

CENTER FOR LAW AND EDUCATION

August 19, 2002

By Internet

Thomas Irvin

Office of Special Education and Rehabilitation Services

U.S. Department of Education

Re: Request for Public Comment on the Report of the President's Commission on Excellence in Special Education, 67 Fed. Reg. 47354, July 18, 2002

Dear Mr. Irvin:

What follows are the comments of the Center for Law and Education ("CLE") on the Report of the President's Commission on Excellence in Special Education., submitted in response to the Department of Education's July 18, 2002 notice in the Federal Register seeking public comment on the Report. CLE, a national non-profit organization, has worked to advance the education and decision-making rights of low-income students, minority students, and students with disabilities for over thirty years. As one of the few national organizations that is firmly rooted in both disability rights and school reform law, CLE is particularly interested in the Commission report as its recommendations relate to the Individuals with Disabilities Education Act ("IDEA").itself, and its impending reauthorization.

These comments are not intended as an overall critique of the Commission's report, nor do they respond to every statement in the report with which CLE may take issue. Rather, our comments are limited to (1) selected Commission recommendations for statutory change that are particularly alarming, (2) selected recommendations, such as in early childhood education, with which CLE particularly agrees, and (3) broader Commission statements that evince a misunderstanding of current law that, if left uncorrected, may lead to misguided efforts to change the IDEA statute.

Comments on Section I: Federal Regulations and Monitoring, Paperwork Reduction and Increased Flexibility

1. *Focus on Results*: In the subsection entitled "Change from a 'Culture of Process' to a Culture of Results," the Commission recommends that "IDEA...*be fundamentally shifted* to focus on results...." (Emphasis added). This recommendation follows two paragraphs of conclusory statements, unsupported by citation to the statute, about the alleged primacy of "process compliance" over "student results" under current law. Current law, however, has a very rigorous focus on student results, including, for example, the following provisions:

- *Evaluations* Evaluations must gather information about strategies and interventions that the child needs to participate and progress in the general curriculum. 🗨️
- *Individualized Education Programs* IEPs must describe how the child's disability affects participation and progress in the general curriculum. They must also contain goals and objectives geared towards enabling him or her to do so. IEPs are to include special education, related services, supplementary aids and services and supports for school personnel that will allow the student to progress in the general education curriculum. Further, IEPs must be reviewed periodically and revised to address any lack of expected progress in the general curriculum. 🗨️
- *Promising Practices* As did prior law, IDEA as amended in 1997 requires states and school systems to keep abreast of research-based promising practices for teaching students with disabilities the general curriculum, and to incorporate these practices as appropriate into IEPs. 🗨️
- *Assessments* Children with disabilities must be included in general state and district-wide assessments, with appropriate accommodations or alternate assessments where necessary. 🗨️
- *Performance Goals* States must set goals for the performance of students with disabilities. These goals must be consistent with any goals and standards the state has set for students in general. 🗨️
- *Accountability* The 1997 IDEA amendments require states and school districts to gather and make public information that parents can use to hold schools accountable for how well their children do in school. First, states must set "performance indicators" they will use to assess how well the state is doing in educating children with disabilities, including at least performance on assessments, drop-out rates and graduation rates. The state must report to the public on how well it is doing on these indicators every two years. In addition, the state must make public statistics showing how children with disabilities fare on the general assessments given to all students, including how many are participating and how they achieve. 🗨️
It must do the same regarding children who take alternate assessments. 🗨️

2. *OSEP Monitoring*: The subsection “Federal Regulatory Activities Are Off-Target and Inefficient” criticizes at length OSEP’s current monitoring practices, and speaks in general terms of the need for change. CLE has no comment in this context on how monitoring might be improved, but agrees with the Commission that the details and logistics of monitoring are not currently addressed in the IDEA statute itself, nor should they be. Changes in the manner in which OSEP carries out its monitoring responsibilities,

including experimenting with new approaches and priorities, should be accomplished by the Department, with public input, through changes in Department policy.

3. *Demonstrating that Policies and Procedures re in Effect:* In the subsection “Federal Regulatory Activities....,” the Commission makes a critical misstatement of current law, which leads to an alarming recommendation. The misstatement is that IDEA merely requires states to demonstrate to the satisfaction of the Secretary of Education “that they have policies and procedures to ensure that the basic *principles* outlined in the statute can be met.” (Emphasis in original). This is absolutely incorrect. States must meet a much higher standard in order to receive federal funds under IDEA. The statute requires that “the State *have in effect* policies and procedures to *ensure that it meets* each of the following *conditions*.” (Emphasis added). The “following conditions” include such core IDEA rights and components as the right to a free appropriate public education; the right to receive one’s education in the least restrictive environment; the right to be included in state-wide assessments and accountability systems; rights to IEPs, competent evaluations and procedural safeguards; Child Find; comprehensive systems of personnel development; and State performance goals and indicators for its system of education services to students with disabilities (e.g., graduation and drop-out rates). The policies and procedures that will ensure the state’s meeting these conditions, and any amendments thereto, must be premised upon public hearings (with adequate notice) and an opportunity for comment by the general public, including individuals with disabilities and parents of children with disabilities.

This misstatement lays the groundwork for the recommendation that is buried in footnote 6 of this section of the report, in which the Commission recommends “that the current method required by the Secretary for a state to demonstrate, to the satisfaction of the Secretary, that the state has in effect policies to ensure that it meets each of the conditions specified in the statute, be replaced by requiring that states provide an assurance that such policies and procedures are in effect.” It is not possible, however, to “demonstrate” that something is so simply by giving an “assurance” that it is so. To “demonstrate” is “to show evidence of, to prove.” An “assurance,” in contrast, is merely “a formal declaration or promise given to inspire confidence.” The Commission’s recommendation would have the effect of eviscerating the current statutory requirement that states show that they actually have the required IDEA components and systems *in place and operational*, rather than simply asserting that they do. The requirement that states “demonstrate,” and the public and Secretarial scrutiny that this entails, is critical to ensuring that effective, comprehensive policies, procedures, programs and systems based upon scientific evidence and best practices will be developed and implemented. Calling for its abolition in a document that purports to call for increased accountability, and for an enhanced role for the Department in enabling states to achieve high-quality results, is counterproductive.

4. *IDEA Regulations:* This section of the report contains repeated complaints about the regulations implementing IDEA. In the subsection “Federal Regulatory Activities Are Off-Target and Inefficient,” for example, the Commission states that the regulations are “unreasonably complex,” “burdensome,” and “minimally related to student

achievement.” Nowhere, however, does the Commission elaborate on this conclusion, cite any particular regulation or offer legal or factual support for this view. Similar bald assertions appear in the subsection “Utilize Federal Special Education Staff More Effectively,” (“...the Commission shares the view that regulations are impossible for state and local compliance [sic]”), and in the conclusion to this section of the report (“[t]he current regulatory burden...stifles the ability of parents, teachers and others to improve results for children with disabilities”).

The Commission’s attack on the IDEA *regulations* is not germane to reauthorization of the IDEA *statute*. However, it’s rhetoric may lead to the erroneous, intertwined conclusions that (1) it is the IDEA regulations, not poor educational practice or uneven implementation of the law and regulations, that are responsible for poor results, (2) the IDEA statute requires these allegedly counterproductive regulations, and, therefore, (3) particular statutory changes are in order. This unsupported premise and flawed reasoning do not warrant the changes being proposed.

5. Individualized Educational Program as an Instructional Framework: In its criticism of IEPs in the subsection entitled “Accountability, State and Local Paperwork, and the Individualized Educational Program, the Commission’s discussion and recommendations reflect an apparent misunderstanding of the statutory requirements governing IEP development and implementation, instead, pointing to instances of poor practice and non-compliance by schools and school districts as a basis for its recommendations for changing the very provisions that are intended to ensure the educational outcomes that the Commission is seeking. In a confusing paragraph the Commission first describes the IEP as a “litigation document rather than an instrument outlining an effective instructional program for children with disabilities,” suggesting that the “concept of IEPs as an instructional framework... .” “has been lost to the greater need to document legal and procedural compliance.” CLE disagrees and suggests that it is, in fact, attention to the legal and procedural requirements for formulating the IEP that makes it the critical tool for learning and ensuring improved educational outcomes that it is under existing law.

Also, in what can only be described as a somewhat convoluted discussion about preserving civil rights and promoting achievement while reducing “paperwork”— a term notably undefined throughout the document – the Commission, without reference to existing statutory provisions, recommends that “IEP requirements focus on substantive educational and developmental outcomes and results. Failure to meet such outcomes/results would be the basis for individual additional assistance/enforcement under the law.” In fact, this is what is required by current law. 🗨️

Indeed, under the IDEA, as currently written, students with disabilities must be provided an education in the general curriculum aligned to a single set of high standards established for all students. Their IEPs must be used, *as they were intended*, as critical tools to achieve educational goals. The IEP must be shaped by evaluations of disability related educational needs and gather information about how the child can be enabled to participate and progress in the general curriculum; 🗨️ must describe how the child’s disability affects participation and progress in the general curriculum 🗨️ ; include “a

statement of measurable annual goals, including benchmarks or short-term objectives, related to...meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum...[and] meeting each of the child's other than educational needs that result from the child's disability;" and include "a statement of the special education and related services and supplementary aids and services to be provided to the child or on behalf of the child," and program modifications or supports for school personnel that will be provided for the child "to advance appropriately toward attaining the annual goals"and "to be involved and progress in the general curriculum...." consistent with State standards, goals, objectives, and State of the art practices.

6. *Benchmarks and Short-term Objectives*: Also in the subsection "Accountability, State and Local Paperwork...., despite existing law requiring both "measurable annual goals, including benchmarks or short-term objectives, related to - (I) meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum..." the Commission includes a recommendation to replace "benchmarks or short-term objectives" with "measurable annual outcomes and results." CLE is assuming that this statement is a misrepresentation of the Commission's intent. We assume that the Commission's intent was not to *replace* "benchmarks or short-term objectives" but to eliminate the requirement altogether. In any event CLE challenges the logic of the recommendation. Justification offered by the Commission is that inclusion of benchmarks or short-term objectives in IEPs "contributes greatly to the paperwork burden on educators and parents," and "bears no relationship to the non-linear reality of a child's development." As should be clear from the above discussion, nothing could be further from the truth.

CLE strongly opposes the elimination of what can only be seen as a key element, if not the key element, of the accountability system for ensuring that the IEP is an effective tool to enable students with disabilities the opportunity to learn what all other students are expected to learn. The requirements that the IEP identify measurable annual goals, "*including benchmarks or short-term objectives*" describe *how* the teachers, parent, student, and service providers will help the student achieve these goals and know if they are succeeding. The *how* portions of the IEP are further defined by the statements of special education services and supplementary aids that will be provided to the student or on behalf of the student in attaining his/her goals and being involved in and making progress in the general curriculum. As further discussed in the next section of these comments, regarding instructionally relevant paperwork, benchmarks or short term objectives exist to ascertain whether or not the specialized instruction is effective in addressing needs resulting from the student's disability and enabling involvement and progress in the general curriculum.

The Commission claims that under the current law, student services are listed as "an independent feature in and of themselves" and recommends that "IEPs should list services as they relate to the achievement of measurable annual outcomes..." Once again, this recommendation seems to have been made outside the context of current law. As currently written, IDEA requires that the IEP contain a "statement of the special

education and related services and supplementary aids and services to be provided to the child or on behalf of the child,” and program modifications or supports for school personnel that will be provided for the child “to advance appropriately toward attaining the annual goals” and “to be involved and progress in the general curriculum....” consistent with State standards, goals, objectives, and State of the art practices. The IDEA also requires annual reviews of a student’s IEP “to determine whether the annual goals for the child are being achieved” and calls for revision of the IEP to address a shortfall between the goals and student achievement. Furthermore, under IDEA and Section 504 each eligible student is entitled to receive a free appropriate public education consistent with state education standards established for all students.

7. Distinguishing Compliance Paperwork from Instructionally Relevant Work: In the subsection entitled “Impact of Paperwork on the Classroom,” the Commission expresses a concern that excessive paperwork “interferes with (educators’) ability to serve children with disabilities.” The Commission cites a variety of sources of excessive paperwork: federal monitoring requirements, IEPs that are focused on legal protection and compliance with regulatory processes, and the benchmark and short-term objective components of IEPs. This “paperwork” needs to be clearly defined to distinguish that which is instructionally relevant and requires the teacher’s involvement as a professional from non-educationally relevant paperwork that should be assigned to administrative support or otherwise handled as part of efficient school management. Some portion of this paperwork may be streamlined or more effectively handled by clerical rather than teaching staff. Hence, CLE does not dispute that teachers are currently overburdened, but suggests that the solution lies in improved management and administration, with such funding to support administrative or teacher support, *not* in deleting instructionally relevant tasks that, for example, may require or necessitate teachers documenting student response to their methods and instructional strategies as part of assuring improved teaching and learning. .

Mapping and tracking student progress toward annual goals through the benchmarks and objectives is critical to effective special education. A briefing paper on the IDEA authored by the National Information Center for Children and Youth with Disabilities’ notes the role of benchmarks and objectives in helping students achieve annual goals. Benchmarks are “major milestones”, and objectives are “measurable, intermediate steps” that relate to annual goals. Benchmarks and objectives are part of the IEP process because they “enable parents, students, and educators to monitor progress during the year, and, if appropriate, to revise the IEP consistent with the student instructional needs.” Since the introduction of standards-based education reform as well as the IDEA Amendments of 1997 requiring full participation of students with disabilities in any state or district-wide assessment, goals, benchmarks, and short-term objectives have become more relevant to improved teaching and learning as evidenced, in part, by teaching guides identifying this component of the IEP as a lesson planning resource. Well-written objectives help teachers determine where a student needs work and what strategies and activities will be used to help the student learn the knowledge and/or skill. High quality benchmarks for a student should mark stops along the way to larger goals; benchmarks define expected performance at key points in the school term

and can be translated into instructional units. A student's objectives should relate to the continuum of performance demanded by the state's standard assessments (e.g., failing, needs improvement, proficient, advanced), thereby, providing a map to the student's achievement of state established goals. 🗨️ The work put into developing goals and objectives and measuring student performance relative to IEP goals and objectives is instructionally relevant to ensuring that students make meaningful progress in the general curriculum. Far from routine documentation and administrative tasks, goals and objectives should be integral to the delivery of effective instruction to students with disabilities and improved teaching and learning.

The paperwork burden can be addressed without compromising the quality of instruction and student outcomes. Rather than eliminating paperwork related to student progress toward individual and general curricular goals, Congress should direct the Department of Education to address the paperwork burden through policy guidance primarily on administrative and management efficiencies for reducing paperwork that is not related to educational objectives and shifting administrative paperwork to clerical staff.

8. *Paperwork Reduction Waivers*: Also in the subsection "Impact of the Paperwork Burden in the Classroom," the Commission report specifically recommends that up to 10 states be allowed to propose paperwork reduction strategies under IDEA to the Secretary of Education, and to receive waivers of unspecified and undefined "federal paperwork requirements." CLE opposes this recommendation because the Commission offers no evidence to support it. The Commission's report refers multiple times to the paperwork 'requirements,' noting that federal, state, and local paperwork 'requirements' create a heavy burden on teachers, schools, and parents," that the growing paperwork 'requirements' "do not contribute to student results," the U.S. Department of Education "should clearly describe what paperwork 'requirements' are imposed by federal law," and "[s]tate and local paperwork 'requirements' should be changed to reduce this burden." Despite the multiple references to both "paperwork" and "requirements," the Commission does not adequately define what is meant by "paperwork"; nor does it identify these so-called "requirements" that impose this purportedly unfair burden on teachers and administrators.

Without adequate explanation and definition of the nature and concern represented by this generic reference to "paperwork" and/or the so-called "requirements" under federal law, CLE fears that the emphasis on reducing paperwork will be counter to improving educational achievement for all students with disabilities. Although the Commission report cites the Study of Personnel Needs in Special Education (SPeNSE) as authority for special education teachers expressing their dissatisfaction related to paperwork, the SPeNSE report, provides little, if any, insight about the nature of the "paperwork" at issue. Significantly, the SPeNSE report was not designed to examine "paperwork" and, its findings – such as they are – raise significant issues and questions.

The report ¹⁰ states that the “average special education teacher spends 5 hours per week completing forms and doing administrative paperwork.” It also indicates that general educators “spend considerably less time than special educators completing forms and administrative paperwork -2 hours per week compared to 5 - and this is no higher for those who have students with disabilities in their classes. However, general educators spend 2 hours more per week than special educators grading papers.” The report posits that perhaps, general education teachers do not feel routine duties and paperwork interfere with their job of teaching if they think grading papers is part of their instruction, and therefore, perceive it as contributing to their teaching rather than interfering with it.

While the SpeNSE report does indicate that while 38% of teachers spend less than 3 hours per week on paperwork related tasks, and 8% of teachers spend more than 14 hours on paperwork, there is no information describing the nature of their duties, or whether the time included time correcting/reviewing students’ papers, never mind performing formative assessments on a regular basis. Given the lack of data, it is hard to fathom how the so-called “paperwork issue” has attracted the kind of attention that it has.

9. *Early Childhood*: CLE is gratified to see the Commissions concern, in the subsection “Early Childhood Programs,” that IDEA ensure a “seamless system” for children transitioning from early intervention services for infants and toddlers under Part C of IDEA to preschool services (for 3-5 year-olds) under Part B. CLE has long been concerned that despite the current statutory mandate for a seamless system with no interruption in services during these critical developmental years, many children who turn three years of age during the summer are denied services. To the extent that the Commission has recommended that IDEA explicitly clarify the current law provisions that make such interruptions are impermissible, we agree. ¹¹

On the other hand, CLE does not believe that the Lead Agency must necessarily be the State Education Agency in order for there to be a seamless system for children moving from Part C to Part B.

Comments on Section II: Assessment and Identification ¹²

1. *Simplifying and Orienting Assessments to Services*: In the introductory (un-subtitled) portion of this section, the report states that “[t]he overall Commission recommendation for assessment and identification is to simplify wherever possible and to orient any assessments towards the provision of services.” The recommendation to simplify follows a general assertion that IDEA eligibility determination requirements are “complex.” The Commission notes not a single specific statutory requirement in example. Indeed, IDEA does not tell states and local school systems what kind of tests or assessment tools to use in evaluating children who have or are suspected of having disabilities, or how to interpret the results; such details are left to state law and local practice. Rather, IDEA sets forth basic, broad criteria that state- and locally-designed evaluation systems must meet, in order to safeguard civil rights and produce educationally relevant, valid and reliable results. ¹³ These should be beyond dispute in 2002, and include the following.

- School systems must assess a child in *all* areas related to the suspected disability.
- Schools must use assessment tools and strategies that provide information that will directly assist professionals and parents to determine the child’s educational needs.
- Schools must provide and administer tests and other evaluation materials in the child's native language or other primary way in which the child communicates, unless this is clearly not feasible.
- Schools, when evaluating children with limited English proficiency, must choose and administer evaluation tools in a way that ensures that they measure the child’s disability (if any) and special education needs, rather than his or her English language skills.
- Schools must use a variety of assessment tools and strategies to gather information about the child needed to determine whether the child has a disability and needs special education, to enable the child to be involved and progress in the general curriculum, and to design an IEP.
- School systems may not use a single test or other procedure as the sole basis for deciding that a child is a child with a disability, or for designing an appropriate educational program for the child.
- Standardized tests and other evaluation materials have been proven valid for the specific purpose for which they are being used.
- Tests and other evaluation materials must be administered by trained and knowledgeable people following the instructions provided by the producer.
- The tests and other evaluation materials they use include methods designed to assess specific areas of educational need and *not* just IQ.
- Test results of children with impaired hearing or vision or manual or speaking skills actually reflect the child's aptitude, achievement or other factor being measured, rather than simply reflecting the fact that his or her vision, hearing, speaking skills or manual skills are impaired.

The recommendation to “orient any assessments towards the provision of services” similarly, and erroneously, assumes that poor state and local practice in this area is a result of bad federal law. To the contrary, IDEA already requires what the Commission has recommended. Under current law, evaluations must produce just the

instructionally relevant information the Commission desires, as exemplified by the following statutory requirements:

- Schools must use assessment tools and strategies that provide information that will directly assist professionals and parents to determine the child's educational needs. 🗨️
- Schools must use a variety of assessment tools and strategies to gather information about the child needed...to enable the child to be involved and progress in the general curriculum, and to design an IEP. 🗨️
- The tests and other evaluation materials they use include methods designed to assess specific areas of educational need and *not* just IQ. 🗨️

Furthermore, in designing an evaluation for an individual child who has or is suspected of having a disability, the evaluation team must review existing data about the child, and identify what additional information is necessary in order to determine, among other things, the child's present educational needs and what additions or changes in his or her educational services are needed to enable the child to participate and progress in the general curriculum. 🗨️

2. *Universal Screening:* At the end of the subsection "Early Identification and Intervention Programs," the Commission recommends that "states be given the flexibility to use IDEA funds to support early intervention programs and to combine IDEA funds with other sources of federal support for these programs." The relatively brief discussion preceding this recommendation refers to "universal screening of young children," to identify those "most at risk for later achievement and behavioral problems." Without further details, including, among others, whether the Commission is suggesting in-school screening of school-age children, or universal screening of toddlers and preschoolers, those concerning consent and confidentiality, and safeguards to ensure that the kind of informal, subjective and socioeconomically- and culturally- biased judgments that have contributed in the past to disproportionate labeling of low income children and children of color as having mental retardation or emotional/behavioral disturbances, it is not possible to comment on the programmatic aspects of what the Commission recommends. However, with so little IDEA money available, and with the Commission's decision not to recommend full funding at this time, allowing states to finance universal screening at the expense of services for children who do have disability-related educational needs is bad policy.

3. *Three-year Re-evaluations:* The subsection "Evaluation and Assessment," which criticizes and then recommends abolition of what the report terms "three-year evaluations of disability," rests on a fundamental misunderstanding of the IDEA requirement that children with disabilities be reevaluated at least once every three years. Under the statute, the purpose of this reevaluation is not simply, as the report states, "to ensure continued eligibility" but, rather, to gather up-to-date information about the child's educational

needs, so that appropriate, effective educational interventions can be designed, and appropriate educational services provided.

As part of all reevaluations, a group consisting of the child's parent, the rest of the child's IEP team, and "other qualified professionals" review existing evaluation data and other information about the child, including evaluations and information provided by the parent, current classroom-based assessments and observations, and the observations of teachers and related services providers. The group then decides what additional information, if any, is needed not only to determine whether the child continues to have one of the disabilities that may trigger IDEA eligibility, but also whether he or she continues to need special education and related services; the child's present levels of performance and educational needs; what additions or changes in the child's education services are needed to enable him or her to participate and progress in the general curriculum; and what additions or changes in services are needed to enable him or her to meet the annual goals set out in the IEP. The school system then must arrange for the assessments (or other procedures or tests) needed to obtain this information. In addition, the three-year re-evaluation must meet the criteria applicable to IDEA evaluations in general, including the requirements that the assessment tools and strategies used provide information that will directly assist professionals and parents to determine the child's educational needs; that evaluations incorporate a variety of assessment tools and strategies to gather information about the child needed...to enable the child to be involved and progress in the general curriculum, and to design an IEP; and that tests and other evaluation materials used include methods designed to assess specific areas of educational need and not just IQ.

The three-year evaluations the Commission would abolish thus are not merely periodic exercises in eligibility verification, but the mechanism by which schools get the information they need to shape appropriate services as children change and develop over time, and as changing curricula present changing demands, with corresponding changes in the educational/instructional implications of a particular child's disability-related learning style and needs. The "short, yearly assessments addressing progress" that the Commission recommends replace these re-evaluations – albeit without any further description of what such assessments would entail, other than their proposed use to "determine the need for continued services" – are not an adequate substitute. While a yearly assessment of progress might tell parents and educators *how* a child is achieving in school, it would yield no information about *why* a child may be having difficulty, the impact of the child's disability on educational performance, how that disability may be expected to effect his or her educational performance and needs developmentally, over time and as curricular demands change. Unlike the three-year reevaluation required by current law, they will be of little use in understanding educational needs, and developing individualized, effective educational responses.

4. Specific Learning Disabilities and IQ Tests: CLE agrees with the Commission that the current methods of assessing the presence of SLD ought to be changed to the extent that they are interpreted as requiring IQ tests to demonstrate the severe discrepancy required to exist between aptitude and achievement. Neither the statute nor the regulation define

“severe discrepancy”; whether a severe discrepancy exists is determined based on state law. States have elected to define this “discrepancy” in a variety of ways, including by a difference of 1.5 to 2.0 standard deviations between aptitude and achievement. Because tests are differentially valid, and the norm for African Americans different than that for Caucasians, African American students with learning disabilities are less likely to meet the severe discrepancy criteria when IQ tests are required, and thus, to meet the eligibility criteria. The severe discrepancy is required by regulation, not by statute.

Comments on Section IV: Accountability, Flexibility and Parental Empowerment

1. *Separate Goals for “Special Education”*: CLE agrees with the basic premise reflected in the title of the subsection “Set High Expectations for Special Education and Hold LEAs Accountable for Results,” and, as explained below, some of specific points made in this subsection of the report. However, the Commission’s recommendations in this regard evince a misunderstanding of both IDEA and the No Child Left Behind Act (“NCLBA”), and risk diluting the very strong disability-specific accountability provisions that are current law under the NCLBA.

Of most concern is the Commission’s recommendation that “IDEA should be revamped to require states to...set ambitious goals for special education in alignment with the No Child Left Behind Act...[and] define “adequate yearly progress” toward goals for special education.” Implicit in this recommendation is the erroneous – under both IDEA and NCLBA – notion that “special education” is a program and/or curriculum separate and apart from general education, for which different goals are permissible. As both of these laws recognize, however, special education is not a separate program or a curriculum or a place, but, rather; is a set of individualized services that should, under current IDEA, be designed to enable children with disabilities to achieve the same learning goals that all other children are expected to achieve.

Numerous provisions of IDEA tie the “free appropriate public education” and “special education” the law requires to the academic goals embodied in the general curriculum. NCLBA is very firm in its insistence that schools be held accountable for seeing that students with disabilities meet the same challenging goals set for all students. Among other things, NCLBA requires that students with disabilities, *as an independent subgroup*, make adequate yearly progress (“AYP”) towards the standards set under that law *for all students* in order for a state/LEA/school to avoid being designated as “needing improvement,” placed in corrective action status, or otherwise sanctioned. Indeed, the Department in its proposed regulation implementing these statutory requirements has already recognized that alternate standards are acceptable for “only that very limited portion of students with the most significant cognitive disabilities who will never be able to demonstrate progress on grade level academic achievement standards even if provided the very best possible education.” As the Department noted, this limited portion of students is not more than 0.5 percent.

To the extent that the Commission, in this recommendation, may be contemplating goals for outcomes beyond those measured by a state's academic assessment, current law under both IDEA and NCLBA already incorporate goals of that sort. These provisions need to be taken into account in crafting any new legislation and, may, indeed provide a point of departure for more rigorous accountability measures. Since 1997, IDEA has required states to set goals for the performance of students with disabilities, which must be consistent with any goals and standards the state has set for students in general. States must also set "performance indicators" they will use to assess how well the state is doing in educating children with disabilities, including at least performance on assessments, drop-out rates and graduation rates. While IDEA requires the state to report to the public on how well it is doing on these indicators every two years, unlike the NCLBA it has no mechanism for improvement, corrective action or sanctions when performance and progress on these indicators are poor. In contrast, under NCLBA a state's definition of AYP, (while to be based primarily on the state's academic assessments) must include the graduation rate for high schools and a similar academic indicator for elementary and middle schools. These, too are part of the annual goals that students with disabilities as a subgroup must meet if a state/LEA/school is to avoid being placed in improvement status, etc. The NCLBA provision thus has more teeth than does the comparable IDEA provision, but is limited to a single mandatory indicator at each level (elementary/middle/high school).

Given the historic and continuing inequities faced by students with disabilities and the stark differences in post-school outcomes experienced by students with and without disabilities, goals and indicators for students with disabilities beyond those required by the NCLBA, with teeth lacking in current IDEA provisions on performance goals and indicators, would be an immensely positive *supplement* to what should be a unified accountability system for all students. In considering any amendments to IDEA in this regard, great care must be taken to ensure that any new provisions do, indeed, supplement the already strong, inclusive provisions of the NCLBA for children with disabilities, and do not undermine, confuse or otherwise diminish them, or create a second and separate accountability system for this vulnerable population.

2. *Participation in Assessments*: The Commission's report in this same subsection, "Setting High Expectations....," further recommends that "IDEA should affirm NCLBA's insistence on the inclusion of students with disabilities in statewide assessment and accountability systems." IDEA has explicitly done exactly that since 1997, in section 612(a)(17), and Section 504 of the Rehabilitation Act and Title II of the Americans with Disability Act require the same. CLE agrees, however, that the statute ought to specify that alternate assessments are to be aligned with the state academic standards and assessments adopted for all students.

3. *Diploma Requirements*: Also in the subsection entitled "Set High Expectations...." the Commission opines that "[t]he current 'either diploma or graduation certification' division is inadequate," and states that "[s]tates should consider implementing a graduated high school diploma system...." It is somewhat ironic that a discussion of high expectations encourages states to develop a system of lesser credentials for students with

disabilities. Federal law should be requiring states to provide students with disabilities the education and support services they need in order to graduate with a regular diploma, and holding states accountable when they do not provide such services of sufficient quality – not inviting them to achieve lesser results. Further, federal law and policy should encourage states to carefully examine their requirements for “regular” diplomas to ensure that such requirements do not discriminate on the basis of disability.

4. *Children in the Child Welfare and Juvenile Justice Systems:* Here, in the final paragraph of the subsection entitled “Setting High Expectations....,” the Commission encourages state agencies to ensure “alternative educational services” to children in the child welfare and juvenile justice systems. This brief paragraph gives no explanation as to why these two very different groups of children, with different needs and different legal statuses, are discussed together; why they should be getting something called “alternative educational services,” as opposed to the educational services required to be available, as a matter of right, to all children; or what is meant by “alternative educational services.” Are children in foster care because of neglect or abuse, for example, to be removed from the public schools they otherwise would attend and placed into “alternative education,” simply because of that status? Is the mere status of being involved, in any way and for any reason, with the juvenile justice system, to be sufficient ground for removal to “alternative educational services”?

5. *School Choice:* In the subsection “Increase Parental Empowerment and School Choice,” the Commission’s report recommends that states create “school choice” plans that allow parents to take all available revenues to which the student would have otherwise been entitled – not just IDEA funds – to “follow students to the schools their families choose” when their school or school district is failing or under-performing. Without detail or discussion, it is difficult to imagine what the Commission has in mind, whether it is contemplating a public school “choice” plan as set out in the No Child Left Behind Act when a child has had the misfortune of attending a school that has failed to make AYP for two years, or a voucher scheme that would allow parents to take the “per pupil cost of educating a child in the school district their child attends plus the limited federal dollars to a private school of their choice.

Such schemes run the risk of weakening the public education system for all students by undermining the capacity and infrastructure of the public school institution by draining already limited resources. Furthermore, assuming the school selected under a “choice” plan were a private school, even with a voucher, barring a state law creating such a mandate, the school has no obligation to provide the student with disabilities full rights and protections under IDEA. Thus, the student might receive an education only up to the value of the voucher, and be without funds to pay for additional and necessary special education and related services as the child is entitled to under IDEA. The same holds true with respect to procedural safeguards that the private school, barring a publicly placed private placement, has no obligation to provide.

6. *Training and Information for Parents:* CLE agrees with the Commission’s call (in the subsection “Increase Parental Empowerment...”) for the Department of Education to

“increase support for programs that promote parental understanding of their rights and educational services under IDEA, so that parents can make informed decisions....” The peer-to-peer approach to rights-based information and training that the Parent Training and Information Centers (“PTIs”) have developed and honed is a most potent tool for parent empowerment, and must be preserved and strengthened in the law. CLE hopes that the Commission’s inclusion in the “Special Education Research Agenda” contained in its report of “evaluations of parent training and information programs” (item number 11), was done in this spirit.

7. *Binding Arbitration:* In the subsection, “Improve the IEP Process, Prevent Disputes and Improve Dispute Resolution,” the Commission recommends that IDEA permit the creation of voluntary binding arbitration systems. CLE strongly disagrees. Binding arbitration as envisioned by the Commission would require both parties to waive their rights to further procedural protections and appeals under IDEA. While this may be seen as worth the risk by some parents represented by counsel in certain matters, it is a potential disaster for unrepresented parents. Arbitration is no less adversarial than due process hearings, and unrepresented parents will face school systems with access to legal expertise and assistance by school counsel, whether afforded through direct representation in the arbitration or behind the scenes. This power imbalance, while equally unfair and undesirable in the context of due process hearings, is at least somewhat mitigated there by the right to further administrative (in a state with a two-tiered due process system) and then judicial appeals. Binding arbitration provides no such safety net. Furthermore, the Commission presents no evidence that *appeals* from due process hearings – the level of protection that binding arbitration would deny – are imposing an undue burden of any sort on school systems. And insofar as binding arbitration would replace due process hearings when used, it can only be a solution to the perceived burdensomeness of due process hearings if the Commission envisions arbitration systems that afford parents few procedural rights. Finally, it should be noted that very few due process hearings relative to the number of children receiving services under IDEA are actually held each year, and that the number is actually declining. 🗨️

CLE appreciates this opportunity to comment, and thanks the Department for considering its views.

Sincerely,

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