or at a school function; or who has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function. Subsection (k)(1)(D) of §615, as subsection (C) above, specifies that these students who are removed from their current educational placement (irrespective of whether their behavior is or is not a manifestation of their disability) must "continue to receive educational services," consistent with FAPE as required by §612(a)(1)(A), "so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP…"

Proposed regulation/recommendation: Clarify that these statutory requirements must all be read consistent with the overriding statutory mandate to provide FAPE under §612(a)(1)(A) and as defined by §602(9). [Under prior law, the Department obfuscated the statutory mandate to provide FAPE consistent with state educational agency standards by promulgating regulations that it construed to authorize provision of limited education and encourage fragmentation of services "to make progress in the general education curriculum " and advance toward achievement of individualized education program goals –independent of the mandated provision of FAPE consistent with state educational agency standards.]

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

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

This obfuscation of the statutory mandate and failure to require implementation of FAPE during the period of any exclusion from school for in excess of 10 school days, is one of the primary reasons that thousands of students with disabilities continue to be mis-educated, and left behind.

Thousands of children with disabilities are sent home – euphemistically, the "interim alternative education setting" – and provided 5-10 hours of education per week based on school authorities misinterpreting the requirement to provide FAPE as authorizing fragmented and isolated services.

Proposed regulation/recommendation: Clarify that States and school districts shall be held accountable for providing the statutorily mandated FAPE that is statutorily defined as consistent with a prescribed curriculum and in accordance with the SEA's standards, including academic and achievement standards required by NCLB.
Only through such accountability will school districts have an incentive to develop IEPs that represent high expectations for teaching and learning the same rigorous high standards set for all other students – standards that are aligned with the curriculum, which students with disabilities must be given the opportunity to learn through provision of specialized instruction and supportive, corrective and developmental services.

Manifestation Determination §615(k)(1)(E)

Changes have been made in this section of the statute and the Department needs to consider the following clarifications.

Proposed regulation/recommendation: While the statute is silent with respect to the removal of students with disabilities from their educational placements for up to 10 school days, the Department should establish by regulation that any punishment of a student with a

disability for a single school day for behavior or an action for which the student is not culpable is a violation of the student's basic civil rights under Section 504 and thus, should at least be discouraged by the Department, instead of being seen as a *de minimis* violation.

Rationale: Particularly in light of the new accountability, there is nothing *de minimis* about being denied education for up to 10 school days. Common sense suggests that removing students from the educational setting, especially for behavior or conduct for which they are not culpable, contributes to the achievement gap and should be discouraged.
Proposed regulation/recommendation: The statute expressly states: "the [LEA], the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—(I) if the conduct in question was caused by or had a direct and substantial relationship to, the child's disability; or (II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP."

Proposed regulation/recommendation: The Department needs to expressly underscore by regulation that the requirement to examine "all relevant information in the child's file, including the child's IEP," must include "a determination that in relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were appropriate and being provided consistent with the IEP and placement."

Proposed regulation/recommendation: By regulation, the Department needs to clarify that "all relevant information in the child's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents" must consider whether the child's disability impaired the ability of the child to understand the impact and consequences of the behavior subject to the disciplinary action.

Proposed regulation/recommendation: The Department needs to ensure that such evidence is considered in any determination made by the local educational agency, the parent, and relevant members of the IEP Team, including *persons with specialized knowledge of the child and the child's disability,* who can participate through written input or conference call or other methods, as necessary, to determine that the above conditions were met , then the conduct shall be determined to be a manifestation of the child's disability. Given the stakes for children with disabilities, who, as a subpopulation group, are already well behind their peers without disabilities, the Department needs to promulgate through regulation that "relevant members of the IEP team" shall, for purpose of the manifestation determination, include "qualified persons with specialized knowledge of the child and the child's disability."

Determination that Behavior Was A Manifestation §615(k)(1)(F)

Under the statute, as amended, if it is determined that the child's conduct was a manifestation of the child's disability, the IEP Team is required to conduct a functional behavioral assessment and implement a behavioral intervention plan for such child (provided that a previous assessment has not been conducted).

Proposed regulation/recommendation: Clarify that even if a child's conduct is

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

Appeal, Authority of Hearing Officer §615(k)(3)

The statutory language provides that a hearing officer "may order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others."

Proposed regulation: Clarify through regulation that the Hearing Officer in making such determination must find that the public agency has demonstrated by substantial evidence that maintaining the current placement of such child is substantially likely to result in injury to the child or to others; considers the appropriateness of the child's current placement; considers whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and determines that the interim alternative educational setting meets [specified] requirements…"

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

Placement during Appeals §615(k)(4)

A significant and serious change denies the right to stay put to students with disabilities who are not involved with dangerous weapons, drugs, infliction of harm to self or others. This single change has such serious ramifications to students with disabilities, especially those from low-income families, who lack access to legal counsel, technical assistance and experts to assist them in challenging any allegations of school code violations, or that their disabilities or the failure of the school to adequately address the consequences of their disability, and the behavior or conduct for which they are being disciplined.

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

Proposed regulation/recommendation: Through regulation, the Department should prod States and school districts to hold expedited hearings within much shorter timeframes than the 6 weeks of school authorized by statute.

Electronic Mail §615(n)

A new provision has been added regarding electronic mail.

Proposed regulations/recommendations: The Department needs to clarify that if an agency offers to provide parents notice pursuant to the due process provisions via electronic mail (e-mail), and the parent elects to receive notice in such form, that the agency must establish a process for confirming actual parental receipt of said written notice.