



The Council of Parent Attorneys and Advocates, Inc.
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IDEA-PART B
**Comments on Notice of Proposed Rule Making
Regarding the 2004 Amendments to the Individuals
with Disabilities Education Act**
submitted to
U.S. Department of Education
Office of Special Education and
Rehabilitative Services

September 6, 2005

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

September 6, 2005

by email(IDEAComments@ed.gov) and hand-delivery

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

Re: IDEA Part B-Comments (NPRM)

Dear Dr. Justesen:

We appreciate the opportunity to submit comments on the Department of Education's proposed regulations under the Individuals with Disabilities Education Act, Part B. The Council of Parent Attorneys and Advocates (COPAA) is a nonprofit organization of parents, attorneys, and advocates who work to protect the civil rights of children with disabilities and ensure that they receive appropriate educational services. Some members are in private practice; others work for public interest organizations that serve low-income parents and other nonprofit purposes. COPAA members see the successes and failures of special education and the IDEA through thousands of eyes, every day of every week of every year.

It is essential that the final regulations preserve the rights of students with disabilities under the IDEA. The Department should be guided by the IDEA's first two purposes: "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living," and "to ensure that the rights of children with disabilities and parents of such children are protected." Sec. 601(d).

COPAA believes that many of the proposed regulations are consistent with the Act and carry out its purposes. Other regulations, however, appear impermissible under §607 of the IDEA because they contradict the Act itself; reduce protections in the July 20, 1983 regulations without clear and unequivocal Congressional direction to do so; or are outside the Department's limited authority to promulgate only regulations necessary to ensure compliance with the IDEA's specific requirements. COPAA is concerned that other proposed regulations would weaken the rights of parents and children with disabilities and result in their receiving inferior educations.

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A number of regulations could also raise costs by encouraging litigation or forcing American families to spend more money to protect their children's rights and ability to receive an appropriate education. To the extent that regulations result in children with disabilities receiving inferior and inadequate educations, they place an onerous cost on our society.

Many children receive good special education services that make the difference between school success and failure. Yet, even now--three decades after IDEA was enacted--its promise is still a goal remaining to be met. A majority of states have failed to completely implement IDEA and are out of compliance with its most basic, essential requirements. It is important to promulgate regulations that will protect the rights of students with disabilities under the IDEA.

Thank you for considering COPAA's comments. Please feel free to contact Robert Berlow, COPAA's Government Relations Chair, if COPAA may be of additional assistance or provide additional information.

Sincerely,
Barbara J. Ebenstein, Chair

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Subpart A-General

Current § 300.3 (Proposed Removal of Regulations That Apply)

COPAA opposes removal of current 34 C.F.R. § 300.3. That the regulations already apply does not make this regulation unnecessary. 70 Fed. Reg. at 35783. The regulation is necessary to alert public agencies and members of the public as to other definitions that apply for purposes of the IDEA. This promotes full, meaningful, and informed participation. Without the references people will be forced to scour the federal regulations to make sure that they know about every other regulation that applies. Cross -references such as this one are made throughout the federal regulations. There is no harm in retaining the rule and it should be retained. COPAA suggests further, that consistent with the Departments laudable decision to provide a single source document, the regulations referenced in the current regulation should be printed out in an appendix to these regulations.

§ 300.7 Charter School

Recommendation and rationale: Include the full definition of charter school from the ESEA.

The proposed rule incorporates by reference § 5210(1) of the ESEA, 20 U.S.C.A. § 6301 rather than printing it in the regulation. Reprinting the definition in the regulation would be consistent with the approach used in defining, e.g., "core academic subjects," and would be consistent with the Department's innovative and user friendly decision to "construct one comprehensive, freestanding document," that "create[s] a single reference document for parents, State personnel, school personnel, and others to use." 70 Fed. Reg. at 35783. For parents and members of the public who do not have ready access to the U.S. Code or the C.F.R. this is particularly important.

§ 300.8 Child With A Disability

Recommendation 1: The definition of "autism" should not be changed, or renumbered.

Rationale: Under the current regulation a child may be considered autistic if he or she manifests the criteria set out in § 300.7(c)(1)(i) even after age 3. The proposed regulation refers only to the new subparagraph (i) but as renumbered it only covers the emotional disturbance exception to the autism definition. This problem can be corrected by deleting the reference in subparagraph (ii) to (c)(1)(i) and inserting (c)(1) or by retaining the current numbering.

Recommendation 2: Retain examples of congenital anomalies.

Rationale: COPAA disagrees with the decision to take out the examples of congenital anomaly on the ground that they are outdated. The exclusion might be used to deny a child with one of these or a condition like one of these. This definition was in place on July 20, 1983 and Congress expressed no dissatisfaction with the definition. Changing it now would violate § 607(b)(2) of the Act.

§ 300.18 Highly Qualified Special Education Teacher

Recommendation 1: Modify proposed §300.18 (c) as follows, including striking the phrase "appropriate to the level of instruction being provided" in §300.18(c)(2) and adding the phrase "to be able to provide instruction aligned to the academic content standards for the grade level in which the students are enrolled" in its place:

(c), "Requirements for highly qualified special education teachers teaching to alternate achievement standards. When used with respect to a special education teacher who teaches core academic subjects exclusively to children who are assessed against alternate achievement standards established under 34 C.F.R. 200.1(d), highly qualified means the teacher, whether new or not new to the profession, may either

- (1) meet the applicable requirements of section 9101 of the ESEA and 34 C.F.R. 200.56 for any elementary, middle or secondary school teacher who is new or not new to the profession, or
- (2) meet the requirements of subparagraph (B) or (C) of section 9101(23) of the ESEA as applied to the elementary school teacher, or , in the case of instruction above the elementary level, meet the requirements of subparagraph (B) or (C) of section 9101(23) as applied to an elementary school teacher and have subject matter knowledge **to be able to provide instruction aligned to the academic content standards for the grade level in which the students are enrolled,** ~~appropriate to the level of instruction being provided~~, as determined by the State, needed to effectively teach to those standards.

Rationale: The proposed regulations do not follow the spirit and the letter of IDEA 2004 with regard to highly qualified teachers, in that they allow for the possibility that the teachers of students with disabilities may be less than highly qualified. As such, the proposed regulations run afoul of the clear intent of both the IDEA and the No Child Left Behind Act (NCLB). NCLB Regulation (34 C.F.R. 200.1(d)) allows states to develop alternate academic achievement standards as long as they are aligned with the State's academic content standards, promote access to the general curriculum and reflect professional judgment of the highest achievement standards possible. In order to be able to teach effectively to alternate achievement standards that are aligned to the State's academic content standards, a special educator must be proficient in the grade level subject matter from which the alternate standards are derived. Anything less will not ensure that students are sufficiently challenged and will have true access to the general curriculum.

Recommendation 2: Insert new 300.18(e):

"(e) A special education teacher who provides consultation to a general education teacher shall not provide any direct instruction in the content area using a "pull-out" model of service delivery unless the special education teacher also meets the highly qualified requirements for the academic area."

Rationale: Allowing consultative teachers to be less highly qualified than other special education teachers takes into account the fact that these teachers would be working alongside general education teachers who are highly qualified in the content area. The special education teacher's role is intended to assist the general education teacher in modifying the curriculum to meet the needs of the student. As such, the special education teacher would not need to be as proficient in the content area as long as the highly qualified general education teacher is available to ensure that the content area standards are met. However, if a pull-out model is used, the student will not have the benefit of the classroom teacher's expertise while he or she is being taught. As such, a special education teacher providing content area instruction in a pull-out setting will need to be as highly qualified as other special education teachers providing content area instruction. The intent of both IDEA 2004 and NCLB is to provide all students, including students with disabilities, access to teachers who are highly qualified to teach the core academic content.

§ 300.19 Homeless children

Recommendation and rationale: For the reasons stated in our comment to proposed § 300.7 the full definition of "homeless children" set out in the McKinney-Vento Homeless Assistance Act, as amended, should be set out in this regulation.

§ 300.24 Individualized Family Service Plan

Recommendation and rationale: For the reasons stated in our comment to proposed § 300.7 the full definition of the term "individualized family service plan" from § 636 of the Act should be copied into this regulation.

§ 300.25 Infant Or Toddler With A Disability

Recommendation and Rationale: For the reasons stated in our comment to proposed § 300.7 the full definition of the term "infant or toddler with a disability" from § 632(5) of the Act should be copied into this regulation.

§ 300.26 Institution Of Higher Education

Recommendation and rationale: For the reasons stated in our comment to proposed § 300.7 the full definition of the term "Institution of higher education" from § 101 of the Higher Education Act of 1965 should be copied into this regulation.

§ 300.27 Limited English Proficient

For the reasons stated in our comment to proposed § 300.7, the full definition of the term "Limited English Proficient" from § 9101 (25) of the ESEA should be copied into this regulation.

§ 300.30 Parent

The meaning of the term "parent" needs to be clarified to protect natural and adoptive parents' constitutional rights to make decisions for their children while also ensuring that the rights of all children with disabilities are protected and advanced by responsible parents at all times.

Recommendation 1: Revise proposed § 300.30 by re-designating proposed subsection (b)(1) as (c)(1) and adding a new subsection (b) that adopts the language from current § 300.20(b) in the 1999 regulations.

Rationale: The proposed revision makes clear that in cases where the parents' rights have been terminated, and the foster parent has a long-standing relationship with the child, has no conflict of interests, and wants to make educational decisions, that no further inquiry is needed and that the foster parent should be considered the IDEA "parent." In such a case, because a court will have acted to terminate or subrogate the parents' constitutional rights, the parents are protected. Children's rights will also be protected by virtue of the fact that the foster parent satisfies the other provisions of the current regulation. However, courts would have some discretion regarding long-term relationship as discussed below.

Retaining current § 300.20(b) will also solve a possible problem relating to wards of the state. Under proposed § 300.44(b) and the IDEA as amended, a child is not a ward of the state if his/her foster parent is an IDEA parent. Under proposed § 300.30, all foster parents would be IDEA parents. Therefore no child with a foster parent could be a ward and in those cases courts could not appoint surrogate parents. In cases where the foster parent did not have a long-term relationship with the child, or had a conflict of interest, the court could not appoint a surrogate parent and would not be able to make the inquiry regarding conflicts, knowledge and skills required for appointment of surrogate parents under current regulations and, at least for surrogates appointed by public agencies, proposed § 300.519(d).¹ However, if the requirements in current § 300.20(b) were applied, and foster parents could be parents for IDEA purposes only by meeting those requirements, the child would benefit. Those foster parents who did not meet the requirements could not be parents for IDEA purposes, and surrogate parents could be appointed by the court. If courts apply the criteria for appointing surrogates in proposed § 300.519(c), as COPAA is proposing, the educational interests of children would be better protected.

Recommendation 2: Add at the end of the suggested new subsection (b) a new paragraph (3) providing as follows:

¹ COPAA is also proposing that judges making surrogate appointments should apply the same criteria and that proposed § 300.519(c) should be amended accordingly. *See* comment to proposed § 300.519.

(3)(A) If a court of competent jurisdiction, after notice to all interested parties, including Guardians ad litem/lawyers representing children and interested relatives of the child, determines that it will be in the interests of the child to allow a foster parent to act as an IDEA parent, notwithstanding the absence of a long-term relationship with the child and no other IDEA parent listed in paragraphs (a)(1)-(a)(4) is identified, the foster parent may be the IDEA parent without satisfying the long-term relationship requirement.

B) The provisions in paragraph (3)(A) notwithstanding, a court may appoint a surrogate parent to act as the IDEA parent for a ward of the state if all of the requirements of § 300.519 are satisfied and the court finds that it is in the interests of the child for the surrogate parent to act as the IDEA parent. In making this determination the court shall consider factors such as the number of foster homes in which a child has resided.

Rationale: If a child is living with a person who qualifies as a foster parent but has only recently taken a child into his or her home, courts should be able to choose foster parents to act as IDEA parents if no other IDEA parent is available. It makes little sense in many cases for the court to appoint a surrogate parent to exercise IDEA rights in such a case because a surrogate is likely to know less about the child and have less of an interest in the child than a person who takes the child into his or her foster home. However, where children have moved from foster home to foster home, for the various reasons that this occurs, it may make more sense to appoint a surrogate parent who will oversee a child's education even as homes change. If another IDEA parent is available, or if another person is available who could be the parent but cannot for whatever reasons take the child into his/her home, but cares about the child, knows the child, and is better positioned to make decisions for the child, the court should choose that person as the IDEA parent. Especially in cases where children have a history of being moved from foster home to foster home, courts should be looking for local relatives who can protect the child's IDEA interests.

Recommendation 3: Revise subsection (b)(1) [as renumbered (c)(1)] by deleting the phrase "when attempting to act as a parent under this part".

Rationale: The language sought to be deleted calls for a totally subjective decision by public agency employees which, if resolved against the natural or adoptive parent, effectively denies that parent constitutional rights without due process of law. Such employees cannot offer due process and are unqualified to make these types of decisions.

§ 300.34 Related Services

Recommendation: Proposed § 300.34(a) should be amended to retain the term "early identification and assessment of disabilities in children.

Rationale: This appears to be an inadvertent omission in proposed § 300.24(a) since it is included in § 300.34(c)(3). If the Department intended to remove this service COPAA objects to deleting this critical service from the list of related services. Congress has repeatedly stated the importance of early identification and intervention and strengthened provisions in the law in 2004 in this regard and "early identification and assessment" is a listed related service under the

July 20, 1983 regulations. Congress expressed no intent to delete these services and doing so would violate § 607(b)(2) of the Act.

Recommendation: Proposed § 300.34(b) should be amended by deleting "the optimization of device function, maintenance of the device."

Rationale: The proposed regulation is not authorized by the Act and is therefore in violation of § 607(a), (b)(1). Section 602(26)(b) of the Act excepts from the definition of related services surgically implanted medical devices and replacement of these devices. Congress made clear, however, "that schools should perform routine maintenance and monitoring of external devices connected with the use of surgically implanted medical device[s]." S. Rep. No. 108-185 at 8. The inclusion of the phrases we suggest removing could restrict the ability of IEP teams from recommending related services needed to help a child benefit from special education, such as instruction in listening and language skills for children using cochlear implants.

§ 300.43 Universal Design

Recommendation: COPAA recommends that the full definition of universal design from the Assistive Technology Act be included in this definition for the reasons stated in our comment on proposed § 300.7.

Subpart B-Eligibility

§ 300.100 State Plan Assurances

Recommendation: Based on language in the House and Senate reports COPAA recommends that proposed § 300.100 be amended by inserting (a) before the currently proposed language and adding new subsections (b) - (d) providing as follows:

(b) The state plan shall provide a complete citation to every policy, procedure, rule, regulation, statute, handbook, guideline, instruction or form setting out state (and where applicable, local) policies and procedures that carry out and/or implement each provision of these regulations.

(c) The state plan shall indicate where copies of policies, procedures, rules, regulations, handbooks, forms and the like may be obtained by members of the public.

(d) At a minimum copies of all state policies and procedures, rules, regulations, statutes, forms, guidelines, instructions and the like shall be available (1) on the State Department of Education website (and every LEA website) in a section conspicuously identified as applying to special education and the IDEA and in a format that is readily available, such as Adobe Acrobat; (2) in every public and charter school within the State (or LEA); (3) in every public library within the state; and (4) in hard copy to members of the public upon oral or written request.

Rationale: The proposed regulation is identical to statute and provides no detail regarding what state plan assurances must include. While it is true that Congress intended to relieve states of the burden of supplying "boxes upon boxes" of materials to the Department of Education, it is equally true that Congress continues to "expect[] States to meet the law's requirements" and for the Secretary of Education to disapprove State plans containing "false assurances" or take "immediate corrective action" when information was received showing that a state was not "not fulfilling its assurances." S. Rep. No. 108-85 at 14. The House Report provides that the change "would allow States to include in its application [sic] **cites to specific policies and procedures.**" H. Rep. No. 108-77 at 94. Clearly, the House saw this as a substitute for requiring filing the documents themselves.

The House suggestion is eminently sensible and should be implemented. Doing so will facilitate monitoring and enforcement by the Department. Moreover, it will facilitate meaningful parental understanding of how states are implementing the law and enable parent participation in the educational decisions affecting their children. If states are not required to at least provide citations to their policies and procedures to the Department of Education, parents of children with disabilities, teachers, administrators and other stakeholders will have no way of knowing on what the "assurances" contained in state plans are based. They will not know whether there is, in fact a "plan" based on real policies and procedures or simply a bare assertion that a plan exists. And policies and procedures without citations may be impossible to locate. This will ultimately lead to litigation that is costly to states and localities and delays "achieving successful outcomes by students."

Moreover, because under IDEA 2004 § 612(a), each state must provide assurances that it has policies and procedures in effect to implement the IDEA, and under § 612(a)(19), those policies and procedures cannot be adopted before public hearings and opportunity to comment on proposed policies and procedures, states must know what their policies and procedures are **before** their plans are submitted. Requiring states to provide citations imposes no burden and must be mandated. These ends are further served by requiring state plans to indicate exactly where the referenced policies and procedures may be located and obtained.

§ 300.101(a) Free Appropriate Public Education

Recommendation 1: § 300.101 should be changed by inserting after "General" and before "A free appropriate public education":

State plans shall include complete citations to the policies, procedures, rules, regulations, statutes, guidelines, forms, handbooks and the like established to ensure that

Rationale: Parents of children with disabilities, teachers, administrators and the public at large are entitled to know where state and local policies and procedures that are used to implement the Act are located so that they can be consulted and, if necessary, changed. Since the Department of Education will not be maintaining these documents, the public at large needs easy access to applicable policies and procedures.

Recommendation 2: Proposed § 300.101(a) should be amended to retain current section 300.121(a), except to the extent the current section requires filing information with the Secretary. The new regulation should be rewritten as follows:

Each state must provide assurances that it has policies and procedures that ensure that all children with disabilities aged 3 through 21, including children with disabilities who have been suspended or expelled from school, are provided a free appropriate public education.

Thus, the final regulation should contain two changes: (1) restore the phrase "aged 3 through 21" in place of "between 3 and 21 inclusive;" (2) delete the phrase "as provided for in § 300.530(d)" with regard to children who are suspended or expelled, so that those children receive FAPE.

Rationale:

a. Children who are 3 or 21.

The phrase "aged 3 through 21" has been part of the regulations since July 20, 1983 and is widely understood. Changing it now will only cause confusion especially since the phrase "between 3 and 21 inclusive" is a contradiction or could be taken to mean over 3 and under 21 (*i.e.*, ages 4-20).

b. Improper elimination of FAPE for children subject to discipline.

Proposed § 300.101(a) appears to eliminate **FAPE** for children subject to discipline, and thereby violates § 607(b)(1) and § 607(a) of the IDEA. The Department's proposed regulation states "a free appropriate public education must be available to all children . . . including children with disabilities who have been suspended or expelled from school, as provided for in § 300.530(d)." The Department's proposal adds the words "as provided for in § 300.530(d)" to the statutory requirement in § 612(a)(1). But proposed § 300.530(d)(1)(i) only requires that children "continue to receive educational services, 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." Section 300.530(d)(1) does not include a specific requirement to provide FAPE. Yet § 615(k)(1)(D) expressly requires that a child removed from his current placement, "shall – (i) continue to receive educational services, **as provided in section 612(a)(1)** 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 § 300.101(a) cross-references the faulty § 300.530(d)(1) and therefore, the same problem exists with regard to § 300.101(a). One solution is simply to eliminate the cross-reference to § 300.530(d)(1). The other is to state specifically in § 300.503(d)(1)(i) that children who are expelled or suspended must receive FAPE, in accord with § 612(a)(1), as § 615(k)(1)(D) requires.

If the proposed regulation is not changed, it will violate § 607(b)(1). The regulation must be amended to require that FAPE be provided. In addition, the proposal violates § 607(a)

because limiting the obligation to provide FAPE in this manner is not necessary to ensure compliance with the specific requirements of IDEA 2004.

It appears from the preamble that the Department intended to follow the requirements of IDEA 2004 and not impose a lesser standard. In explaining proposed § 300.101, the Department states that "the obligation to ensure the right to FAPE for children who have been suspended or expelled from school would be addressed in proposed § 300.530(d) in subpart E." 70 Fed. Reg. at 35,786 (June 21, 2005). The preamble to § 300.530(d) states: "Paragraphs (c) and (d)(1) and (2) of proposed § 300.530 would incorporate the statutory provisions from section 615(k)(1)(c) and (D) of the Act concerning removals for more than 10 school days and the provision of services during periods of removal." 70 Fed. Reg. at 35810. Both of these passages, and especially the use of the word "incorporate" in the latter passage, suggest that the Department intended to follow the statute and to not establish a lesser standard. The wording of the proposed regulation discussed above, however, indicates that a lower standard is actually being proposed.

Furthermore, if the proposed language is retained, LEAs and states will claim that they are allowed to provide less than FAPE to these children. This will lead to costly hearings and litigation.

§ 300.110 Program Options

Recommendation: Proposed § 300.110 should be amended to require SEAs to ensure that LEAs have "in effect policies, procedures, and programs" to provide children with disabilities the variety of educational programs and services available to non-disabled children.

Rationale: The proposed regulation does not fully implement the statute. The statute requires LEAs to submit plans providing assurances to the SEA that the LEA meets all of the conditions set out in § 613 of the Act. The proposed regulation simply requires states to "ensure that each public agency **takes steps** to ensure that its children with disabilities have available to them the variety of educational programs and services available to non-disabled children, including art, music, industrial arts, consumer and homemaking education, and vocational education." The regulation should be expanded to fully carry out the statute.

§ 300.111 Child Find

Recommendation 1: Section 300.125(b) of the 1999 regulations should be retained.

Rationale: First, § 300.125(b)(1999) requires information gathering and specification of persons responsible in language very similar to the corresponding section of the July 20, 1983 regulations. To the extent the proposed rule cuts back on procedural and substantive rights conferred by the 1983 regulations it violates § 607(b)(2) of the Act because it makes changes that do not "reflect[] the clear and unequivocal intent of Congress in legislation."

Second, the proposed regulation is totally unjustified by the 2004 amendments. In 2004 Congress added the phrase "children with disabilities who are homeless children or are wards of the State and." Congress also amended § 612(a)(10) by making the child find requirements for

children placed in private schools by their parents **more specific**. Neither of these changes suggests in any way Congress' displeasure with 34 C.F.R. § 300.125(b). Indeed, the fact that new provisions governing child find requirements for children in private schools provide for efforts equivalent to those made for children in public schools, § 612(a)(10)(A)(ii)(III), suggests that Congress desired to bring the private school children protections up to the level of the public school children vis a vis child find, not that some new, lower standard should be used for all children. The new law expressly requires a design for private schools that will ensure an accurate count of children with disabilities yet the proposed regulation implementing § 612(a)(3) deletes the current regulation provision relating to an accurate count. While Congress expressed a general desire to cut back on paperwork submitted to the Department, Congress expressed no displeasure with regulations requiring states to name responsible child find agencies, to describe how required child find policies and procedures would be monitored, and to describe the methods used by states to determine which children are receiving services. Nor are the requirements of § 300.125(b) the least bit onerous. The proposed regulation is completely beyond anything contemplated by the 2004 amendments. Current section 300.125(b) must be retained.

Recommendation 2: To implement the new statutory requirement that child find target wards of the state and homeless children, the regulation must require public agencies to establish liaisons with child welfare agencies, agencies acting under the McKinney Act, and other agencies who may come in contact with wards of the state, foster parents, other IDEA "parents," and homeless children. The regulation should also require public agencies to provide IDEA training to child welfare workers and others who are in contact with wards and homeless children.

Rationale: Homeless children and wards move frequently. In addition child welfare workers often have enormous workloads and may not take the time to coordinate with school personnel. IDEA 2004 now expressly places on public agencies the responsibility to identify homeless children and wards. Federal regulations must clearly set out requirements for public agencies to follow or this provision of the Act is unlikely to be implemented.

Recommendation 3: Current section 300.125(c) ("Child find for children from birth through age 2 when the SEA and lead agency for the Part C program are different") should be retained in § 300.111.

Rationale: The Department states that subsection (c) is being removed to give the states more flexibility but there is nothing mandatory about the existing regulation. The existing provision simply asks states to provide a description of "the Part C lead agency's participation" in child find activities, advises states that "the Part C lead agency's participation may include the actual implementation of child find activities for infants and toddlers" and that "the use of an interagency agreement or other mechanism ... does not alter or diminish" the SEA's ultimate responsibility for compliance with the child find requirement. The Department added these provisions in 1999 in response to comments "request[ing] that the regulations clarify the child find requirements for children birth through age 2, because the requirements under Parts B and C are different, and it is not clear which must be followed." Thus, the Department explained, the provision was required to add "needed clarification of long-standing statutory requirements

under Parts B and C regarding the respective responsibilities of the SEA and Part C lead agency for child find activities." 64 Fed. Reg. 12406, 12557 (March 12, 1999). The Department has not stated now that states do not still need the clarification they requested just a few years ago and Congress did not indicate any displeasure with the existing regulation, much less suggest that the existing legislation curtailed states' flexibility. Since states left to their own were uncertain in 1999 there is, especially in the absence of any stated evidence to the contrary, no reason to think that taking this clarification out now will not lead to renewed uncertainty, new requests for clarification and the costs attendant to such requests.. Current § 300.125(c) should, therefore, be retained.

Recommendation 4: All provisions regarding the definition of the term developmental delay belong in § 300.8, not § 300.111.

Rationale: COPAA does not understand why additional requirements pertaining to developmental delay are being placed in the child find regulation. The statute requires identification, location, and evaluation "of all children with disabilities." 20 U.S.C. § 1412(a)(3). "The term 'Child with a disability' for a child aged 3 through 9 (or any subset of that age range, including ages 3 through 5) may, "at the discretion of the State and local educational agency, include a child experiencing developmental delays as defined by the state" Once the SEA and LEA elect to include these children they are required to "find" them in the same manner as they are required to find other children with disabilities. The proposed regulation defining child with a disability incorporates the statutory requirement. § 300.8(b). The child find requirements for these children are no different than the requirements for other children with disabilities, although SEAs and LEAs would do well to develop appropriate policies and procedures for finding children not yet in school because of their age.

With regard to the substantive change to current § 300.313 by proposed section 300.111(b), the change is not justified by any statutory change. Subsections (b) and (c) provide useful clarification for states regarding the various options for determining appropriate disability classifications. By not addressing the 1999 regulations, Congress indicated its satisfaction therewith and they should not be changed.

§ 300.112 Individualized Education Programs (IEP)

Recommendation: The reference to § 300.300(b)(3)(ii) should be removed.

Rationale: The reference is not "necessary to ensure that there is compliance with the specific requirements of this title." Therefore, it violates § 607(a) of the Act. § 300.112 would implement the statutory requirement (§ 612(a)(4)) for state plans to provide assurances that IEPs or IFSPs will be developed for every child with a disability in conformity with § 614(d). § 300.300(b)(3)(ii) would implement § 614(a)(1)(D)(ii)(III)(bb), the statutory provision excusing states from developing IEPs when parents withhold consent for initial provision of special education and related services. Therefore, § 612(a)(4) is implemented by § 300.112 without referring to § 300.300(b)(3)(ii) The IDEA contains numerous requirements for IEPs most of which are set out in § 614, none of which except this one, **excusing States from providing**

FAPE, the Department felt compelled to reference in this regulation. This regulation should implement § 612(a)(4) and nothing more.

§ 300.116 Placements

Recommendation 1: Retain the language in existing regulation § 300.552 preserving the right to education in the least restrictive environment, by striking the phrase "unless the parent agrees otherwise" from proposed § 300.116(b)(3) and (c).

Rationale: The proposed change will undercut the statutory requirement that children be educated in the least-restrictive environment; will cause difficulties for Section 616 monitoring; violates § 607(a) of the Act because it is not necessary to implement the specific requirements of IDEA 2004; and can increase costs because educating children in inclusive settings is cost-effective.

Including the phrase "unless the parent agrees otherwise" in proposed § 300.116(b)(3) would significantly undercut the requirements of the IDEA by suggesting that parents may be encouraged to agree otherwise. It would turn what are currently least restrictive environment requirements into discretionary options by allowing parents to choose a different placement, perhaps a more restrictive placement, for their child. Additionally, in many districts in which students are typically placed into segregated placements, parents may feel coerced by IEP teams into "agreeing" to more restrictive placements because they do not know the full range of supplementary aids and services and programmatic modifications and supports to which their children are entitled, and which would enable their children to be educated satisfactorily in a less restrictive setting. On paper, however, it would simply appear as if the parent agreed to a placement other than the placement closest to the child's home. This will make fulfillment of monitoring responsibilities under § 616 extremely difficult, as one of the statutory priorities for monitoring is "Provision of a free appropriate public education in the least restrictive environment." § 616(a)(3)(A). The words "unless the parent agrees otherwise" should be deleted from the proposed regulations.

In contrast the current regulation § 300.552 comports with the requirements of IDEA 2004, § 612(a)(5), serves the purposes of the Act, and should be retained. It does this through using the term ""**as close as possible**" to the child's home, and stating that "**unless the IEP . . . requires some other arrangement,**" the child is to be educated in the school he/she would attend if non-disabled." The current language allows the leeway necessary for a child to attend a different, but not the closest, school, without encouraging a more restrictive environment. Under the current rule, children with disabilities **are** currently attending magnet, charter, and special schools. Indeed, it would be a violation of the Rehabilitation Act and Americans with Disabilities Act to prevent them from doing so simply because they have disabilities.

Section 607(a) of the statute, permits the Secretary to issue regulations "only to the extent that such regulations are necessary to ensure that there is compliance with the specific requirements of this title." Nothing in IDEA 2004 § 612(a)(5) supports this proposed regulatory change or bears any relationship to it. It is not necessary to revise current § 300.552 in any way to implement the statute. The current least restrictive environment regulation has been in place

since 1983, and especially since there have been no statutory changes there is no need to change the corresponding regulation now.

Retaining the existing regulation is cost-effective and will save money. A 1989 study found that over a 15-year period, the employment rate for high school graduates with disabilities who had been in segregated programs was 53%. The students with disabilities, who had been included in typical classrooms, or integrated programs, were 73%. The same study also found that the cost of educating students in segregated programs was double that for educating them in integrated programs. Piuma, Mary F., *Benefits and Costs of Integrating Students with Severe Disabilities into Public School Programs: A Study Summary of Money Well Spent*. San Francisco: San Francisco State University, 1989.

The right to an education in the least restrictive environment has been an established right since the inception of the IDEA statute in 1975. The LRE requirements are an integral substantive and procedural requirement of the IDEA. Since *Brown v. Board of Education*, the Supreme Court has decreed that separate education is not equal education. Separate and unequal schools for children with disabilities persisted for a long time in our country's history, and problems continue to persist. The President's Commission on Excellence in Special Education explained in 2002:

This Commission finds it important to reflect on the basic rights of children with disabilities to be educated in the least restrictive environment appropriate to the child and his or her educational needs. We are deeply concerned that many children with severe disabilities, including those children with autism or emotional disturbance, are relegated to segregated educational settings simply because of their disability. Despite decades of successful inclusion of children with disabilities in regular schools that would not be possible without the basic protections of IDEA and its predecessors, there are children with disabilities who are still segregated simply because their disability creates difficulties in providing integrated educational experiences.

Members of this Commission viewed situations where children with severe disabilities—for no apparent justifiable educational purpose—were separated from the regular school building and consigned to secondary settings because of their disability.

The current regulation is important; the proposed regulation is unnecessary and likely to worsen the problems cited by the Commission even further. It would also conflict with the statute and be fiscally irresponsible.

Recommendation 2: Retain the word "preschool" in 300.116. Also, the final regulation should contain a clause which states that if an inclusive preschool is the appropriate placement for a child, and there is no inclusive public preschool that can provide all the appropriate services and supports, the public agency must pay all costs associated with providing a free, appropriate public education for the child in a private preschool; including paying for tuition, transportation and such special education, related services and supplementary aids and services as the child needs.

Rationale: The use of the word "preschool" from the current regulation is critically important to clarify that a preschool child with a disability, who is served under IDEA, has the same rights regarding placement decisions as older students with disabilities. This includes the rights in the LRE provisions. Many parents are told that their preschool-age child does not have the right to be educated with non-disabled children and that the public agency will not provide a placement in a private preschool, even if it is the only available appropriate placement. This situation undermines the "individualized" decision-making that is the hallmark of IDEA. The decision about whether an inclusive preschool placement should be provided must be based on whether it is the appropriate least restrictive environment for the child, not on the availability of inclusive public preschools. Preschool has clearly been identified as a critical educational period for all children. This is especially true for children with disabilities. An early placement with non-disabled peers is the foundation for later inclusive educational opportunities and ultimately for employment in the community.

§ 300.134 Consultation

Recommendation 1: The proposed regulation should be amended to accurately reflect the statutory command by inserting the word "including" before "regarding the following" at the end of the first paragraph, before (a).

Rationale: While the Department states that § 300.134 "would incorporate ... section 612(a)(10)(A)(iii)..." 70 Fed. Reg. at 35788, the introductory sentence of § 300.134 omits the statutory word "including" before "regarding the following." This leaves the impression that the matters about which consultation is required are limited to the activities listed in the following subparagraphs whereas the statute's use of the word "including" suggests that states must consider the listed factors but may also consider others. There is no ground under the statute or reason to limit states' consideration of additional factors. The limit is bound to generate questions by SEAs to the Department, unnecessary paperwork and unnecessary use of financial and human resources. The proposed regulation should be amended to accurately reflect the statutory command.

Recommendation 2: Proposed § 300.134 should be amended to require policies and procedures to carry out and implement § 612(a)(10)(A)(iii) and those policies and procedures should be cited in the state plan.

Rationale: Section 612(a) of the Act requires states to have policies and procedures to implement all of the "conditions" of § 612. Subsection (a)(10)(A)(iii) imposes conditions for which such policies and procedures are required. Citations in the state plan were recommended in the House Report and Congress' intent should be carried out.

§ 300.148 Placement Of Children By Parents If FAPE Is At Issue

Recommendation: Retain existing § 300.403(b) which states that disagreements regarding FAPE and financial responsibility are subject to due process.

Rationale: The Department proposes to omit present § 300.403(b). Making this change is not necessary to carry out the specific purposes of the IDEA, as required by IDEA 2004

§ 607(a). Indeed, unintended weight may be given to the deletion of the provision from the regulations. Retaining the provision adds needed clarity.

§ 300.149 SEA Responsibility for General Supervision

COPAA supports the requirement in subsection (b) of the regulation requiring states to have policies and procedures in place to ensure compliance with monitoring and enforcement requirements of the regulations. COPAA recommends again that all regulations contain similar requirements so as to comply with § 612(a) of the Act.

§ 300.150 SEA Implementation Of Procedural Safeguards

Recommendation: COPAA recommends that, in addition to complying with § 612(a)(19) to develop whatever procedures SEAs use to inform state agencies of their responsibilities under § 300.150, that copies of these procedures be posted on an official SEA website, conspicuously labeled so as to facilitate access and that they be available for inspection and copying, without charge at the SEA office and every LEA office, and on file in all public libraries.

Rationale: Parents of children with disabilities and members of the public are entitled to participate in developing and have ready access to all procedures related to the rights of children with disabilities. Posting these materials on websites, retaining copies in public libraries and providing copies to citizens who request them is a minimal burden and will not entail costs disproportionate to the important public policy served.

§ 300.152 Minimum State Complaint Procedures **§ 300.152(a)(3)(B) Opportunity to Resolve State Complaints**

Recommendation: COPAA supports the proposal in § 300.152(a)(3)(B) to permit parents and LEA to mediate State complaints, but the Department should not permit the use of other undefined "alternative means of dispute resolution."

Rationale: Proposed § 300.152(a)(3)(B) would permit school district and parents to enter mediation or other "alternative means of dispute resolution" in an effort to resolve state complaints. Mediation is well defined under IDEA 2004 § 615(e) and proposed regulation § 300.536. The mediator must be impartial and there are strict confidentiality requirements. Parents do not pay anything; the State bears the cost. The Department of Education has done well to incorporate the use of mediation. The term "alternative means of dispute resolution," however, is vague and undefined and could mean anything. It could mean voluntary binding arbitration or other private means of resolution. Private entities resolving complaints will not be subject to public accountability, which is essential because complaints often deal with allegations that a public agency has acted improperly in providing an education for a child. Moreover, the proposed CRP provision is so vague that parents could have to pay the expenses of the other means of resolution. The proposal is so unlimited that the entity resolving the complaint could be biased, not impartial, or could apply the law incorrectly. Parents or school district would have little redress. There will likely be additional litigation over the extent of these undefined forms

of alternative dispute resolution, which will, in turn, raise costs for SEAs. Moreover, to the extent that the proposal encompasses Voluntary Binding Arbitration, arbitration for due process complaints was proposed by the House, but rejected by the Senate and full Congress. It was opposed by a broad coalition of stakeholders from parents to lobbyists representing school districts and other arms of government. If Congress had wanted to permit binding arbitration to resolve IDEA issues, it would have said so. Similarly, the Department should reject it.

§ 300.152(c)(1) State Complaints and Due Process Decisions

Recommendation: Revise proposed § 300.152(c)(1) to retain existing § 300.661(c)(1), requiring States to set aside only the portions of a complaint about which due process has been commenced, and strike the language requiring States to set aside the entire complaint.

Rationale: The proposed regulation would require the State to set aside an entire complaint if due process has been commenced with respect to any subject at all that is raised in the complaint. Under the current regulations, if a parent files a State complaint and then initiates a due process hearing, the State will set aside only those portions of the complaint that are the subject of the due process hearing. This promotes efficiency and makes sense, since a hearing officer will render a decision on the same issues. Meanwhile, the state resolves the remaining issues (that the hearing officer will not deal with) within 60 days. But, under the proposed regulation, these other issues would simply languish during the hearing and any subsequent court proceedings. These hearing and proceedings will not resolve them because they are not the subject of the due process complaint notice. As a result, children may go without FAPE for extended periods of time for no reason, or have IEPs that are not implemented. This does not promote efficiency or make sense, but raises costs. Moreover, parents, faced with the possibility that their State complaint will be halted, are likely to simply seek due process on everything in the complaint. This will increase costs for the parents, the LEA, and the SEA. The State complaint process is more parent-friendly and much less expensive than due process, and parents should be able to use it for their complaints if they wish.

As the Department recognized in 1999, "State responsibility for ensuring compliance with the Act includes resolving complaints even if they raise issues that could have been the subject of a due process hearing request. A State's general supervisory responsibility is not satisfied by relying on private enforcement efforts through due process actions for all issues that could be the subject of a due process hearing. In addition, the State complaint process and mediation provide parents and school districts with mechanisms that allow them to resolve differences without resort to more costly and litigious resolution through due process." 64 Fed. Reg. at 12646 (March 12, 1999).

§ 300.153 Filing a Complaint

Recommendation: Retain existing § 300.153(b)(1), allowing complaints that state that a public agency has violated a requirement of Part B of the IDEA or of this part.

Rationale: Some organizations have asked that the State Complaint procedure be limited to violations of the law and that parents be prohibited from using it to address the

appropriateness of services. Inappropriate educational or related services can result in a denial of a Free Appropriate Public Education, a violation of the law. It is not clear if what they seek is a change in the regulations so that parents cannot file complaints with the SEA when school districts fail to implement the IEP, i.e., an LEA fails to provide a child with necessary related services required by the IEP--such as failing to provide speech therapy for 3 months—even though it is in the IEP. The failure of an LEA to implement an IEP is a violation of the law. COPAA members use the State Complaint procedure for this purpose, as well as to file systemic complaints and other complaints that an LEA has violated the law with regard to an individual child. COPAA members report that States have quickly ordered LEAs to provide services required by IEPs, enabling children to quickly get the therapy or educational services the IEP team has determined they need. In addition, due process can be very costly and take much longer. The State complaint process is cost effective for all involved and easier to use, and the process is often friendlier, particularly for parents not represented by counsel. If parents lose the option to use the Complaint procedure, they may forego obtaining necessary services for their child rather than pay the costs of due process. Because the SEA is ultimately responsible for providing FAPE, parents should retain the right to complain to the SEA on all of these issues, as stated in the July 17, 2000 memo from OSEP (OSEP 00-20).

§ 300.154 Methods Of Ensuring Services

Recommendation: The IDEA's second specified purpose is to protect the rights of parents and children with disabilities, § 601(d)(1). COPAA recommends that to fulfill that purpose, the reference to parental consent in § 300.154 and elsewhere in the regulations should be to "informed parental consent." COPAA also recommends that all interagency agreements developed by a State under this section should be posted on SEA and other relevant websites, in public schools, public libraries and on request to the LEA or SEA, provided to members of the public.

Rationale: Parents often find themselves caught between responsibilities of conflicting agencies. Since the law and regulations require the various roles to be spelled out in interagency agreements which must, among other things, include "policies and procedures to determine and identify the interagency coordination responsibilities of each agency" parents of children with disabilities must be able to access the agreements to facilitate their full participation in educational decisions affecting their children.

§ 300.156 Personnel Qualifications

Recommendation: COPAA recommends that the regulation clearly state that the state plan will not be approved until the policies and procedures are properly and actually adopted and that they are maintained. Further, as with all policies and procedures these should be available on an SEA website and be easily accessible. They should also be available on all LEA websites, at LEA offices, in public and charter schools and in public libraries with other applicable policies and procedures.

Rationale: The proposed regulation as worded is inconsistent with the statute and therefore violates § 607(b)(1) of the Act. The Act requires each state plan to show that it has

actually put in place policies and procedures to ensure that personnel necessary to carry out the Act are appropriately and adequately prepared and trained. But, the proposed regulation instead simply allows the SEA to set out to accomplish this end at some future unspecified date

§ 300.157 Performance Goals and Indicators

Recommendation 1 and Rationale: COPAA recommends that the regulation be amended to make clear that the goals and indicators established be set out in policies and procedures to be made available on websites, and in schools and libraries within the state. The proposed regulation requires goals but does not require that they be in the state plan and in policies and procedures as required by § 612(a). The proposed regulations should also require states to cite to policies and procedures implementing this section in the appropriate section of their state plans.

Recommendation 2 and Rationale: COPAA recommends that the regulation require states to make annual reports required by § 300.157(c) available to the public on the SEA website, in all public and public charter schools, all libraries and that notice of the availability of the annual report be provided to the parents (or other responsible adults) of every child with a disability by such means as necessary to reasonably insure that such parents are aware that the report has been issued and that they may obtain a copy. The public, but especially parents of children with disabilities, are entitled to know whether their special education programs are producing results. Access to reports facilitates obtaining this knowledge.

§ 300.160 Participation in Assessments

Recommendation 1: COPAA recommends that the regulation be amended to make clear that the state must ensure that it has in effect and provide citations to policies and procedures that set out how all children with disabilities are to be included in the assessments required by the Act, including procedures and policies setting out the guidelines for alternate assessments [§ 300.160(c)], the required "accommodations guidelines," [§ 300.160(b)], a clear statement that only the IEP team, including the parents, will make the decisions regarding alternate assessments, how parents shall be notified that the question of alternate assessments will be visited at IEP meetings, and policies and procedures regarding when and how reports will be distributed to parents of children with disabilities and the public at large [300.160(d)]. Such policies and procedures must be made available on websites, and in schools and libraries as previously suggested.

Rationale: The proposed regulation does not require, as does the first clause in § 612(a) and § 612(a)(16) that states have policies and procedures to ensure that children with disabilities are properly assessed, but simply requires states to ensure everything in § 300.160. The proposed regulation provides no guidance to states as to how they are to comply with this crucial requirement of the Act. In amending the IDEA in 2004, Congress noted the importance of "appropriately assessing students with disabilities." S. Rep. No. 108-85 at 18. To ensure that this occurs, states must be required to develop policies in cooperation with parents and other interested persons and to publish the policies for all to see. The absence of guidance will lead to

requests for clarification requiring unnecessary paperwork and will likely lead to litigation and its attendant costs.

Recommendation 2 and Rationale: COPAA recommends that reports required by proposed § 300.160(d) be posted on websites, be available in schools and libraries, and that notice of availability of reports be provided to parents of children with disabilities in a manner that assures that parents are aware that those results are available for public review. Too often "public notices" are buried in the classified sections of newspapers where the people who most need to see them do not know to look. This kind of information should be readily available to parents, not hidden.

§ 300.162 Supplementation of State, Local and Other Federal Funds

Recommendation: COPAA recommends that § 300.162 require states to have policies and procedures and, as the statute requires for all of the requirements in § 612, provide assurances to the Secretary of Education that it has such policies and procedures regarding the statutory obligations pertaining to supplementation. Citations to the policies and procedures should be provided in state plans as recommended in the House Report.

Rationale: COPAA respectfully disagrees with the Department's statement in the preamble that not requiring an assurance is consistent with statutory changes. 70 Fed. Reg. at 35793. The first clause in § 612(a) requires each State to "submit[] a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:" One of those conditions is the condition listed in § 612(a)(17). States must provide assurances that they have policies and procedures pertaining to every condition listed under 612(a)(17) and those policies and procedures must be developed in conformity with § 612(a)(19). COPAA again recommends that the state plan for a state reference its applicable policy and procedure and that all policies and procedures be available on websites, in SEA and LEA offices, in public and public charter schools and libraries.

Public participation depends on public knowledge. Parents and the public at large are entitled to know how their states are implementing the law and how to go about pursuing their children's rights under IDEA. Access to the rules that govern are essential to facilitate parental participation.

§ 300.163 Maintenance of State Financial Support

Recommendation and Rationale: COPAA recommends that proposed § 300.163 be amended in a manner similar to the recommendation for proposed § 300.162. Residents of states are entitled to participate in developing and, upon development, to know what policies and procedures are in place to allow them to determine if their states have or have not complied with all the requirements of § 612(a)(18). This information has to be collected in some form because the Secretary is empowered to reduce a state's funding if it violates this requirement. Having the information available to the public in a manner that the public helps formulate is no extra burden for states and is required by § 612(a)(19).

§ 300.165 Public Participation

Recommendation: The current regulations, 34 C.F.R. § 300.280 -300.284 should be retained.

Rationale: Proposed 300.165 would affect a major cut back in public participation rights not expressly or even implicitly authorized by law. The regulations to be removed contain protections that have been in place largely as currently codified since July 20, 1983. As such, they may not be deleted without "clear and unequivocal intent of Congress in legislation," § 607(b)(2). Congress has expressed no such intent, and therefore, as proposed, the rule would violate § 607(b)(2) of the Act. In addition, it would reduce participation by parents of children with disabilities at a time when Congress has clearly indicated its desire to increase such participation.

Sections 300.280 – 284 set out nothing more than well-established notice and comment procedures designed to facilitate citizen participation in government. Failing to retain current regulations will invite litigation and its attendant costs, as the proposed regulations lack specificity and reduce the ability of the public to participate in formulating state policies and procedures.

First, § 300.280 in both the 1999 and July 20, 1983 regulations requires States to hold hearings, allow for comment, and to make the policies and procedures available. The first two requirements come directly from IDEA § 612(a)(19), while the third, making the policies and procedures available to the public, is necessary to facilitate comment. To not require states to comply with this longstanding requirement is a major step backward from open and participatory government. While COPAA does not oppose relieving states of the "burden" of providing copies to the Department of Education we strongly oppose and cannot see the "burden" of making copies of binding policies and procedures available to the people who will be bound. In any event, these are protections contained in the July 20, 1983 regulations the removal of which violates § 607(b)(2).

Second, § 300.281(a) -(c) in the 1999 and 1983 regulations requires adequate advance notice before hearings, sets out requirements for notice including the purpose, date, time, and location of hearings as well as how to submit written comments, and requires notice by publication in newspapers or other widely circulated media sufficiently in advance of the hearings to afford a reasonable opportunity to participate state-wide. To remove these provisions lessens protections in place on July 20, 1983 in violation of § 607(b)(2).

Moreover, these requirements are essential elements of participatory democracy needed to facilitate implementation of the statutory requirement. Notifying citizens in advance of public hearings creates no burden for states, which routinely notify citizens of everything from alcohol licensing to roadwork plans. The specific requirements of § 300.281(b) are commonsense and have served the public well for 20 years. Furthermore, publication in the media is, and has, for hundreds of years been required for all manner of public and private actions. Requiring states to so notify people interested in IDEA is no less important than requiring notices of foreclosures or planned roadwork or changes in any other state procedures. Removing these regulations is likely

to generate costly litigation about the meaning and extent of public notice and participation that could easily be eliminated by retaining the regulations.

Similarly, § 300.282(a)-(b) in the 1999 and July 20, 1983 regulations simply requires SEAs to conduct public hearings at times and places that afford reasonable opportunity to participate and requires a 30-day comment period. Requiring this of states assures that § 612(a)(19) has meaning. This does not impose any unreasonable burden on the States. Moreover, 30 days appears to be required by 20 U.S.C. 1232d(b)(7). It makes more sense for states and the public to know of the 30-day period from the IDEA regulations, when those regulations control a given situation, than to require everyone to look elsewhere for guidance. Failing to note the 30-day requirement in the IDEA regulations may cause citizens to be unaware of the time limit.

Moreover, given the amount of time it has taken to rewrite IDEA and the proposed regulations, the importance of the rights involved, and the size and diversity of the states, COPAA submits that state comment periods of at least 60 days must be required so that everyone who wishes to provide input may do so. While the various organizations with professional lobbyists may be able to meet 30 day time periods, parents of children with disabilities must act for themselves and may require more time.

Section 300.283 in the 1999 and July 20, 1983 regulations requires states to review, consider, and modify policies and procedures as needed based on public comments. Taking this provision out implies that the comment period is to be a meaningless exercise--that states do not have to consider the comments or modify proposed policies and procedures based thereon. Failing to retain current guidance will invite litigation and its attendant costs.

Section 300.284 in the 1999 and July 20, 1983 regulations simply requires states to tell their citizens where copies of final policies and procedures can be read by publishing this information in newspapers or other media. Again, taking this provision out implies that such notice is not required but even if this is not the implication there should be no question in this regard. Failing to retain at least current guidance will invite litigation and its attendant costs.

COPAA submits, however, that in addition to currently required publication requirements states must be required to post their policies and procedures on the State department of education (or equivalent department) website in commonly used formats that are easy to download and print, to state on their websites in which media the policies and procedures were published, and to notify parents where policies and procedures may be viewed and/or copied. States must also be required to provide hard (or if requested electronic) copies of policies and procedures without charge to members of the public who do not have computer access, particularly those who cannot afford to pay for copies. Copies of policies and procedures must also be available in every public school and publicly financed charter school and in every public library and made available for review on request by any member of the public.

Retaining or improving the current regulation is particularly important because the proposed regulations eliminate the requirement that states provide copies of policies and procedures to the Department of Education. If the Department is no longer to be the repository

and accepts state assurances that they exist, parents of children with disabilities and other members of the public will only be able to establish that they do not exist, or are inadequate, if they have access to whatever their states adopt.

The Department of Education further explains the cutback by stating that states must still comply with 20 U.S.C. § 1232d(b)(7) and state law. To the extent that § 1232d includes requirements contained in current regulations it makes more sense for states and the general public to view them together in one place, that is, in these regulations. However, § 1232d(b)(7) does not provide the specificity of § 612(a)(19) and protect public rights as guaranteed to the public under current IDEA regulations. Nor can state policies be considered sufficient. For one thing they can be changed. For another, without review of every single state policy it is impossible to determine whether this is so.

§ 300.166 Rule of Construction

COPAA makes the same recommendations regarding § 300.166 as it does above for §§300.162, 163 as the sections are interrelated.

§ 300.170 Suspension and Expulsion Rates

Recommendation: The proposed rule should be amended to require states to develop policies and procedures as per § 612(a)(19), to make developed procedures widely available (as discussed in comments above), and to maintain collected data and make it available to the public for at least 7 years after the year for which it is collected, since there is a lag time between collection and ultimate reporting.

Rationale: The proposed regulation is inconsistent with the statute and therefore violates § 607(b)(1) of the Act. The statute, in the first clause of § 612(a) requires states to provide assurances in their state plans that they have policies and procedures to meet the conditions set by § 612(a)(22). This means that each state must develop, pursuant to § 612(a)(19), policies and procedures by which it will "examine[] data, including data disaggregated by race and ethnicity, to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities." Proposed § 300.170, however, simply copies the text of § 612(a)(22) of the Act. It fails to include the state plans and policies and procedures requirement contained in the first clause of § 612 subsection (a) of IDEA 2004, and applicable to § 612(a)(22).

Collection of information on suspension and expulsion rates, required for the first time by the IDEA to be disaggregated by race and ethnicity, is an important function in which the public, including parents of children with disabilities, can and should be involved so that a comprehensive, fair and objective system is developed to collect data, examine and analyze it. It is one thing for the Department to state that it does not want to keep copies of the information. It is a very different thing to fail to require states to establish policies and procedures for collecting and maintaining data.

§ 300.172 Access to Instructional Materials

Recommendation 1 And Rationale: COPAA recommends that rather than adopting and providing citations for the definitions in proposed § 300.172(e) that the text of the definitions be included in this regulation. This would be consistent with the Department's overall format of "construct[ing] one comprehensive, freestanding document." 70 Fed. Reg. at 35783. Because parents of children with disabilities and many others do not have access to the United States Code but may have access to a copy of the regulations the Department will help to fulfill Congress' intent of facilitating and enhancing full, meaningful parental participation by making all definitions and legal requirements available in one place..

COPAA also recommends that the regulation be revised to require states to adopt policies and procedures, as required by § 612(a)(19), to implement the conditions set out in § 612(a)(23). This is a new federal requirement and all interested members of the public, including parents of children with disabilities, in each state are entitled to participate in designing the plan for putting *it into effect*.

Recommendation 2: Amend § 300.172 to require that children who are in need of accessible materials will receive their instructional materials at the same time as other children.

Rationale: IDEA 2004 § 612(a)(23) requires States to ensure that children who are blind or have other print disabilities receive accessible instructional materials "in a timely manner." The statute does not define timely manner but the legislative history makes clear that Congress meant for children who need Braille or large text or similar materials get them at the same time as other children receive their materials. H. Rep. No. 108-77 at 97 ("Currently, these instructional materials, in specialized formats such as Braille, synthesized speech, and digital text, often do not get to the students who need them in a timely manner, which should be the same time fellow students without print disabilities are receiving their copies of the materials."); S. Rep. No. 108-185 at 19 ("The committee feels strongly that instructional materials should be provided to blind and print-disabled students at the same time their fellow students without print disabilities are receiving the same materials.") So that states have no questions in this regard and to avoid needless, costly litigation on this point, Congress' clear intent should be spelled out in the regulations.

§ 300.174 Prohibition against Mandatory Medication

Recommendation: The following section should be added:

"§ 300.174(c) Additional clarification. In implementing this section, school staff should neither promote nor discourage any specific medication or medical treatment options that parents and treating professionals may consider and implement. In addition, when medication has been included in a treatment program to address a specific condition, nothing in this section shall be deemed as a bar to school staff reporting to parents or their representatives, classroom observations on the impact and/or efficacy of specific treatments, if consent is given by the parent."

Rationale: The Act and the regulation prohibit both state and local education personnel from requiring a child to have a prescription for a controlled substance as a condition of attending school. No parent or child should be forced to adopt a treatment medication or medical treatment for a disorder in order to attend a public school. Teachers and related service providers often recognize learning, functioning and behavioral problems in the school setting and therefore should be able to advise parents of what they observe. But, professionals should act within their professional scope of practice. Thus, school personnel should not recommend the use of medication or any other medical intervention. They also should not interfere with the administration of a medically supervised treatment. Medication assessment and prescription is the role of a physician under the direction of the parent. School personnel may recommend to parents a medical assessment by persons licensed to perform such evaluations. Moreover, teachers play an important role in providing observations to the medical professionals. Students spend a significant portion of their day in the classroom. Teachers and staff should be able to report observations to parents, their representatives, and medical professionals if consent is given by the parent.

Subpart C – Local Educational Agency Eligibility

§ 300.210 Purchase of Instructional Materials

Recommendation: Amend § 300.210(a)(3) to require that children who are in need of accessible materials will receive their instructional materials at the same time as other children.

Rationale: For the reasons stated in COPAA's comments under proposed § 300.172, it is critical that children who are blind and have other print disabilities receive their instructional materials at the same time as other children.

§ 300.226 Early Intervening Services

Recommendation 1: Proposed § 300.226 should be modified by adding after (c), a new paragraph (1) and adding new paragraphs (2), (3), and (4) as follows:

(2) Whenever a public agency proposes to provide services to a child under this section, the agency shall first provide oral and written notice in a language (including sign and Braille) appropriate to the parent that the public agency is proposing to provide early intervening services (including an explanation of such services), of the provisions of subsection (c)(1), of their child's right to a free appropriate public education and to an evaluation, of the parent's right to refuse early intervening services, and the right to insist on an evaluation and determination as to whether the child is a child with a disability entitled to FAPE and obtain informed consent from the parent.

(3) If the parent provides informed consent to the provision of early intervening services, the parent shall have the right to withdraw that consent and request an evaluation and determination of eligibility at any time.

(4) Public agencies shall adopt, pursuant to § 612(a)(19) of the Act, comprehensive policies and procedures designed to ensure that children provided early intervening services are carefully monitored, that parents are kept informed of their progress or lack thereof, and that if there is any suspicion that the child has a disability after services are commenced, that all necessary evaluations be performed immediately and that school personnel be informed of these procedures and policies, including the means by which school personnel can request such an evaluation.

Rationale: The statute and proposed regulation make clear that early intervening services may not be used to limit the right to FAPE. IDEA 2004 § 613(f)(3); proposed § 300.226(c), and preamble, 70 Fed Reg. at 35797-98. Parents sometimes are not aware of rights such as these. In addition, parents may be willing to accept proposed solutions that seem attractive but may not be based on sufficient evaluations. Moreover, parents may be unwilling or unable to appreciate or accept the extent of their children's disability or potential disability, which trained school personnel may suspect exist, and for which school personnel, would have requested an evaluation. School personnel often have advanced degrees in special-education or related fields and disabilities training that parents simply do not have.

Each LEA must continue to have procedures for school personnel to refer children for evaluations; the law made no changes in this regard. The Department has recognized in the preamble how important this is: "We have included the language regarding evaluation of children suspected of having a disability in proposed § 300.226(c) because we believe it is critical to ensure that any child suspected of being a child with a disability is evaluated in a timely manner and without any undue or unnecessary delay." Children develop quickly and time is of the essence in addressing their learning difficulties. Even a few months makes the difference between beginning a grade and the middle of a grade, and the child who falls behind because of a disability needs that disability addressed very quickly. Accordingly, parents must be fully aware of their rights, of the differences between early intervening services and special education and related services, and of the ability to request an evaluation.

Recommendation 2: COPAA recommends that the regulation be amended to provide that copies of reports required under § 300.226(d) be posted on the website, if any, of the LEA, and the SEA, and that copies be available to members of the public in public libraries, LEA offices, and upon oral or written request without delay and at no charge to citizens.

Rationale: Each LEA that provides early intervening services must report annually to the SEA about the number of children served under the section and the number who subsequently receiving special-education and related services. Parents and members of the public are entitled to know how their tax dollars are being spent and how these new programs are working and to obtain copies of these reports.

Subpart D – Evaluations, Eligibility Determinations, Individualized Education Programs and Educational Placements

§ 300.300 Parental Consent

Recommendation 1: The regulations must include a procedure for obtaining informed parental consent that applies in all circumstances when such consent is required to be obtained. Therefore, proposed § 300.300 should be revised by adding a new subsection (a) and renumbering the proposed sections accordingly:

(a) In obtaining informed parental consent, the public agency must, at a minimum undertake the following:

- (1) determine who is the "parent" or who are the "parents" with legal authority to provide consent, where they live and their phone number(s), and make note of these facts in the student's file.
- (2) where children are homeless or wards of the state, determine who is the "parent" for IDEA purposes by contacting child welfare workers, homeless shelters, court workers, guardians ad litem, and lawyers representing parents and children;
- (3) provide all parents with a copy of the IDEA notice of procedural safeguards;
- (4) give or mail the parent (by certified mail, return receipt requested) a consent form and annotate the child's file to reflect that fact;
- (5) orally inform the parent (using interpreters if needed) of the consequences of withholding consent and the reason the LEA recommends that the child be evaluated or needs special education;
- (6) If the family is homeless and/or has no telephone/email or if there is a basis to believe or the public agency suspects that the parent(s) may be illiterate or mentally incompetent, take other steps as are reasonable, to obtain parental consent;
- (7) if the parent declines consent or does not give consent in response to the first request, a representative of the LEA shall call or meet with the parent to again seek consent, and explain the consequences of withholding consent and the reason the LEA recommends that the child be evaluated or needs special education.

Rationale: Proposed § 300.300 incorporates much of the statutory language without guidance as to specifics. COPAA submits that guidance is especially necessary under the IDEA as amended because the statute allows the public agency to decline to evaluate if consent is withheld or the parent fails to respond to a request for consent. If parents withhold consent for providing special education services and related services, the statute prohibits the public agency from providing them and seeking a hearing to provide them. It also holds that the public agency is not responsible for providing FAPE. This is a very severe penalty for a child to bear. The principal purpose of the IDEA to **ensure** that FAPE is provided to **all children with disabilities**. § 601(d)(1). A child who does not receive needed special education and related services (i.e. FAPE) receives an inadequate education that will not prepare him/her adequately for future employment and more independent living as Congress intended. See 20 U.S.C. § 1400(c)(1). This is also likely to raise costs for society, as more governmental resources will be needed to

support this child as an adult. The child may drop out, again increasing costs. For this reason, very careful guidance must be given by the Department so that public agencies make very serious efforts to obtain consent.

Without mandated procedures, individual school employees will determine child by child, employee by employee, what is required to obtain consent. While flexibility should be allowed, minimum standards should apply. When evaluations are not performed or not timely performed, and children do not receive special education or related services, or do not receive them in a timely manner, costly litigation will ensue over whether public agency efforts were made or whether they were timely made or whether they were sufficient enough to obtain informed consent. To protect the rights of children, public agencies must be required to make serious attempts to obtain parental consent and should not be able to hide behind claims that they attempted to obtain consent if reasonable efforts have not been made and fully documented. The regulations should require that requests for consent either be given directly to the parent or sent by certified mail with return receipt. It is not sufficient to simply give the form to a child to bring home, particularly with an issue as significant as evaluating a child to determine if he/she has a disability. The fact that an LEA need not provide services if the parent "refuses to consent to services," requires extremely special care. A parent has not refused to consent simply because he/she does not return the first request for consent; indeed, ignoring the first request is not refusing to consent. Refusal is an affirmative act. Special attention must be called to the request. Doing so is more cost-effective, for the reasons stated above.

Recommendation 2: Proposed § 300.300(a)(1)(ii) – Use the statutory language, not the proposed regulatory substitute and delete preamble explanation

Rationale: IDEA 2004 § 614(a)(1)(D)(I)) states that "Parental consent for initial evaluation must not be construed as consent for initial provision of special education and related services." The Department proposes to replace the statutory phrase "placement for receipt" with the phrase "initial provision" in § 300.300(a)(1)(ii) so as to "make clear that consent does not need to be sought every time a particular service is provided to the child."

The proposed change is unnecessary to comply with the specific requirements of the IDEA, and therefore, impermissible under IDEA 2004 § 607(a). Current § 300.505(a)(1)(2) is clear and carries out Congress' narrow intent that parents who consent to have their child evaluated are not consenting to have special education and related services provided to their child. Contrary to the Department's statement in the preamble, the second sentence of § 614(a)(1)(D)(i)(I) of the Act was not changed by IDEA 2004. Rather, the identical provision was included in IDEA '97 in 614(a)(1)(C)(i). Indeed, Congress explained, "The bill specifies that parents must provide informed consent before the initial evaluation of a child, but that such consent shall not be construed as consent for placement for the receipt of special education and related services." H. Rep. No. 105-95, 98 (May 13, 1997). Congress has indicated absolutely no dissatisfaction with the current regulatory interpretation of this statutory provision and there is, therefore, no reason to change it.

The Department also asserts in the preamble that the proposed language is consistent with its "position that placement refers to the provision of special education services rather than as a

specific place, such as a specific classroom or specific school." This statement should be removed because the meaning of the term "placement" is not at issue in § 300.300.

Recommendation 3: Proposed § 300.300(a)(2) (Consent for wards of the state) should be modified to specify minimum requirements for contacting parents of wards of the state to obtain their informed consent so as to protect their rights but must at the same time protect the rights of children with disabilities who are wards of the state. In addition to the procedures proposed by COPAA in our Recommendation 1 public agencies must have policies and procedures for ascertaining whether the rights of natural/adoptive parents to make educational decisions for their children have been terminated or limited in any way, including enhancing child find procedures to ensure coordination between child welfare agencies, courts, and public agencies.

Rationale: When children are taken from their parents in abuse and neglect proceedings the rights of parents and children must be zealously protected. Parents' rights under the IDEA must be protected because, until terminated, suspended, subrogated or otherwise limited, they have a constitutional right to participate in making all decisions for their children. *E.g., Troxel v. Granville*, 530 U.S. 57, 65-66 (2000), *citing Prince v. Massachusetts*, 328 U.S. 158, 166 (1944); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) and other cases. However, by virtue of their circumstances, these parents may be difficult to locate or contact, or public agencies may be unaware of the neglect/abuse proceeding and unaware of who may be acting as the IDEA parent. If they are not contacted, natural or adoptive parents may be unaware of and unable to exercise their IDEA rights. For example, they might not know there is an IEP meeting and may not be available to consent to provision of services. If they do not consent, under the new law, the public agency is held harmless for any failure to provide FAPE. Children's rights to FAPE are therefore adversely affected and the goal of the IDEA to provide "full educational opportunity to all children with disabilities," § 612(a)(2) is undermined. Because the effect of the hold harmless provision on children is so severe Congress made clear that "the local educational agency must make **every reasonable effort to obtain consent from the parent.**" Sen. Rep. No. 108-185 at 24 (emphasis added). The proposed federal regulation must be amended to carry out the statutory goal and Congressional intent.

At the same time, children who are wards of the state are such because their parents have been accused of being or been adjudicated as being neglectful or abusive. Federal regulations must establish clear guidelines to ensure that some responsible person is acting as the IDEA parent and protecting the child's IDEA rights. Requiring early identification of the parent who has IDEA rights protects children as well as parents. School personnel are not normally involved in child welfare/abuse/neglect cases and child welfare personnel may not be in contact with school officials or knowledgeable about the IDEA. But expanded focused child find and interagency cooperation will facilitate early determination of whether the natural/adoptive parent's rights have been terminated or limited and, if they have, of who is the IDEA parent. Including such a coordination requirement is consistent with the amendment to § 612(a)(3) of the Act, expressly requiring public agencies to find homeless children and wards. *See also* COPAA's comment to § 300.111.

Requiring documentation of all efforts to identify and contact the parents of a child, under this provision and § 300.300(a) [as proposed by COPAA] is simply good business practice. But because public agencies are relieved of the duty to perform initial evaluations if parents fail to provide consent or fail to respond to a request to provide consent (§ 300.300(a)(3) *infra*) records of public agency efforts should make absolutely clear that the reason they failed to evaluate was because the parent, the correct "parent" with IDEA rights, failed to cooperate.

Recommendation 4: In § 300.300(a)(3), concerning optional use of due process by SEA/LEA to compel initial evaluation, COPAA recommends deleting the phrase "but is not required to" in and delete preamble language encouraging states to not use due process to override parental consent.

Rationale: The added language is misleading and the preamble instruction is contrary to the Act's stated purposes and goals. By using the word "may" Congress clearly told states they were "not required to" use due process. In enacting § 614(a)(1)(D)(ii)(I) Congress codified regulations in effect since July 20, 1983. In over twenty years Congress has given no indication that states should use this option "only in rare circumstances" as the Department now suggests. 70 Fed Reg. at 35799. In contrast Congress took away the state option to force **placement** by going to due process.

The Department's position in this regard is inconsistent with Congressional intent, with the Act's primary purpose of **ensuring** that FAPE is provided to **all children with disabilities**, and with the child find requirement under which states must provide assurances that they have policies and procedures in place for identifying, locating and evaluating "all children with disabilities residing in the State." § 612(a)(3). While the rights of parents to withhold consent must be honored the rights of children to FAPE must be zealously protected by public agencies charged with ensuring that they get FAPE when they need it. The proposed language combined with the preamble sends the opposite and wrong message to states.

Recommendation 5: Proposed § 300.300(b)(1), regarding Parent Consent for Services, should be amended to refer to § 300.300(a) as set out in COPAA's proposed amendment.

Rationale: Proposed 300.300(b)(1), in language essentially the same as the 1999 regulation would implement § 614(a)(1)(D)(i)(II) of the Act. It requires a public agency to "seek to obtain informed consent from the parent ... before the initial provision of" FAPE, but does not define "seek to obtain."

Public agencies will not be deemed in violation of the legal requirement to provide FAPE if parental consent for services is withheld and the statute and proposed regulation now expressly prohibit public agencies from using § 615 procedures to facilitate provision of services in the absence of parental consent or "failure to respond", *see* proposed § 300.300(b)(2), (3)(i); § 614(a)(1)(D)(ii)(II), (III)(aa). Accordingly, the federal regulations must require LEAs to "make every reasonable effort to obtain consent from the parent" as Congress intended. Sen. Rep. No. 108-185 at 24. What an LEA does to "seek" consent may mean the difference between whether a child with a disability receives FAPE or is forced to go without a free appropriate public education.

The primary purpose of the IDEA has not changed. It is still to **ensure** that FAPE is provided to **all** children with disabilities, § 601(d)(1). Moreover the Act continues to impose on public agencies the obligation to provide FAPE to **all** children with disabilities. Therefore, when parents withhold consent, public agencies have a solemn obligation to truly seek to obtain consent and must be absolutely certain that the decision to withhold is fully informed and voluntary rather than inadvertent or due to the agency's failure to try hard enough to contact the parent and obtain consent. Otherwise **all** children with disabilities will not be provided a free appropriate public education. If children with disabilities are not adequately educated, they will not obtain appropriate employment or live more independently. In that situation, society will pay more to support them. Consequently, amending the regulation is likely to be more cost-effective.

Recommendation 6 and Rationale: § 300.300(b)(2) adds "failure to respond" to the statutory language. A parent's failure to consent to special education and related services carries with it a heavy penalty for the child: a child in need of those services may be denied them and fail to obtain an appropriate education that could have life-long implications for the child. The regulation should make clear, as noted above, what efforts must be made to obtain a response from the parent and the final regulation should make reference to the requirements established under 300.300(a) as COPAA has proposed.

When a parent expressly refuses consent, the parent's intent and instructions are clear. But when a school simply does not receive back a consent form after sending it out the first time, it is not necessarily the case that the parent has failed to consent. Perhaps the parent returned the form with a child, or does not read English unbeknownst to the public agency, or the parent overlooked the form or doesn't understand the significance of the request or appreciate that immediate action is required. Given the severity of the penalty for the child (not the parent), it is imperative that LEAs be required to orally contact the parent and seek again to obtain consent.

Recommendation 7: § 300.300(b)(3) implements and copies nearly verbatim § 614(a)(1)(D)(ii)(III) of the Act. The regulation should clarify what is meant by the failure to consent to services or the failure to respond to a request to provide consent for services.

Rationale: In writing 614(a)(1)(D)(ii)(III), Congress' intent appears to have been to excuse public agencies from drafting IEPs if parents make clear either before or after evaluations are done that they have no intention of allowing their children to be provided special education. But, the regulation as worded seems to imply that the parent must consent to services before an IEP setting out special education and related services is even drafted. This could not have been Congress' intent and it is difficult to understand how parents can consent before the IEP is even drafted. To carry out Congress' intent while carrying out the Act's stated purpose of ensuring that FAPE is provided to all children with disabilities, that the rights of parents and children are protected, and that the full educational opportunity goal is realized, the minimum requirements for public agencies seeking to obtain consent outlined in COPAA's Recommendation 1 above are required.

Recommendation 8: Proposed § 300.300(b)(3) should be revised by adding after "related services," and before "the public agency" the following:

and if the public agency has taken the steps required by § 300.300(a) [as proposed by COPAA] above and has documented those steps in the student's permanent file.

Rationale: This provision would conform subsection (b)(3) to changes suggested above.

Recommendation 9: The informed consent provision of § 300.300(a) proposed by COPAA above should apply to re-evaluations pursuant to § 300.300(c).

Rationale: In light of the new consequences that attach to parents' refusal to consent and for the reasons stated above stronger informed consent provisions are now required. In the preamble the Department explains that it is removing the more explicit requirements of current regulations "because public agencies take seriously their obligation to obtain parental consent," they would "typically ... use a number of informal measures to obtain such consent," and that "eliminating the provision currently in § 300.505(c)(2) ... should give public agencies increased flexibility to use the measures they deem reasonable and appropriate." 70 Fed Reg. at 35799.

Where agencies take their parental consent obligations seriously, they should not have any problem making the efforts to obtain consent outlined above for all evaluations and for providing services. If the Department does not wish to impose requirements on state agencies, the regulations should at least set out guidelines along with a requirement that state plans include references and citations to the state policies and procedures to be followed and which constitute the reasonable efforts to obtain the consent contemplated by Congress. While Congress has clearly stated its intent to eliminate unnecessary paperwork, it has not relieved the Department of its duty to oversee compliance with the law or to establish minimum standards for carrying out the statutory requirements.

§ 300.301(d)(2) Initial Evaluations – Child moves after evaluations started

§ 300.301(d)(2) relieves a subsequent LEA from compliance with the 60 day time period if the period has begun for a previous LEA but not ended and "the subsequent public agency is making sufficient progress to ensure prompt completion of the evaluation, and the parent and subsequent public agency agree to specific time when the evaluation will be completed." COPAA recommends that the proposed regulation be amended in two ways.

Recommendation 1: States must have policies and procedures developed pursuant to § 612(a)(19) that set out what public agencies must do to "ensure prompt completion of the evaluation." At the very least the regulation must require subsequent public agencies to contact previous public agencies within 5 days to request a status report, copies of any completed evaluations, copies of the student's file, any evaluations which have been completed, but the results of which must be written up, and an estimate as to when this will occur.. If the information is not received within 15 days, subsequent agencies should be required to begin their own evaluation process and finish it within 60 days of beginning. Records of such attempts should be retained in a central file for the child and parents should be kept informed

Rationale: Without guidance in the regulations, the sending and receiving agencies may not coordinate their activities and children with disabilities will be caught in the middle—with incomplete evaluations and unable to obtain needed services. States should not be allowed to delegate this function to parents because agency to agency communication is more likely to lead to obtaining what is required and public agencies have more resources. . . .

Recommendation 2: Because the statute imposes a burden on the subsequent agency to "ensure prompt completion" the regulations should call for sanctions against subsequent agencies if they fail to make the effort and on previous agencies if they fail to cooperate with subsequent agencies or otherwise impede the ability of subsequent agencies to make sufficient progress to ensure prompt completion of the evaluation.

Rationale: There must be some system of accountability if public agencies do not comply with the statutory mandates.

Recommendation 3: Parents must be advised of the requirements of this section and they must give informed consent to any date for completion of evaluations.

Rationale: Parents are unlikely to be aware of their rights under this provision. When they move to new school districts, they will be anxious to obtain services for their children, but have no way of knowing who is responsible for assuring that the process is completed.

This is an area ripe for problems. Previous agencies with no continuing obligation to provide FAPE to a child have little incentive to act expeditiously and must be given one. Subsequent agencies may be at the mercy of previous agencies but should at least be required to take the initiative to obtain what is needed. Parents are caught in the middle as they often are when more than one government agency is involved. They should not be required to sort things out while their children are denied FAPE.

§ 300.304 Evaluation Procedures

Recommendation 1 and Rationale: Proposed § 300.304(b)(2) would provide that a public agency may "not use any single procedure" as the sole criterion for determining if a child has a disability or the child's appropriate educational program. The corresponding provision was changed from "procedure" in IDEA '97 to "measure or assessment" in IDEA 2004 § 614(b)(2)(B) (not § 612(a)(6)(B) as stated in the preamble). Given the change, it is improper to maintain the word "procedure" in the regulations. The regulation should use the statutory language which clearly requires formal measures and assessments not abstract "procedures."

Recommendation 2: Amend 300.304(c)(5), dealing with children who transfer school districts, to provide that the public agency to which the child transfers has the responsibility to coordinate with the other agency and ensure that evaluations are completed in a timely manner.

Rationale: As noted under § 300.301(d)(2), it is important for the regulations to specify that the public agency to which the child transfers is responsible for coordinating with the other agency and ensuring that evaluations are completed in a timely manner. That agency is

responsible for identifying the child and providing FAPE from the time the child transfers going forward. Since the statute requires the subsequent agency to ensure adequate progress, the proper place for responsibility to lie is on the subsequent agency, but with consequences for the previous agency in the event they fail to cooperate. The failure to make this clear in the regulations will inevitably lead to requests for clarification, more paperwork, and the failure of either agency to take charge, thereby putting the parent and child in the middle. This in turn will lead to needless, costly litigation.

It is also critical that assessments be completed quickly. As Congress noted in the Conference Report: "In order to minimize ... delays, the Conferees intend that local education agencies ensure that assessments for these children and youth be completed expeditiously, taking into consideration the date on which such children and youth were first referred for assessment in any local educational agency." Conf. Rep. No. 108-779 at 204.

§ 300.307 Specific Learning Disabilities

Recommendation: Proposed § 300.307(a)(1) should be deleted.

Rationale: COPAA suggests that the regulation is inconsistent with the statute to the extent it would allow any State to "prohibit the use of a severe discrepancy between intellectual ability and achievement ..." § 300.307(a)(1). § 614(b)(6) of the IDEA, 20 U.S.C. § 1414(b)(6) provides that an LEA "shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability" The statute gives LEAs an option. It does not prohibit discrepancy analysis, authorize the Department of Education to do so or authorize the Department to empower SEAs to prohibit discrepancy analysis. Even if the statutory language was ambiguous the legislative history would remove any such ambiguity. H. Rep. No. 108-77 at 107 ("The bill specifically allows local educational agencies to continue to use the discrepancy model."); Sen. Rep. No. 108-185 at 26 ("This would not prohibit the use of this model, however, if an LEA chooses to base its decisions on the discrepancy formula.") The regulation conflicts with and/or is not authorized by the statute and therefore violates § 607(b)(1) of the Act.

Because the proposed regulation is inappropriate and violates the IDEA, its retention will inevitably lead to litigation with all its attendant costs and requests for clarifications or waivers by LEAs, and the costs attendant to those requests.

Recommendation 2: Proposed § 300.307(b) stating that "a public agency must use the State criteria ..." should be deleted.

Rationale: Section 614(b)(6) of the Act provides options to LEAs. The statute does not give the Department authority to divest LEAs of authority granted by the statute to make their own decisions regarding Learning Disability determinations or to force LEAs to comply with any state criteria except such state criteria mandated by the Act.

§ 300.309 Determining The Existence Of A Specific Learning Disability

Recommendation 1: Proposed § 300.309 should be amended to conform to the statutory language by giving LEAs the option, when determining if a child has a specific learning disability, to use a process that determines if the child responds to scientific, research-based intervention. The mandate proposed in the regulation is inconsistent with the statute and/or goes beyond the statutory mandate in violation of § 607(a) and § 607(b)(1) of the Act.

Rationale: The IDEA as amended provides that "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 described in paragraphs (2) and (3)" of § 614(b). That is, **LEAs** are given an **option by the statute**. Proposed § 300.309(b) would convert the option into a mandate. It provides that the group which decides whether a child has an SLD "**must** consider, as part of the evaluation . . . data that demonstrates that – (1) Prior to, or as a part of the referral process, the child was provided appropriate high-quality, research-based instruction in regular education settings, . . . and (2) Data-based documentation of repeated assessments of achievement . . . was provided to the child's parents." Congress did not, as the Department states, add as "an element for a determination that child has an SLD" that there be "a finding that the child failed to make sufficient progress in meeting State-approved results when using a response to scientific, research-based intervention process." Congress and the President by his signature left to each local educational agency the choice whether to use such a process.

Nor is there any authority for the statement in the preamble that an element of the SLD determination is whether "the child exhibits a pattern of strengths and weaknesses that the team determines is relevant to the identification of an SLD." Indeed, this requirement is not even in the proposed regulation but appears only in the preamble and, would allow thousands of IEP teams across the country to make up their own rules.

In addition, as proposed § 300.309(b) would effectively prohibit IEP teams (or "groups") from finding a child to be SLD whenever an LEA fails to use "scientific research-based techniques" in teaching a child or fails to provide data-based documentation to parents because the proposed regulation states that these "must" be considered. Yet nothing in the statute **requires** any LEA to **use** these techniques at all, much less specify that they be used "as part of the evaluation" of a child." Under the proposed regulation, an LEA could choose to **not** use these techniques and, therefore, never have to find a child to be SLD. This would turn the IDEA on its head.

The proposed regulation is also flawed because it conflicts with the statutory time frame for completing evaluations. Congress has directed each state to complete evaluations within 60 days of consent or such other time limit imposed by the state. This requirement applies to all evaluations including evaluations for suspected SLD children. Because the statute imposes this time limit, the regulations cannot suspend or stop the evaluation clock for the school to provide high-quality research-based instruction or to do the data collection and provide it to parents. Yet, the proposed regulation seems to contemplate doing just that.

Moreover, the evaluation clock starts when the parent gives consent to evaluate. At this juncture, attempts to use "early intervening services" to help a child, including ""scientifically based literacy instruction," 20 U.S.C. § 1413(f)(2)(B), proposed § 300.226 should have been completed. Indeed the Department has correctly recognized in proposed § 300.226(c) that early intervening services may not be used to delay appropriate evaluation.

All children should receive high-quality, research-based instruction. The regulations should require these services to be provided as part of the early intervening services under § 613(f) and proposed section 300.226 of the regulations. This is appropriate. Furthermore, it is impossible to provide high quality research based instruction and obtain "data" that has any meaning during a 60 day or similar time period. This is one more reason that such instruction and data collection should be part of the early-intervening services. As we noted above, COPAA applauds proposed § 300.226(c) which prohibits use of early intervening services to delay appropriate evaluation.

Recommendation 2: Proposed § 300.309(c) should be deleted as it is unauthorized by the statute and because it conflicts with proposed § 300.226(c)

Rationale: Proposed § 300.309(c) provides that "If the child has not made adequate progress after an appropriate period of time, during which the conditions in paragraphs (b)(1) and (2) of this section have been implemented, a referral for an evaluation to determine if the child needs special education and related services must be made." As noted above, however, by the time the evaluation process starts, all early intervention attempts should have long since been completed and data collected. To allow an "appropriate" period of time to pass at this juncture would contradict the IDEA requirement to complete evaluations within 60 days from the date of parental consent, and thus violate both § 607(b)(1) and § 607(a) (since it is not necessary to ensure compliance with the IDEA's specific requirements). LEAs are not permitted to divert children into early intervening services once a parent has consented to a special-education evaluation. Likewise, LEAs are not permitted to refuse to give the parent the forms for seeking a special-education evaluation or to halt the process in any other way once the parent requests the evaluation. Further, proposed 300.309(c) seems to allow school districts to conduct the (b)(1) research-based instruction and (b)(2) data collection for an undefined "appropriate period of time" before making a referral for a special-education evaluation. Children are in the formative stages of their development, and a few months of delay can truly hinder the educational development of a child with a disability. Permitting the 300.309(b) activities to go on for an undefined "appropriate period of time" is neither reasonable nor necessary to ensure compliance with the specific provisions of the IDEA, as required by § 607(a). Moreover, because it is undefined, this will likely lead to litigation and attendant costs.

COPAA does not, however, object to, proposed § 300.309(d), permitting an extension of time for the evaluation and eligibility determination by mutual consent, as long as fully-informed consent was obtained from the parent, including an explanation of what rights the parent could give up by permitting the extension. Such consent must comply with proposed § 300.9

§ 300.310 Observation

Recommendation and Rationale: COPAA favors the amendment to subsection (a) requiring observation by someone trained in observation and recommends that a similar amendment be made to subsection (b). Children who are not yet of school age should be observed by people who are properly trained and those people should observe academics and behavior.

§ 300.311 Written Report

Recommendation and Rationale: The preamble states that the written report required by 300.311 "would serve as the required evaluation report and documentation of the determination of eligibility as required by proposed § 300.306(a)(2). The term "evaluation report" as used in § 300.306(a)(2) means every evaluation report, not just a summary. This is mandated by IDEA 2004, § 614(b)(4)(B). A regulation may not contradict the statute without violating § 607(b)(1). The LEA should be allowed to provide a summary if it wishes but parents have a right to each psychological, speech and language, occupational therapy, assistive technology, physical therapy, educational services, or other evaluation report prepared.

§ 300.320 Definition Of Individualized Education Program

Recommendation 1 and Rationale: Proposed § 300.320(a)(3) deals with measuring progress towards IEP goals. To effectuate Congress' intent in IDEA 2004, § 300.320(a)(3) must do more than repeat the statutory language. COPAA recommends that the new regulation at the very least retain language from the current regulation on progress made to date by the child "toward the annual goals" and "the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year." The regulation should add in subsection (3)(i) "for example, by stating instructional objectives attempted, met, unmet during the period reported upon." The regulation should make clear that it is not sufficient for a report to state simply that the child is making sufficient progress, but must provide information from which the parent can see how and to what extent the child has advanced since the last report.

In deleting the **requirement** that IEPs contain benchmarks or short term objectives (except for children taking alternate assessments), Congress did "not intend for the elimination of these requirements to lessen parental input or information, **or to eliminate the need to break annual goals into instructional objectives.**" Sen. Rep. No. 108-85 at 29. The last makes clear that the regulation must require that periodic reports specify which instructional objectives were attempted, which were achieved, and which were not achieved during the reporting period. Moreover, Congress clearly expressed the view that progress reports, modifications and accommodations could be used to meet parents' concerns regarding their need to be kept updated about their children's progress and concerns about individualization of programs. Congress therefore said that "the progress updates must provide parents with specific, meaningful, and understandable information on the progress children are making."

Recommendation 2: Proposed § 300.320(a)(3) should retain the language from the current regulation requiring reports "at least as often as parents are informed of their non-disabled children's progress." 34 C.F.R. § 300.347(a)(7).

Rationale: Congress expressed its view that reporting was to make up for elimination of short term objectives benchmarks. Nothing Congress said or wrote suggests that less reporting than was required under the 1999 interpretation of the 1997 amendments was contemplated. As written the proposed regulation leaves the question of the frequency of reports open. This will ultimately lead to disputes which lead to litigation which leads to added costs. In addition, providing progress reports will not increase costs for school districts, since school districts provide such information to parents of non-disabled children. Indeed, regular reporting could reduce educational costs, by allowing schools to quickly intervene to help a child who is not making progress.

Recommendation 3 and Rationale: Proposed § 300.320(a)(2)(ii) should define "academic and functional" goals to include goals relating to all areas of development affected by the child's disability, including, but not limited to, functional life skills, behavioral, social-emotional, speech and motor goals. Nothing has changed in the IDEA to relieve LEAs and SEAs of their obligation to provide specially-designed instruction and related and supplementary services related to these areas. Moreover, IDEA 2004 has strengthened the role of positive behavioral interventions. As the Senate explained, "The Committee also recognizes that functional performance is critical for many children with disabilities in order to improve educational outcomes." Sen. Rep. No. 108-185 at 18.

Recommendation 4: The statutory term "regular class," also used in the 1999 regulation, should be retained in proposed regulation § 300.320(a)(5).

Rationale: IDEA 2004 § 614(d)(1)(A)(V) requires the IEP explain "the extent, if any, to which the child will not participate with non-disabled children in the regular class." By changing "regular class" to "regular education environment," the regulation, § 300.320(a)(5), contradicts IDEA 2004 and is impermissible under § 607(b)(1). The regular environment could simply mean being in the same school building or eating in the same lunchroom as non-disabled children, while still permitting children to be segregated into self-contained classrooms with no explanation. The term regular class is widely understood. Imposing a new word, undefined, without Congressional authorization will cause confusion and differing opinions as to meaning. This will lead ultimately to litigation and its attendant costs.

Recommendation 5: In § 300.320(b), Transition Services, COPAA supports making it clear that transition services may start before the first IEP in effect after the child's 16th birthday.

Recommendation 6 and Rationale: Proposed § 300.320(c) deals with the transfer of rights. The transfer of rights from parent to child is an important right for the child that the state may or may not allow. § 615(m). Any state rules in this regard must be developed pursuant to § 612(a)(19) public participation. Further, if states decide not to transfer rights as allowed but not required under 615(m) § 300.320(c) should require IEP teams to explain to children that their

parents retain the rights even though they have reached the age of majority. Parents and children are entitled to know the rules.

§ 300.321 IEP Team

Recommendation 1: Proposed § 300.321(a)(4)(iii) should be amended to read as follows:

Is knowledgeable about the availability of resources of the public agency **and who has decision-making authority on behalf of such agency.**

Rationale: The purpose of the proposed change would be to conform this provision with the requirement that the LEA send a representative with decision-making authority to resolution sessions after due process is requested. If persons with decision-making authority are sent to IEP meetings the need for due process hearings may never arise. If agency representatives can decide these matters after hearings are requested in resolution sessions it makes sense to include these individuals in IEP meetings so that due process hearings never have to be requested. Following this approach will save money because hearings will not be requested, resolution sessions will not be conducted, and hearings will be avoided. Including such a representative is also consistent with Congress' overall desire that disputes between parents and LEAs be resolved as early as possible because this best serves the interests of all involved, most importantly, the child with a disability.

Recommendation 2: The proposed regulation should retain the requirement that the public agency take steps to obtain the participation of other agencies in transition planning meetings as required by current § 300.344(b)(3)(ii).

Rationale: COPAA disagrees with the preamble's assertion that taking steps to include other agency employees in transition planning is "an unnecessary burden" *See* 70 Fed. Reg. at 35804. The statute was expressly amended to require IEPs to include "appropriate measurable postsecondary goals ... related to training, education, employment and where appropriate, independent living skills." § 614(d)(1)(A)(VIII). It is essential for effective transition planning that those agencies that will be involved in the student's life or have resources to assist the child in his life after school attend meetings. Representatives from other agencies contribute ideas and expertise in the critical areas of training, employment and independent living skills that school personnel often lack. Indeed, the proposed regulation recognizes this fact by requiring participants from other agencies to be invited where appropriate. If it is appropriate to invite them it is also appropriate to take necessary steps to assure that they attend and participate.

Recommendation 3: Amend proposed § 300.321(e) to provide that no team member may be excused unless and until the parent is told the purpose of the meeting for which the public agency proposes to excuse a team member, that the public agency would like to excuse the team member, the team member's name and position, the reason(s) why they wish to exclude the team member, the parent's right to have the team member present if s/he wishes, and the parent's right to discuss with the team member any issues in advance of the meeting so the parent is adequately informed. This notice should also be included in any statements of parents'

rights generally distributed. The regulation should also provide that the agency may not exclude a team member unless the public agency has obtained the parent's informed consent a reasonable time before the meeting is to occur.

Rationale: This new provision was added "to give parents greater control over the IEP and to make the process more efficient and more effective for children" and to give public agencies to "better utilize their personnel who are not needed for a particular meeting." H. Rep. No. 108-77 at 110. There is danger that these purposes will not be served if public agencies use the provision to save money and/or to address staffing problems. Moreover, it may be difficult to know in advance of the actual meeting whether a team member's presence is or is not needed. The team approach was developed to ensure that members with different areas of knowledge and expertise could work cooperatively and collaboratively to address a child's needs. For example, it may seem simple to say that only the speech language therapist is needed because all the LEA proposes is to add an additional 30 minutes of therapy per week. But the special education or regular education teacher may well be needed to identify where this half hour would come from, or to share her insight and knowledge about goals that would further the child's education. The occupational therapist may have experience with the child's use of language during therapy sessions. Parents must be given every opportunity in advance of a meeting to contribute to deciding who and who is not needed.

Furthermore, the new statutory provision is intended to increase efficiency--not to enable schools to surprise the parent shortly before, or at, the meeting with a request to exclude IEP team members. Many parents take time off work or arrange childcare to attend IEP meetings, and they will be under pressure to go through with a meeting, even if only the LEA representative (an administrator) is present and asks the parent to agree that teachers and therapists need not be there.

Recommendation 2: § 300.321(e)(2) should specify that an absent IEP team member's input must be provided to parents at the same time it is given to other team members. The input must be mailed or delivered to parents in advance of the IEP meeting so that they may have adequate time to consider it.

Rationale: Under § 300.321(e)(2), parents and LEA may agree to excuse team members if "the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting." Requiring that parents and the rest of the team be given the input at the same time ensures meaningful parental participation. Parents are being asked to give up the right to have the team member present. It also enables the parent to ask any questions so that she is informed more clearly about the subject area. IEP team meetings are often interdisciplinary, and team members are knowledgeable about the child's needs in areas outside their specific expertise. It is important that parents receive the input sufficiently in advance of the IEP meeting to adequately consider it; a document mailed a day or two before the meeting simply is not appropriate.

Recommendation 3: Proposed § 300.321(f) should be revised to require Part B personnel to advise parents of the right to request the presence of Part C personnel and to explain why the presence of Part C personnel might be helpful.

Rationale: Parents may not know that this is their right. They should be told to ensure meaningful participation.

§ 300.322 Parent Participation

Recommendation 1: Proposed § 300.322(d) should be amended to retain the examples given in current § 300.345(d) (1)-(3) because omitting these provisions violates § 607(b)(2) of the Act.

Rationale: Deleting the examples violates § 607(b)(2) of the Act because it would lessen the protections provided by the July 20, 1983 regulations. As such, if the proposed provision becomes final, it will generate litigation and its attendant costs. Moreover, the 1983 regulation and 1999 regulation only provide examples of the kinds of efforts public agencies must take in their "attempts to arrange a mutually agreed on time and place." These examples establish types of efforts that have been and should be minimally required but do not establish the exact efforts that must be made in every case of every child in every public agency. Removing these now arguably gives public agencies license to do less, even far less. Doing so will weaken parental involvement despite Congress' repeated finding that "the education of children with disabilities can be made more effective by ... strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home." § 601(C)(5). In addition, the July 20, 1983 regulations made clear the need to keep records of parent responses, such as the inability to attend a meeting due to illness or inability to get excused from work and a suggested rescheduling. A parent trying to attend an IEP meeting is very different from a completely silent parent.

Keeping the current requirements is important to protect the rights of parents and children, the two primary purposes of the IDEA. IEP meetings have always provided one of the primary venues for parental participation in the educational lives of their children. Given the added consequences under the new law for parents who refuse to consent and their children and the new prohibition against public agencies using due process to require provision of special education and related services to children with disabilities it is even more important that every effort be made by public agencies to ensure the parental participation that all agree is essential. The record-keeping required by the July 20, 1983 regulations promotes accountability by requiring public agencies to record the efforts they make to facilitate parental attendance at meetings.

Recommendation 2: To avoid violating § 607(b)(2) of the Act the proposed regulations should be amended so as **not to remove** current § 300.345(e) requiring the agency to take all action necessary to ensure that the parent understands IEP meeting proceedings including arranging for interpreters.

Rationale: The proposal to eliminate current § 300.345(e) violates § 607(b)(2) of the Act because it procedurally or substantively lessens the protections provided to children with

disabilities under the regulations in effect on July 20, 1983. Nothing in IDEA 2004 affects or changes the right to an interpreter, which has been part of the regulations since July 1983.

Moreover, COPAA cannot understand why anyone would want to eliminate a provision facilitating participation for all parents, including those who have language, hearing, or sight disabilities, from a section of regulations governing participation by parents in a program for people with disabilities. That other statutes already require these things is not a rational explanation. The IDEA regulations need to make clear that, for IDEA purposes, interpreters will be supplied where necessary to facilitate participation.

The Department suggests that these provisions are superfluous because the protections afforded by current § 300.345(e) are superfluous in light of requirements under other federal statutes and regulations. 70 Fed. Reg. at 35805. But this only serves to emphasize the importance attached to interpreter services. Moreover these laws and regulations say nothing about the use of interpreter services in IEP meetings.

Finally, leaving the regulation in place adds no additional burden on public agencies administering the IDEA. It just makes clear in this set of regulations that they are bound. The final regulation must restore current section 300.345(d). If anything, maintaining the current requirement will decrease litigation and save money, because parents and school districts will not be litigating whether parents do indeed have these rights under other statutes. Likewise, states will save money because parents are likely to file complaints about the right to interpreters if they are denied interpreters because the regulation was unclear. States will not have to waste resources and money resolving such complaints.

§ 300.323 IEP In Effect

Recommendation 1: The provisions of current § 300.342(b)(1)(i) should not be removed as this would violate § 607(b)(2) of the Act.

Rationale: The Department explains that the requirements of § 300.342(b)(1)(i) are covered by proposed § 300.323(a), but they are not. The latter provision requires IEPs to be in effect at the beginning of the school year. The former provision also covers situations where IEPs are developed after a school year begins. If current § 300.342(b)(1)(i) is removed, public agencies could take license to wait until the next school year to implement an IEP. This is untenable and unacceptable. While this may not be what the Department intends, and arguments can be made as to why that would not be the case, it would be one possible interpretation that could lead to delay of services to children with disabilities and/or costly litigation. Current § 300.342(b)(1)(i) is essentially the same as § 300.342(b)(2) of the July 20, 1983 regulations and cannot be removed without express authorization by the statute, which has not been provided.

Recommendation 2 and Rationale: COPAA suggests that the timeline for developing an IEP set forth in proposed § 300.323(c)(1) and the timelines for completing evaluations, § 300.301, should be set out in the same regulation so that parents and school personnel do not have to search through the regulations for different time lines. Alternatively there could be a

new regulation with all the timelines and these could be referenced in § 301 and § 323. Either way everyone would be able to look to one place to learn the timelines.

Recommendation 3: Current § 300.342(b)(3) should be retained in the new regulations.

Rationale: Current § 300.342(b)(3) requires that each teacher and provider working with a child be advised of his or her specific responsibilities related to implementing an IEP and the specific accommodations, modifications and supports required under the IEP. That "public agencies are required to share this information with responsible individuals in order to meet their obligations under the Act," 70 Fed. Reg. at 35805, is not a reason to leave the provision out. It is the purpose of regulations to provide the guidance "necessary to ensure that there is compliance with the specific requirements" of the Act." *See* § 607(a). The Act requires public agencies to provide FAPE to children with disabilities. It is thus necessary for the agencies to advise the teachers, therapists, and other line personnel of their specific duties and of the accommodations etc. applicable under each child's IEP. It is not enough, for example, for an IEP to require modifications or accommodations. Team members may attend only parts of meetings and may not be aware of accommodations or modifications placed in the IEP if they are not told. Furthermore, personnel change; new personnel will not have been at the IEP meeting or know the child's IEP.

Recommendation 4: Proposed § 300.323(e)(2) contains requirements for obtaining records from the prior agency. COPAA recommends that "reasonable steps" be defined to require that the records be obtained within 15 days from the date the child enrolls in the new school district. The regulation should provide further that the previous school shall respond to any request for records by supplying the records not later than 15 days of receipt of a request. The regulation should also provide that the previous school shall, on learning that a child with a disability is moving, offer to provide the parents of the child with copies of all records or to forward the records to the new school in advance of or concurrent with the move.

Rationale: It is vital that school districts obtain the child's records quickly from the previous school district so that they know the child's educational needs and history and can provide appropriate special-education and related services. Money will be saved because the new school district will not have to repeat procedures to learn on its own information that the previous school district already has. Teachers and related services personnel will benefit from learning what accommodations and positive behavioral and other techniques worked with the child in his previous school. This, in turn, benefits the child.

§ 300.324 Development, Review, and Revision of IEP

Recommendation 1: Retain current § 300.346(b), requiring consideration of the special factors in § 614(d)(3)(B) in writing and revising IEPs.

Rationale: The Department explains that it is removing current § 300.346(b) because "the Act no longer requires the consideration of special factors in IEP review and revision." 70 Fed. Reg. at 35806. This is not accurate. The Act was not amended to remove consideration of special factors on IEP review; indeed, *none of the changes made to IDEA 2004 affected the*

special factors, other than the addition of language strengthening the requirement for positive behavioral interventions. See IDEA 2004 § 614(d)(3)(B). Current § 300.346(b) was included in the 1999 regulation as a reasonable interpretation of the statute. The inclusion was so uncontroversial that there was apparently no objection because the preamble to the 1999 regulation doesn't mention the provision.

In addition, the Act probably did not include consideration of special factors under § 614(d)(4) because the language "developing each child's IEP" in § (d)(3) was probably thought to mean each development, including annual review. It is hard to believe that Congress could have intended that the only time the LEA is to consider, e.g., behavior that impedes a child's learning or the need for assistive technology or Braille materials, § 614(d)(3)(B)(i) was when the team first sat down to write an IEP, and thereafter to ignore it.

Finally, IEPs must provide the special education, related services, and modifications that the child needs, by law. All of the special factors fit within this definition: assistive technology, positive behavioral interventions, Braille materials, the child's special communication needs, etc. Children change each year and their present levels of performance change. A child who was not reading Braille as a kindergartener when her first IEP was developed but able to use Braille as an elementary school student should have that considered in writing her later IEPs. Likewise, assistive technology needs change over time. The young child who used a simple 16-button recorded-speech device may, later in elementary school, need an interactive speech device that enables him to answer his teacher's many questions and contribute to a variety of classroom discussions just like his peers who can speak. It is not sufficient under the IDEA to consider the special factors and needs only when the initial IEP is written. Nonetheless, because the proposed regulation would seem to allow LEAs to do this, it should be struck and the language in the current regulations retained.

The current regulation was needed for clarification. Without it, queries from states and litigation over whether the special factors should be considered, would have undoubtedly occurred between 1999 and 2005. Congress must be presumed to have been aware of the current regulation and they did nothing to change it. 34 C.F.R. § 300.346(b) should be retained.

Recommendation 2: Current § 300.346(a)(1)(iii) requiring consideration of state and district assessments should be included in the new regulations.

Rationale: The proposed regulation would remove the requirement that IEP teams consider a child's performance on state and district wide assessments contained in current § 300.346(a)(1)(iii) and "instead ... include language from section 614(d)(3)(A)(iv) ... regarding consideration of the academic, developmental, and functional needs of the child." 70 Fed. Reg. at 35806. The section added has nothing to do with the section removed and the section added is required by the only amendment to the applicable section of the statute. The provision removed was included in 1999 because its inclusion was consistent with the Act's emphasis on "ensuring that children with disabilities participate in the general curriculum and are expected to meet high achievement standards" and the Act's explicit requirements regarding including children with disabilities in state and district wide assessments. 64 Fed. Reg. at 12588 (March 1999). In amending the Act, Congress voiced no opposition to the Department's 1999

interpretation and must be deemed to have acquiesced to its inclusion. Moreover its inclusion helps implement the Act. 34 C.F.R. § 300.346(a)(1)(iii) must be retained. Moreover, retaining the provision is consistent with Congress' intent to coordinate IDEA and NCLB.

Recommendation 3: COPAA recommends amending § 300.324(a)(4), concerning revising IEPs without meetings. The regulation should state that whenever a change to an IEP is proposed, and the public agency suggests that the change be made without a meeting, that the parent notice required by § 300.503 contain a boldface statement that the parent is entitled to a face-to-face meeting with all team members but may choose to waive it by giving written informed consent and that the public agency representative eliciting informed consent state orally to the parents his/her rights. The school file should contain a contemporaneous entry regarding to the effect that the oral statement has been provided.

Rationale: While nobody wants to attend unnecessary meetings, the team approach is and has always been, crucial to facilitating parental and staff participation and ensuring that FAPE is provided to all children with disabilities. Written modifications should be the exception to the rule and allowed only where there is true agreement by the parents, that is, agreement based on informed consent, in accord with proposed § 300.9. This is important to prevent mistakes and miscommunications and reduce costly litigation about whether parents consented to a change.

Recommendation 4: COPAA recommends that parents be told orally and that notices of parents' rights clearly state that parents are entitled to a copy of any revised IEP at no cost by simply asking for a copy.

Rationale: Parents may not know of their rights and when they do not, they are unlikely to ask for a copy of their child's amended IEP. Notifying parents that they have this right facilitates trust and continued meaningful participation.

§ 300.327 Educational Placements

Please see comment to proposed § 300.501(c).

§ 300.328 Alternative Means Of Meeting Participation

Recommendation: Current § 300.501(c)(2) should be retained and included in the new regulation.

Rationale: Proposed § 300.328 is not a proper substitute for current § 300.501(c)(2) as the preamble suggests. 70 Fed. Reg. at 35807. Rather current 300.501(c)(2) incorporates current section 300.345(a) through (b)(1). The latter provisions require the public agency to take steps to ensure that parents are present, including notifying parents of the meeting early enough to ensure that they have an opportunity to attend and scheduling the meeting a mutually convenient time and place. § 300.345(a). The current regulation goes on to specify that the required notice must indicate the purpose, time and location of the meeting, who will attend, and inform the

parents of the provisions of § 300.344 relating to the participation of other individuals who have knowledge or special expertise about the child.

Proposed § 300.328 addresses none of this. Rather it implements the **new statutory requirement contained in § 614(f) of the Act** which allows the parent and agency to agree to alternative means of meeting participation.

Congress expressed no dissatisfaction with current § 300.501(c)(2). It must, therefore, be presumed that Congress believed it was a reasonable interpretation of the statute. In fact, Congress restated its long held view that strengthening parental participation is in the best interests of children with disabilities. § 601(C)(5). Deleting this provision weakens rather than strengthens crucial rights parents have under IDEA 1997 and the 1999 regulations. This will inevitably lead to litigation as parents claim that they were not notified and not given the opportunity to participate required by section 614(e) of the Act. The attendant costs to agencies, not to mention the children, can be avoided by retaining the current regulation.

Subpart E – Procedural Safeguards

§ 300.501 Opportunity To Examine Records; **Parent Participation In Meetings**

Recommendation 1: COPAA recommends retaining from current § 300.510(c)(4) the phrase "including information that is consistent with the requirements of § 300.345(d)" in new § 300.501(c) COPAA also recommends that public agencies be required to maintain contemporaneous documentation in student case files regarding efforts to include parents.

Rationale: As proposed public agencies would only be required to keep undefined records of their attempts to include parents. Current § 300.345(d) [and by reference 501(c)(4)] contains reasonable suggested procedures for ensuring and documenting public agency efforts to ensure participation of parents in placement decisions. Since the current regulation gives public agencies flexibility it is not necessary to give them more, as the Department is proposing. 70 Fed. Reg. at 35807. Without the suggested procedures the guidance that currently exists will disappear. This will ultimately be perceived as license to do less which will lead to disagreements that in turn will lead to hearings at which decisions will be made without standards. Without guidance hearing officers will then be required to decide case by case based on their individual notions of reasonableness whether school districts, by whom many are paid, have done enough. COPAA opposes this change and incorporates here by references the comments made under proposed § 300.322(d).

Recommendation 2: Current § 300.501(c)(5) should be retained.

Rationale: Current § 300.501(c)(5) requires the public agency to "make reasonable efforts to ensure that the parents understand, and are able to participate in, any group discussions relating to the educational placement of their child, including arranging for an interpreter for parents with deafness, or whose native language is other than English." 34 C.F.R. § 300.501(c)(5) (1999). Whether reasonable efforts to ensure parent participation in placement

decisions is inherent in parents' right to participate in those decisions, as the Department states in the preamble, is not the point. The 1999 regulations placed an affirmative duty on public agencies so that there would be no doubt in that the responsibility to make parental participation meaningful was on the agency and that the agency was obliged to make reasonable efforts such as the ones listed to ensure meaningful participation. Deleting this provision now suggests that public agencies do not have to make reasonable efforts or at least leaves totally up to the agencies what is reasonable. There should be no question that an interpreter must be present for a deaf parent or a parent whose first language is not English, or whose only language is other than English.

Nor should there be any question as regards the public agencies' responsibilities towards other parents. § 601(C)(5) (B) makes clear Congress' continuing belief that strengthening parental involvement is key to ensuring provision of FAPE to all children with disabilities.

Congress enacted this provision in 1997 to ensure that parents participate in placement decisions. The Department enacted a reasonable regulation interpreting that provision. Congress did not amend the underlying statute or give any indication that it was dissatisfied with the regulation. The final regulation should include all of the language from the current regulation.

§ 300.502 Independent Educational Evaluation

Recommendation: Retain existing § 300.502(c)(2) and strike proposed language permitting "any party" to use an Independent Educational Evaluation (IEE) that a parent privately obtains and pays for as evidence at a due process hearing.

Rationale: The IDEA limits discovery that parents and school districts can obtain from each other. IDEA requires that evaluations to be used in a hearing must be exchanged 5 business days before the hearing, § 615(f)(2). The proposed regulation, which would permit school districts to obtain these privately-paid for evaluations is not necessary to ensure there is compliance with the specific requirements of the IDEA and therefore, violates § 607(a). The IDEA does not require parents to produce evaluations that they do not intend to use in the hearing. Parents should be able to obtain independent evaluations at their own expense for their own use to assist their child. It is possible that the proposed change is inadvertent. The preamble asserts that the regulation was changed to clarify that "the results of a parent-initiated independent educational evaluation *at public expense* may be introduced by any party as evidence at a hearing on a due process complaint." (emphasis added). But the proposed regulation instead affects privately-obtained and privately-funded evaluations. Parents may be more reluctant to pay for private evaluations if they know that the school districts can obtain them. Rather, they could seek them at public expense, raising costs for school districts.

§ 300.504 Procedural Safeguards Notice

Recommendation 1: Retain proposed § 300.504(a)(2) requiring the procedural safeguards notice to be given to parents upon receipt of the first State complaint or due process complaint in that school year, rather than the first one ever in the child's educational career.

Rationale: This is a reasonable interpretation of the statutory language in § 615(d)(1). Parents may file more than one due process complaint during the many years a child is in special education. It is insufficient to provide a procedural safeguards notice only upon the filing of the first complaint in the child's educational career.

Recommendation 2: Clarify § 300.504(b) to state that placing a copy of the procedural safeguards notice on the LEA's website does not fulfill the statutory obligation to give it to parents.

Rationale: Proposed regulation § 300.504(b) and IDEA 2004 § 615(d)(1) state that a current copy of the agency's procedural safeguards notice can be placed on the LEA's website. This is separate from the requirement that the notice be given to parents, and thus, it seems to clearly follow that such website posting is not a substitute for giving the notice to parents. Nonetheless, to avoid any confusion, and to make clear to public agencies that they cannot refer parents to their website the regulations should clarify that this is the case. Many parents do not have internet access, and even those who do must receive the actual notice.

Recommendation 3: Retain proposed § 300.504(c)(5), requiring that the procedural safeguards notice specify that parents have the opportunity to resolve complaints through both the due process complaint and State complaint procedures, and an explanation of the two procedures.

Rationale: As the Department of Education recognizes, it is important that the notice contain this information. The preamble explains that this will help reduce confusion about the two kinds of complaints. In addition, IDEA 2004 § 615(d)(2)(E) requires it, by mandating that the notice describe all safeguards related to the opportunity to present and resolve "complaints." Both types of complaints are referred to in the IDEA, which recognizes the existence of a complaint pursuant to § 615(b)(6) and a due process complaint notice pursuant to § 615(b)(7). There is no evidence in the legislative history (the Conference Report, Senate Report, House Report, or Congressional debates) that Congress intended for the procedural safeguards notice to be limited to due process notices alone. Finally, the Department of Education is within its regulatory authority to require procedural safeguards notices to describe both procedures. This helps "ensure that the rights of children with disabilities and parents of such children are protected," § 601(d). There is no logical reason to withhold information from parents, as the Department recognizes. In addition, to the extent parents choose State Complaint Procedures, they choose the less costly alternative. Any description of the jurisdiction of the two procedures must comply with the law and its requirements.

§ 300.506 Mediation

Recommendation 1: Remove the words "arising from the same dispute," to prevent the regulation from contradicting IDEA 2004 § 615(e)(2), and ensure that all mediation discussions remain confidential.

Rationale: Proposed regulations § 300.506(b)(6)(i) and (b)(8) require mediation discussions to remain confidential in hearings or civil proceedings "arising from the same dispute." IDEA 2004 §§ 615(e)(2)(F)-(G) make confidential all discussions during the mediation process, and specify that they "may not be used as evidence in any subsequent due process hearing or civil proceeding." The statute is clear on its face: it does not matter whether the proceeding or hearing arises from the same dispute or a different one. The Conference Report, H. Rep. No. 108-779, at note 208, likewise states that the conferees intend "to ensure that all discussions during the mediation process remain confidential." Accordingly, the proposed regulation contradicts IDEA 2004 and is impermissible under § 607(b)(1). In addition, the proposed regulations violate § 607(a) because they are not "necessary to ensure that there is compliance with the specific requirements" of the IDEA.

The preamble asserts that the Department changed the statutory language because "there could be a misperception that the Department would be attempting to restrict the powers of State courts." 70 Fed. Reg. at 35809. Because it is the statute passed by Congress and signed by the President that has restricted the power of the courts, the Department would be acting properly to simply copy it. Federal statutes, like IDEA, regularly restrict state court powers. For example, IDEA 2004 specifies that state courts must decide IDEA cases based on a preponderance of the evidence, § 615(i)(2)(C), and that neither state nor federal courts can hear cases asserting violations of the highly qualified teachers provision. § 612(a)(10)(E). Finally, the explanation makes no sense. Even the proposed regulation would affect the power of state courts.

Mediation should be strongly encouraged because it is much less costly than litigation. A September 2003 GAO study found that agreements resulted from 93 percent of IDEA mediations in California; the cost of a mediator was one-tenth that of a hearing officer. Sen. Rep. No. 108-185 at 37. These cost savings will evaporate like a water hole in the desert if parents and school districts cannot trust that mediation information will remain confidential, they will litigate, rather than mediate.

Recommendation 2: Retain current § 300.506(c)(1)(i)(A), prohibiting LEA employees from serving as mediators.

Rationale: The IDEA requires mediators to be "impartial." Yet, proposed § 300.506(c)(1)(i) would allow any LEA employee to be a mediator except those working for the agency directly responsible for the child's education or care. If parents know that the person charged with impartially mediating their dispute with their LEA comes from another school district they will be less likely to choose mediation just as the LEA would be less likely if the mediator was a parent lawyer or advocate from another town. This provision will lead to less mediation, more litigation, and increased costs for school districts and states, thereby defeating the clear intent of Congress.

We respectfully disagree with the Department's assertion that the proposed regulation will "ensur[e] that mediators are impartial." 70 Fed. Reg. at 35808. In 1999, the Department of Education correctly recognized that this could not be the case when it forbade LEA employees from acting as mediators:

"[I]n order for mediation to be effective, it must be an attractive alternative to both public agencies and parents and *it must be an impartial system* which brings the proper parties into a confidential discussion of the issues and allows for a binding agreement that resolves the dispute. . . . *the use of current LEA employees as mediators would make mediation a much less attractive alternative to parents.*"

64 Fed. Reg. at 12611 (Mar. 12, 1999) (emphasis added). The current mediator impartiality rules were deliberately made more stringent than hearing officer rules to ensure that mediation will be highly attractive, so more cases will be amicably resolved in mediation. *Id.*

Proposed § 300.506(c)(1) is based on language inserted into the Senate report simply asking the Department to reconsider this requirement and permit SEA/LEA employees to be mediators. This language has nothing to do with any changes made by IDEA 2004 or even with the mediation language in IDEA. Moreover, having prohibited states from allowing appointment of surrogate parents who work for agencies other than the educational agency because of the possible conflict of interest the Department should be equally vigilant in ensuring that mediators have no possible conflict, much less a bias. Special education directors and administrators often belong to the same regional or local associations and have many professional dealings with each other. According to the national Draft Model Standards for Mediator Conduct (Apr. 10, 2005), developed by the American Bar Association, American Arbitration Association, and others, mediators must avoid any conduct that gives the appearance of partiality. <http://moritzlaw.osu.edu/dr/msoc/pdf/standards-041005.pdf>. In order for parents to be encouraged to use mediation, any appearance or perception of partiality must be avoided.

§ 300.507 Filing A Due Process Complaint

Recommendation: Retain existing § 300.507(a)(2) requiring the public agency to inform parents of the right to mediation when they file for due process.

Rationale: The due process procedures are unfamiliar to most parents, and the majority of parents go to due process without counsel. Although the preamble is correct that mediation is available at any point in the process, the regulations should continue to require that parents be informed of its availability if they file for due process. Otherwise, parents are unlikely to know of this right.

Congress has encouraged mediation because it cost-effectively resolves disputes (see above). Indeed, Congress amended the statute to allow for mediation in the absence of a due process hearing request to increase the use of mediation. They did not suggest that **if** due process was also requested, that mediation should be made any less attractive or used less than it is

today. To suggest otherwise is to totally misconstrue congressional intent. LEAs should be eager to advise parents of the mediation option whenever possible, to encourage more mediation. Given that public agencies must inform parents of the availability of low-cost legal help if a due process hearing request is filed, § 300.507(b), there is almost no extra expense to also inform them of the availability of mediation.

§ 300.508 Due Process Complaint

Recommendation 1: Delete the requirement in § 300.508 that parents may not "engage in a resolution session" unless their due process complaint meets the sufficiency requirements of § 300.508(b).

Rationale: The purpose of the proposed language is ambiguous. If the Department is suggesting that resolution sessions may be delayed while LEAs challenge the sufficiency of the due process complaint and the hearing officer decides the motion, this language contradicts the IDEA, and therefore, violates § 607(b)(1). First, Section 615(f)(1)(B)(i) requires the LEA to convene the resolution session "within 15 days of receiving notice of the parents' complaint." Second, Section 615(b)(7)(B) states only that the "party **may not have a due process hearing if the notice is insufficient.**" The statute does not delay the resolution session. There is no suggestion of allowable delay based on an alleged insufficiency of the complaint. In addition, Sen. Rep. No. 108-185 at 38-39 states that "A school district's belief that a parent has failed to meet the notice requirements of section § 615(b)(7)(B) **should not delay a resolution session** between the parties." To the extent that the regulation permits LEAs to delay the 30-day resolution period for a sufficiency challenge, it will only lead to litigation due to the statutory conflict. Such litigation will drive up costs for SEAs, LEAs, and parents.

Furthermore, delaying the resolution session while the sufficiency of the complaint is considered means children would wait even longer for a hearing decision—possibly 3-3.5 weeks longer. An LEA's insufficiency motion is due 15 days after receipt of the due process complaint; the hearing officer must decide it within 5 days after he/she receives it, and there may be a delay between sending and receipt. The IDEA was meant to protect the rights of children by ensuring that disputes were resolved quickly--not to drag out the proceedings so that children are denied FAPE while the school year keeps marching by.

Recommendation 2: § 300.508(d)(3) should require hearing officers to allow due process complaint notices to be amended unless doing so would prejudice the other party.

Rationale: The statute permits hearing officers to grant leave to amend complaints, but the regulations do not provide guidance to hearing officers about when it is appropriate to do so. Parents will not know and understand the hearing procedural rules in detail. They should be able to amend complaints when necessary, rather than having to start the entire process from the beginning with a new complaint. The prejudice standard is clear and appropriate. In the alternative, the standard applied to complaints in federal court should be used. Since 1937, Federal Rule of Civil Procedure 15(a) has required that leave to amend be "freely given when justice so requires."

Recommendation 3: Proposed § 300.508(d)(3) should state that parties will be required to go through the amendment procedure only when seeking to significantly change the subject matter of the complaint, but they may correct minor insufficiencies, such as leaving out the child's address or name of his/her school without doing so, particularly if the LEA already has this information in its files.

Rationale: Most parents are not knowledgeable about the IDEA's procedural details and will have difficulty effectively using the hearing process. When a complaint is amended, the entire hearing process starts over. The parent must go through a 30-day resolution period, and then wait 45 days after that for a hearing decision. § 615 (c)(2)(E)(ii). It makes no sense to require parents to do this for very minor errors, such as leaving out the child's full name, address or school name that the LEA has readily available in its records. If every minor error results in parents being required to amend the complaint or start the hearing process from the beginning, the child's ability to obtain a hearing and relief will be inordinately delayed by adding another 75 days to the process. As the Supreme Court has said, writing complaints and other pleadings should not be "a game of skill in which one misstep by counsel may be decisive to the outcome.... the purpose of pleading is to facilitate a proper decision on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

§ 300.510 Resolution Process

Recommendation 1: Amend proposed § 300.510(a) to state that if the LEA fails to convene the resolution session within the required 15 days or bring the required personnel to the meeting, including a representative with decision-making authority, the parents may proceed on the 16th day to schedule the due process hearing and the 45-day period for a hearing decision shall begin on the date that the due process complaint notice was filed.

Rationale: IDEA 2004 § 615(f)(1)(B), requires the LEA to convene the resolution session within 15 days of receiving the complaint notice, and bring the required personnel to the meeting, including a representative of the public agency with decision-making authority. COPAA members have already reported that LEAs have violated both provisions. LEAs that fail to comply with the law should not be rewarded with a 30-day delay in the proceedings. As the Senate concluded, "The Committee does not intend the resolution session be used simply as a means to delay a due process hearing." Sen. Rep. No. 108-185 at 39. Allowing 75 days for a hearing decision is longer than a school-year quarter. The 30-day period is not intended to allow school districts to run out the clock. For a child who has been denied FAPE, delaying the hearing for an additional 30 days only adds to the harm, particularly if the school district is failing to use the time as required.

Recommendation 2: Amend proposed § 300.510(a)(1) to state that LEAs should make all reasonable efforts to schedule the resolution session at a mutually-agreed upon time and place, that the LEA must contact the parent within 5 days of receiving the complaint to schedule the meeting, and that LEAs must contemporaneously document their efforts to arrange the meeting in the child's permanent record. If the LEA fails to do so, the regulation should provide that the parents may proceed on the 16th day to schedule the due process hearing and the 45-day

period for a hearing decision shall begin on the date that the due process complaint notice was filed.

Rationale: The goal of the resolution sessions is to decrease litigation by allowing the parties to negotiate a resolution to the problem. This requires that parents be able to attend the meeting. As the Department of Education has recognized, LEAs should notify parents of IEP meetings early enough to ensure that they can attend, and to schedule the meeting at a mutually-agreed upon time and place. Proposed regulation § 300.322(a).

Similarly, the LEA must be required to make all reasonable efforts to ensure that the resolution sessions occur at mutually-agreed upon times and places, including making actual contact with parents within 5 days of receiving the due process complaint notice. This should not be difficult because model complaint forms can require parents (or their attorneys) to include day/evening/cell phone numbers in the notice and because most jurisdictions have, as the Department has recognized, very few hearing requests. LEAs should not be able to delay due process hearings by simply scheduling resolution sessions when they know parents cannot attend. Proposed § 300.510(b)(3) seeks to penalize parents who do not attend meetings by delaying their due process hearing and the session. Correspondingly, the regulations must permit hearings to go forward if it is the school district that fails to reasonably schedule meetings. Accountability (including monitoring of how this new process works) requires that school district be required to keep records of their attempts to arrange a resolution session. It also protects parents who were trying to schedule a meeting from claims that they allegedly failed to participate in the meetings.

Recommendation 3: Proposed § 300.510(a)(3) should specify that, if the parties waive the resolution session or choose to go to mediation, the 45-day period for receiving a hearing decision begins at the point they agree to the waiver or mediation. It should also specify that if the parties waive the session by mutual agreement, they may proceed immediately to a hearing.

Rationale: Proposed § 300.510(a)(3) provides that the resolution session need not occur if the parties go to mediation or agree to waive the meeting. As explained above, the purpose of the 30-day resolution period is to work on resolving the dispute, not provide a break in the proceedings. Accordingly, if parties waive the meeting or go to mediation, the 45-day period for receiving a hearing decision should commence at that point. Otherwise, the 30-day period does not fulfill its purpose, and simply becomes a waiting period.

Recommendation 4: Amend proposed § 300.510(a)(4) stating that the parents and LEA together will determine the relevant IEP team members to attend the resolution session. It should also state that if the LEA fails to consult the parents to select the relevant team members within 5 days of the complaint notice and as a result parents are denied a meaningful opportunity to participate in deciding which team members are relevant, including having sufficient time to ensure that all relevant members attend, then the parents may proceed on the 16th day to schedule the due process hearing and the 45-day period for a hearing decision shall begin on the date that the due process complaint notice was filed.

Rationale: The portion of proposed § 300.510(a)(4) requiring parents and the LEA to determine the resolution team members together is in accord with the Conference Committee Report, and is a reasonable interpretation of the statute. Parents are equal members of the resolution team. If the matter is to be resolved, it is important to include IEP team members whom the parents believe need to attend. The LEA must consult parents sufficiently in advance of the meeting to ensure that parents have meaningful input and that arrangements can be made to ensure that the team members attend. School districts should not be permitted to wait until shortly before the meeting to consult parents, and then delay the meeting even more on the basis that the team members are not available.

Recommendation 5: Amend proposed § 300.510(b)(2) to provide that if the LEA fails to make good-faith efforts to engage in a resolution of the problem, and merely uses the 30 days as a waiting period, the 45-day period for receiving a hearing decision shall begin on the date that the due process complaint notice was filed, unless the parent waives the right to receive a decision within 45 days.

Rationale: The purpose of the 30-day period is for the LEA to make a good-faith effort to resolve the parent's concerns. It is not a 30-day break in proceedings. LEAs that make such a good faith effort, even if it fails, have acted properly. LEAs that convene a resolution session, but have no intention of proposing a resolution and are acting in bad faith, should not receive the benefit of the 30-day waiting period.

Recommendation 6: Proposed § 300.510(b)(3) should be removed. Alternatively, if it is retained, school districts that fail to schedule resolution sessions within the 15-day period or fail to ensure that the requisite personnel attend, must be required to schedule the hearing so that a decision can be rendered by the 45th day following receipt of the complaint notice, in accord with COPAA's first recommendation.

Rationale: The proposed regulation is unconscionably one sided, assumes bad faith on the part of parents, assumes school districts always act in good faith, and is arguably unconstitutional. If a parent truly refuses, under any circumstances, to take any part whatsoever in the resolution process it makes sense to delay the resolution process and hearing and COPAA does not oppose such a delay. (If a school district refuses to schedule a meeting at a time or place that the parent can attend, or otherwise makes it difficult for the parent to take part in the process, including misusing the process as described in Recommendation 7, then the parent should not be penalized. The goal is to promote resolution, not to allow misuse of the process or manipulation to prevent parents from having a due process hearing.) However, the statute does not only require the parents to attend the meeting. It also requires the public agency to schedule the meeting within 15 days and ensure that the requisite personnel attend. Yet, the sanction in proposed subsection (b)(3) completely ignores the possibility that the school district may fail to do so.

If parents are to be sanctioned for failure to comply with the law, fairness and equal protection demand similar treatment of public agencies. If the LEA delays the meeting, fails to ensure that the requisite personnel attend, or fails to take steps that make meaningful and fair parental participation possible, the minimum consequence for the LEA should be that they are

required to schedule the hearing so that a decision can be rendered by the 45th day following the complaint notice.

Recommendation 7: Add a new subsection to § 300.510(b) stating that LEAs may not abuse or misuse the resolution session, and may not prevent parents from seeking due process who have attended the session.

Rationale: Neither the LEA nor the parent may refuse to attend a resolution meeting, unless both sides waive it. But the LEA, SEA, and the regulations may only require what is in the law. A regulation that requires more of parents would certainly violate § 607(a) of the IDEA by imposing regulations that are not necessary to ensure compliance with the IDEA's specific requirements and could violate § 607(b)(1) to the extent it contradicts the IDEA. The LEA and SEA, likewise, may not use the resolution session for any purpose beyond resolving the complaint. They may not impose additional obligations on parents beyond those written into the statute, use the resolution sessions to intimidate or interrogate parents, use the session as a one-way discovery session, use the parent's denial of any offer by the agency as grounds for dismissing the hearing, or raise settlement offers at a hearing. Such a system is not only not permitted by IDEA 2004, and thus contrary to it, but is completely inequitable and unjust. The American judicial system is based on treating both sides equitably. Under the IDEA, both sides exchange evidence at the same time—five business days before the hearing. The school districts may not use the resolution session to subvert this equitable statutory requirement. *See* IDEA 2004 § 615(f)(2); 34 C.F.R. § 300.508(a)(3) (July 20, 1983 regulations and 1999 regulations). Moreover, if an LEA refuses to go forward with a resolution session, the hearing may not be delayed. Nor may an LEA prevent a parent from having a due process hearing when the parent has attended the resolution session. There is absolutely no statutory authority for permitting an LEA to delay a hearing in this way.

Recommendation 8: Create a § 300.510(b)(4) permitting parents to seek a Hearing Officer determination that he/she did participate in the resolution session and obtain an order requiring the hearing to proceed without delay.

Rationale: A parent who has participated in a resolution session must have an opportunity to dispute an LEA's claim that he/she did not participate. Otherwise, the ability to move forward to a due process hearing will be entirely within the control of the party that is being sued.

Recommendation 9: Proposed § 300.510(c)(4) should require LEAs to orally inform parents, through an interpreter if necessary, of the right to void the resolution agreement within 3 business days and this information should be printed in boldface or another attention-seeking form on each such agreement.

Rationale: Most parents do not know the intricacies of the IDEA; many are not represented by counsel and do not have advocates. The right to void an agreement within 3 business days of execution is important and parents need to know they may do so. Informing them of this right is consistent with IDEA 2004, requires very little effort on the part of schools, and imposes no real additional costs.

§ 300.512 Hearing Rights

Recommendation: To avoid contradicting the IDEA, modify proposed § 300.512(b) to apply to expedited disciplinary hearings conducted pursuant to §§ 300.530- 300.532. The regulations may permit parties to mutually consent to waive the 5-business day period and exchange exhibits closer to the hearing date.

Rationale: Proposed § 300.512(b) requires parties to a hearing under § 300.511(a) to exchange five business days before the hearing all evaluations and recommendations based on evaluations that the party intends to use at the hearing. It also permits the hearing officer to bar evidence that is not disclosed. Proposed § 300.512(b) must be modified to apply to expedited disciplinary hearings. Otherwise, the proposed regulation violates IDEA § 607(b)(1) by contradicting the IDEA. IDEA 2004 §§ 615(f)(1) and § 615(f)(2) apply the five-business day rule to both ordinary due process hearings under § 615(b)(6) and expedited disciplinary hearings under § 615(k). Moreover, the July 20, 1983 regulations prohibit parties from introducing evidence that was not exchanged five business days before the hearing (*See* § 300.508(a)(3) in the July 20, 1983 and the current regulations). This is explained in detail in COPAA's comments under § 300.532(c).

§ 300.516 Civil Action

Recommendation: Modify proposed § 300.516(b) to specifically state that parties may file civil actions within 90 days from the date of the decision by a hearing officer, or if the state has a two-tier system, the date of the decision by the State reviewing officer or panel. If State statute or regulation imposes a different timeline, the deadline should still run from the date of the decision by the state reviewing officials in a two-tier system.

Rationale: IDEA 2004 § 615(g)(2) allows states to have both one-tier systems (hearing officer only), and two-tier systems (a hearing officer's decision may be appealed to a state-level reviewing officer or panel). Parties cannot file a civil action in court until the entire administrative process has been exhausted. In two-tier systems, the state reviewing officer or panel's decision will almost certainly not be rendered in time to file a civil action within 90 days of the initial hearing officer decision. The regulations should clarify that the 90-day timeline or the State's alternate timeline begins to run from the date of the final administrative decision by either the hearing officer or the reviewing officer or panel in order to prevent the inappropriate dismissal of cases.

§ 300.518 Stay Put

Recommendation: Retain proposed § 300.518 as written.

Rationale: Proposed § 300.518(a) tracks the specific requirements of IDEA 2004 § 615(j). This is required by the plain language of IDEA 2004 § 615(j). The statute is clear that only permissible exception to the stay-put provision is a disciplinary change in placement under § 615(k). The regulations may not create any other exceptions to 615(j)'s pendency provision, or

else they would contradict the IDEA and thus, violate § 607(b)(1). Any attempt to likewise suspend the stay-put provisions would run afoul of § 607(b)(1).

Moreover, § 300.518(c) simply puts into the regulation the Supreme Court's determination in *Town of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985), that a hearing officer's decision agreeing with the parents that a change of placement is appropriate is to be treated as an agreement between the SEA or LEA and the parents for purposes of IDEA § 615(j), and accordingly proposed regulation § 300.518(a). Aside from changing the citation to § 615(k) for disciplinary changes in placement, the IDEA made no other changes to the IDEA § 615(j). Accordingly, there is no reason to modify § 300.518.

§ 300.519 Surrogate Parents

Recommendation 1: Proposed § 300.519 should be amended to clarify that (1) if the "parent" under § 300.30 is known and the child is a "ward of the state," the public agency shall only appoint a surrogate parent if it determines that a surrogate parent is needed to protect the Educational interests of the child and (2) the public agency shall not appoint a surrogate parent without approval of a court of competent jurisdiction if the "parent" under § 300.30 is the natural or adoptive parent whose rights to make educational decisions for the child have not been terminated, suspended, or limited.

Rationale: There are two problems with the regulations as proposed. First, worded as it is in the disjunctive, the regulation can be read to require appointment of a surrogate if the child is a ward and the child's parent is known. It appears that the intent is only to require appointment in such a case if the child needs a surrogate to protect his or her rights, but clarification is necessary to avoid costly litigation that has occurred in the past over these issues.

Second, public agency personnel should not be taking action that deprives natural or adoptive parents of their constitutional right to make educational decisions for their children. See COPAA comment to proposed § 300.30. If the natural or adoptive parent is not present and cannot be found, this should not be a problem, as long as serious efforts are made to locate the absent parent.

If the natural or adoptive parent is known, however, a decision by a public agency employee that a surrogate is necessary to protect a child takes away the natural or adoptive parent's right to make the IDEA decisions. Such determinations cannot be made without due process of law in a court of law. In those cases, public agencies must have policies and procedures for seeking a judicial determination.

Finally, whenever the question of appointment of a surrogate parent arises, rules must be in place to ensure that natural parents are on notice of the proceeding and that any *guardian ad litem* or other person appointed to represent the child in the abuse neglect proceeding is also notified and allowed to participate

Recommendation 2: Proposed § 300.519(c) should be amended by striking "(d)(2)(i) and (e)" and inserting "(d) and (e)" so that no child with a surrogate parent, whether appointed by

courts or public agencies, has a surrogate with a conflict of interest or lacking the adequate skills and knowledge to do the job

Rationale: Children who are in the abuse and neglect system, and wards of the state, are in particular need of care during the IEP process, because there is often not a parent willing or able to speak and advocate for them. Under proposed § 300.519(d)(2), if the public agency appoints the surrogate, he/she cannot have a conflict of interest; must have the knowledge and skills necessary to adequately represent of the child; and cannot be an employee of an LEA or other agency involved in the child's care. This is vital to help ensure that the child receives an appropriate education.

Under the proposed regulation, however, judges would not have to determine if surrogate parents had a conflict or if they have the necessary knowledge and skills. All they would have to do is make sure that the proposed surrogate was not an employee of an agency involved in the education or care of the child. Such a rule opens the door for appointment of unqualified and possibly conflicted people to exercise the IDEA rights of vulnerable children with disabilities. This is manifestly unfair and contrary to the guiding principle for courts overseeing child welfare, abuse, and neglect cases **to act in the interests of the child.**

Furthermore, the July 20, 1983 regulations (§ 300.514(c)(2)) provided that all surrogates must meet all three qualifications. Congress did not unequivocally change this requirement in § 615(b)(2)(A)(i). Rather, in 2004 Congress re-enacted the long-standing requirement that the surrogate cannot be an agency employee while adding authority for judges overseeing child welfare cases to appoint surrogates. Congress did not state that this was the only qualification, or instruct the Department that the other protections in the July 20, 1983 regulations (no conflict of interest and adequate knowledge and skill to do the job) should be eliminated. In other words, Congress acquiesced to all the requirements for surrogates found in the regulations and simply gave judges power to appoint surrogates who previously could only be appointed by public agencies. Consequently, the proposed regulation appears to violate IDEA 2004 § 607(b)(2).

Recommendation 3: Court-appointed surrogates need only meet federal requirements for surrogates not individual requirements promulgated by LEAs

Rationale: Courts may have jurisdiction over cases from more than one school district. They should not have to apply different standards depending on which school district is involved

Recommendation 4: Proposed § 300.704(b)(4) should be amended to retain current regulations allowing for use of SEA allocations to recruit and train surrogate parents (34 C.F.R. § 300.370(a)(1), (b)(2)).

Rationale: The child welfare systems of many if not all states are overloaded with cases and underfunded. Often delays are incurred in appointment of surrogate parents because of the lack of qualified surrogates. IDEA 2004's new requirement to appoint surrogates for unaccompanied homeless youth will further tax the system. This is no time to eliminate a federal funding source.

Moreover, current § 300.370(a)(1), (b)(2) carry forward requirements from the July 20, 1983 regulations. Since there is no clear statement of Congressional intent for change failing to include the provision in the new regulations would violate § 607(b)(2) of the Act.

Recommendation 5 and Rationale: COPAA supports the proposal to delete current section 300.515(c)(3) which allows appointment as surrogate parents employees of public agencies that only provide non-educational care for the child. We agree that removing this provision is needed "to ensure that surrogates do not have interests that conflict with the interest of the child." 70 Fed. Reg. at 35809.

§ 300.530 Authority of School Personnel (Discipline)

Recommendation: Modify proposed § 300.530(d)(1)(i) to conform to IDEA 2004 by adding the words, "as provided in IDEA 2004 § 612(a)(1)" so that the regulation states that children must "continue to receive educational services, as provided in IDEA 2004 § 612(a)(1), 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."

Rationale: Proposed § 300.530(d)(1)(i) contradicts IDEA 2004, and violates § 607(b)(1) because it eliminates the requirement to provide FAPE to children who have been removed from the classroom for disciplinary reasons. FAPE must be provided to children in interim alternative placements under IDEA 2004, § 615(k)(1)(D) and § 612(a)(1). IDEA 2004 § 615(k)(1)(D) states that children who are removed for more than 10 days from their current placement must "continue to receive educational services, *as provided in section 612(a)(1)*, 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" (emphasis added). § 612(a)(1) requires the state to provide "a free appropriate public education" to all children with disabilities, including those "who have been suspended or expelled from school." But proposed regulation § 300.530(d)(1)(i) eliminates the statutory requirement to provide FAPE by omitting the requirement to provide "educational services as provided in section 612(a)(1)." This allows states to provide only educational services enabling the child to participate in the general curriculum and move toward meeting his or her IEP goals—even if what is provided is less than FAPE. This is an impermissible contradiction of, and change to, the statute. The proposed regulation thus violates both § 607(b)(1), by contradicting the IDEA, and § 607(a), because it is not necessary to ensure compliance with the IDEA but alters the IDEA's requirements instead.

Furthermore, if children do not receive FAPE, they are less able to become contributing members of society upon graduation, increasing the costs for society to support them.

Recommendation 2: COPAA supports § 300.530(d)(1)(ii) which requires services designed to address the behavioral violation "so it does not recur."

Rationale: When a child is removed from his/her current placement under IDEA 2004 § 615(k), a Functional Behavioral Assessment, behavioral intervention services, and modifications designed to address a behavioral violation "so it does not recur" is required by

§ 615(k)(1)(D)(ii). Some witnesses have asked the Department to replace the statutory requirement with regulations that would only require "minimizing the likelihood of recurrence" or similar wording. The Department has acted appropriately by not doing so. Doing so would contradict the IDEA, and thus violate § 607(a) and § 607(b)(1).

Recommendation 3: Strike the phrase "if any" from proposed § 300.530(d)(4) and retain the language in current § 300.121(d)(3)(i), stating "School personnel, in consultation with the child's special education teacher, determine the extent to which services are 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."

Rationale: IDEA 2004 § 615(k)(1)(D) requires the school district to provide to a child with a disability who is removed from his/her placement "educational services, as provided in section 612(a)(1) 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." The statute provides no exceptions to this requirement. Nonetheless, proposed § 300.530(d)(4) contains a different rule if a child has been removed for 10 school days in the school year, and the current removal is for less than 10 consecutive school days and is not a change in placement. The regulation proposes that school personnel will determine whether or not the child receives any educational services. Because this contradicts the clear language of the statute, it is a violation of § 607(b)(1). Accordingly, the Department needs to revise proposed § 300.530(d)(4) by striking the phrase "if any" from proposed and retaining current § 300.121(d)(3)(i). Furthermore, nothing in IDEA 2004 justifies the change that the Department proposes. Consequently, it violates § 607(a) because it is not necessary to ensure compliance with the specific requirements of IDEA 2004.

Moreover, the special-education teacher is responsible for knowing about the child's disability, how it impacts his/her learning, and what appropriate services the child needs so that the school district can provide FAPE. She/he is specially trained in these matters. As a result, the regulations should retain the current language in § 300.121(d)(3)(i) requiring consultation with the special-education teacher. The proposed regulation would allow consultation with any of the child's teachers to suffice, even one unfamiliar with the child's learning needs as a result of his/her disability.

§ 300.532(c)(5) Rights In Expedited Discipline Hearings

Recommendation 1: strike § 300.532(c)(5) and keep intact the fundamental hearing rights in § 300.511-513 for expedited disciplinary hearings brought under § 300.532.

Rationale: Proposed § 300.532(c)(5) states "A State may establish different procedural rules for expedited hearings under this section than it has established for due process hearings under § 300.511 through § 300.513." The same procedural rights attach under the IDEA to "due process" hearings in expedited discipline cases and all other cases. By giving states authority to alter and eliminate protections in IDEA 2004 and the July 20, 1983 regulations for expedited disciplinary hearings, proposed § 300.532(c)(5) impermissibly violates IDEA § 607(b)(1), 607(b)(2), and 607(a). Because these rights must be kept intact by law, promulgating regulations

that permit them to be altered or eliminated will only result in costly litigation. In addition, § 300.532(c)(5) would allow states to charge parents for the hearing record, findings of fact, and hearing officer decision in expedited disciplinary hearings, which would impose an enormous financial burden that families could not afford, and will deter them from using the expedited disciplinary process, thus hurting children with disabilities.

a. § 532(c)(5) eliminates fundamental hearing rights provided in § 300.512

The rights contained in proposed § 300.512(a) include the right to be accompanied by and advised by counsel and advocates, to present evidence, to cross-examine witnesses, and compel their attendance, and receive the record in written or electronic form (at the parent's option). This is required by IDEA 2004 § 615(h) which specifically provides these fundamental hearing rights to "any party to a hearing conducted pursuant to **subsection (f) or (k)**, or an appeal conducted pursuant to subsection (g)." The reference to subsection (k) makes clear that the expedited discipline hearings set out in § 615(k)(4)(B) are covered by § 615(h). Since proposed § 300.532(c)(5) would allow states to eliminate or modify these basic rights for expedited discipline hearings, it would contradict IDEA 2004, and thus, impermissibly violate § 607(b)(1). In addition, § 300.508 of the July 20, 1983 regulations provides these rights for all hearings. Consequently, allowing states to eliminate or alter them also violates § 607(b)(2) of IDEA.

Furthermore, proposed § 300.512(a) itself preserves these rights for expedited discipline hearings under § 300.530 through § 300.534. Accordingly, proposed § 300.532(c)(5) contradicts proposed § 300.512(a). It is also inconceivable that these fundamental hearing rights would be eliminated for expedited disciplinary hearings. Surely children who face removal from school, suspension, expulsion, and other changes in placement deserve these fundamental American protections.

b. § 532(c)(5) eliminates hearing officer and other rights provided in § 300.511

Moreover, § 300.532(c)(5) should be struck because it would allow states to states to abolish and alter required hearing officer qualifications for expedited disciplinary hearings in proposed § 300.511(c). These include the right to an impartial hearing officer, and the requirement that the hearing officer be knowledgeable about the IDEA, regulations, case law, and have the knowledge and ability to conduct the hearing and write opinions in accord with appropriate, standard legal practice. These are also rights that IDEA 2004 § 615(f)(3)(A) provides for every hearing under § 615(f)(1)(A), which specifically includes expedited discipline hearings under § 615(k). In addition, the July 20, 1983 regulations § 300.507(a) provide the right to an impartial hearing officer in all due process hearings--whether a disciplinary change in placement hearing or a non-discipline hearing. Thus, the proposed regulation violates IDEA 2004 § 607(b)(1) and § 607(b)(2). Furthermore, given the significance of a change in placement for disciplinary reasons to a child's education, it is completely unreasonable to deprive children of these rights.

Moreover, the proposed regulation allows states to alter or eliminate § 300.511(b)'s requirement that the hearing be conducted by the SEA, or the public agency responsible for educating the child in accord with State statute, regulation, or written policy. This, too, contradicts IDEA 2004 § 615(f)(1)(A), and the July 20, 1983 regulations § 300.506(b). Likewise, it is impermissible under IDEA 2004 § 607(b)(1) and § 607(b)(2).

c. § 532(c)(5) permits states to eliminate right to free hearing transcripts and other documents, imposing an unwarranted financial burden on families.

Proposed § 300.532(c)(5), by permitting states to alter fundamental rights in § 300.512(c)(3) for expedited discipline hearings, would allow states to eliminate or change the right of parents to obtain the hearing record, findings of fact and hearing decision free of charge for those hearings. This appears to be an inadvertent error, as it would be unconscionable to charge parents for these materials. The Department of Education should retain the current regulations, § 300.509(c)(2) which permit parents to have these materials free of charge, in all hearings.

As the Department explained in promulgating the 1999 regulations, "Access to a written verbatim record of the hearing is vital for parents to exercise their full due process rights." 64 FEDERAL REGISTER 12614 (March 12, 1999). The same is true today. It would impose a great financial burden on families to force them to pay for hearing transcripts. Transcripts for a 3-5 day hearing can cost between several hundred dollars and more than a thousand dollars. Many low-income families would be unable to pay the costs at all. Many middle class families would face gross financial hardship, and would likely be unable to pay. Parents of all income levels would likely be deterred from exercising their due process rights in discipline situations or their rights to appeal or to file a civil action if they have to pay for the transcript, findings, and decisions. This would be a travesty of justice. Expulsion, suspension, and other changes in placement for disciplinary reasons are very significant penalties for children to face, and they adversely affect the child's educational record for years to come. It is critical that parents facing such a situation receive the hearing transcript at no cost, just as the Department recognizes it is important for families to receive these materials at no cost in any other due process hearing. Likewise, it would be manifestly unfair and make no sense to permit states to charge families for findings of fact and hearing decisions in expedited discipline hearings. No court charges parties for findings of fact and decisions.

§ 300.532(c)(4) and (c)(5) Exchange Of Evidence

Recommendation: Eliminate proposed § 300.532(c)(4) and (5), which impermissibly contradict IDEA 2004 and lessen protections in the July 20, 1983 regulations for the exchange of evidence prior to expedited disciplinary hearings.

Rationale: Proposed § 300.532(c)(4) allows states to reduce to two business days from five business days the time periods under § 300.512(a)(3) and (b) for exchanging evaluations and evidence for expedited disciplinary hearings. Separately, proposed § 300.532(c)(5) allows states to alter the requirements of § 300.512 for these hearings. This includes § 300.512(a)(3)'s

provision allowing parties to prohibit the introduction of evidence that was not exchanged at least five business days before the hearing.

The proposed regulation violates § 607(b)(1) and § 607(b)(2), by contradicting IDEA 2004 and lessening protections in the July 20, 1983 regulations. IDEA 2004 § 615(f)(2), expressly requires parties to make this exchange five business days before all hearings. § 615(f)(2) specifically applies to hearings under § 615(f)(1), which by its terms includes discipline hearings under § 615(k). The statute thus does not permit the five-business day period to be reduced to two business days or anything else. Moreover, § 300.508(a)(3) of the July 20, 1983 (and existing) regulations requires parties to all hearings to exchange evidence at least 5 business days before the hearing, and permits them to seek the prohibition of evidence that was not exchanged. Proposed § 300.512(a)(3) gives parties the same right, but § 300.532(c)(4) and (c)(5) permit states to change it, and thus lessen protections in the July 1983 regulations.

In addition, reducing the period to two business days would impose a gross hardship on parents. It will be almost impossible to adequately prepare for an expedited disciplinary hearing. School districts have the discipline evidence and the child's file; parents do not. The vast majority of parents are not represented by counsel in due process hearings, and the propose regulation would impose an even greater hardship on them. Indeed, as the Department recognized in 1999, "the intent of prehearing disclosure is to avoid surprise by either party at the hearing." 64 Fed. Reg. 12614 (March 12, 1999). A five-day rule supports this policy. Furthermore, a 2 business day rule makes little sense, because expedited discipline hearings are not really truly expedited. IDEA 2004 § 615(k)(4) requires the hearings to occur within 20 school days. This is never less than 26 calendar days, and usually 26-29 calendar days. Regular due process hearings occur after a 30-day resolution period.

§ 300.536 Change In Placement Due To Disciplinary Removals

Recommendation 1: COPAA supports proposed § 300.536(b)(1) and (b)(3).

Rationale: Proposed § 300.536(b) deals with whether a change in placement occurs when a child is suspended or otherwise removed from the classroom for non-consecutive periods that are each less than 10 school days but together add up to more than 10 school days. (One example would be a child who is removed over a 3-month period for three 9 school-day periods, or 5-6 calendar weeks total.) Proposed § 300.536(b)(1) and (b)(3) are appropriate: a change in placement has occurred when the child has been subjected to "a series of removals that constitute a pattern" because (1) the removals total more than 10 school days and (3) "Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another." These two factors have been the standard under the current regulations and they have served children and schools well for many years.

Recommendation 2: Eliminate the proposed § 300.536(b)(2), which imposes a new "substantially similar" standard on misbehavior before removals for non-consecutive periods of less than 10 school days that cumulate to more than 10 school days may be considered a change on placement.

Rationale: Under proposed § 300.536(b)(2), before the nonconsecutive removals are considered a change in placement, the child's behavior must be "substantially similar to the child's behavior in the incidents that resulted in the series of removals, taken cumulatively, is determined, under § 300.530(f), to have been a manifestation of the child's disability." This proposal allows children to be punished and removed from class for more than 10 cumulative school days for non-similar manifestations of their disabilities. It violates § 607(b)(1) of the IDEA by contradicting the IDEA in at least two places. It violates § 607(a) by going beyond the limited regulatory authority granted the Department to write only regulations that are necessary to ensure compliance with the *specific* requirements of IDEA 2004. It is not reasonable, but arbitrary because it has no relationship to whether a child is removed for 9 school days or 11 or any amount of time. Finally, it is likely to lead to increased litigation over the regulation's permissibility and what is a substantially-similar manifestation, which will only raise costs for everyone. To the extent that children are unfairly excluded from class and fall behind, it will cost more money to educate the child and societal costs may escalate when children fail to learn.

a. § 300.536(b)(2) violates IDEA 2004, § 607(b)(1) because it contradicts the statute.

First, the proposed regulation contradicts § 615 (k)(1)(B), by impermissibly broadening the statutory circumstances under which a child can be removed and circumstances under which a child can be denied a manifestation determination. Congress did not require that before a change in placement occurs, the child's behavior giving rise to the removal must be "substantially similar" to other behavior. Neither the statute nor the legislative history use the term or permit or support this extra "substantially similar" behavior factor. The statute is plain on its face: a child may be removed "for not more than 10 school days" to the extent the alternative placements are applied to children without disabilities. If the removal is for more than 10 school days, it is a change in placement and the remainder of § 615(k) applies, including the required manifestation determination under § 615(k)(1)(E), and the provision of services under § 615(k)(1)(C)-(D). Yet, under the proposed regulation, even the child removed for three 9 school-day periods (27 school days total) over 3 months for non-similar manifestations of his/her disability, would not receive a manifestation determination and would be denied educational services during the removal period. The appropriate standard is to determine whether the removals constitute a pattern under (b)(1) and (b)(3)—not this new standard in (b)(2).

Second, proposed § 300.536(b)(2) contradicts IDEA 2004 § 615(k)(1)(E) by effectively permitting exclusion of children and denial of educational services for behaviors that are a manifestation of their disability, when those exclusions are for non-consecutive periods that exceed 10 days. Under the proposed regulation, only exclusions for substantially similar behaviors would be considered in determining whether there is a change in placement for non-consecutive periods that together exceed 10 days. Consequently, a child may be removed for behaviors that are a manifestation of her disability but that are not "substantially similar" to each other, and may be denied educational services as a result. This is the case under § 300.536(b)(2) even if the exclusions added together exceed 10 days, or even 20 days, or 30 days, and hence, the proposal violates IDEA. Without services, the child is denied FAPE and will suffer harm from its denial.

This is a particular problem because a child's disability may easily manifest in behaviors that are not "substantially similar" but that are discrete conduct code violations that could subject the child to removal or suspension if they were not considered manifestations of a disability. For example, a young child with impaired cognition may have inappropriate contact with peers and may take a toy home that doesn't belong to her because she doesn't understand possession (stealing), or may have difficulty obeying staff instructions. A child may repeat curse words to a teacher that other children told him to say—even if he doesn't understand them, or has a disability that compels him to repeat things. A child with bipolar disorder may be habitually tardy or absent; have manic outbursts that disrupt the class; or may show disrespect to teachers by yelling at them and refusing to obey instructions to stop. We provide these examples simply as real-world situations in which children with disabilities may misbehave that are not substantially similar and yet are manifestations of their disabilities. They are not intended to stereotype children with disabilities; obviously children without disabilities may engage in many similar behaviors. The difference is that when a behavior is a manifestation of a disability, certain legal requirements under IDEA 2004 come into play, and the regulations may not violate those legal requirements.

Third, § 300.536(b)(2) violates the IDEA if it means that before a non-consecutive series of removals is a change in placement, the behaviors must be a manifestation of the disability. A child who is subjected to removals exceeding 10 school days must receive FAPE and educational services—even if the misconduct is not a manifestation of the disability. The manifestation standard simply determines whether the child's placement may be changed or not—it doesn't define change in placement or determine whether services are provided in the alternative placement. As the Department of Education concluded in 1999, "There is no basis in the statute for differentiating the services that must be provided to children with disabilities because their behavior is or is not a manifestation of their disability." 64 Fed. Reg. 12626 (Mar. 12, 1999). This remains a correct statement of the law. Indeed, the manifestation determination review is triggered by the 10-school day change in placement, not the other way around.

b. Proposed § 300.536(b)(2) violates § 607(a) of IDEA 2004.

IDEA 2004 § 607(a) permits only regulations that "are necessary to ensure compliance with the specific requirements" of IDEA 2004. Proposed § 300.536(b)(2)'s "substantially similar" behavior requirement is not at all necessary to ensure compliance with IDEA 2004's specific requirements, and therefore violates § 607(a). Nothing in the statute necessitates (or even supports) adding this factor. Congress was well aware of the existing regulations when it enacted IDEA 2004 and it did not request that they be changed. The IDEA's requirements can be met by using the statutory language.

c. Proposed § 300.536(b)(2) is not a reasonable interpretation of the law.

There is no nexus between the substantial similarity requirement and the fact that the removal is for less than 10 consecutive school days, or for more than 10 consecutive school days. There is such a nexus between 300.536 (b)(1) and (b)(3) and removing a child. Those

regulations look at whether there is a pattern of removal because the removals add up to more than 10 days and because of the proximity and length of each removal. Moreover, the proposed regulation is vague. It states that "the child's behavior is substantially similar to the child's behavior in the incidents that resulted in the series of removals, taken cumulatively, is determined, under § 300.530(f), to have been a manifestation of the child's disability." The entire clause referring to the manifestation of the child's disability is ambiguous and vague. It is not clear if it means (1) that a change in placement results only if the child's behavior is a manifestation of his disability, a requirement that would contradict IDEA 2004; or (2) only behavior substantially similar to other behavior is a manifestation of the child's disability, a criterion that also has no statutory support because IDEA 2004 defines manifestation in 615(k)(1)(E).

Furthermore, school districts that wish to circumvent the IDEA could easily implement 9 school-day suspensions whenever behaviors were not substantially similar. This would be true even if it is clear that there is a pattern of removing the child for time periods less than 10 days (e.g., four 8-9 school day suspensions in a 4-month period). Under the proposed regulation, this would not be a change in placement if the behaviors were not substantially similar.

Subpart F - Monitoring

Recommendation: The regulation should add regulations incorporating the statutory requirements contained in § 616(a) of the Act.

Rationale: The Department's stated intent of developing a comprehensive, freestanding document that incorporates all requirements of the new law is clearly not accomplished in this regulatory document, which omits key requirements of the statute regarding monitoring and enforcement. Without incorporation of these statutory provisions, these regulations will result in no accountability on the part of states or the Education Department for the special education provided to students with disabilities. The proposed regulations will not facilitate implementation of the statute in accord with Section 607.

§300.601 State performance plans and data collection

Problem: Draft §300.601 is inconsistent with the statute because it omits the process to be followed if the Secretary finds that a state plan does not meet the requirements. The process includes notice, an opportunity for a hearing, and timelines for approval or disapproval.

Recommendation: Add the requirements of Section 616(b) to the regulations.

Rationale: To include only a portion of the statutory requirement implies that the remainder is not required.

Conclusion

Thank you for considering the comments of the Council of Parent Attorneys and Advocates, Inc. Please contact COPAA's Government Relations Chair, Robert Berlow, at (301)912-2281 or robertberlow@comcast.net if you have any questions.