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August 19, 2005

Dear Dr. Justesen:

The National Down Syndrome Society (NDSS) is a nonprofit organization representing the more than 350,000 Americans who have this genetic condition, their families, and professionals in the field. We have 196 affiliates in 49 states. NDSS is committed to being the national leader in supporting and enhancing the quality of life and realizing the potential of all people with Down syndrome. We demonstrate this commitment through our education, research and advocacy initiatives for people with Down syndrome and their families. On behalf of the children with Down syndrome and their families who benefit from the Individuals with Disabilities Education Act (IDEA), NDSS submits the following comments and recommendations concerning the proposed IDEA regulations.

Parental involvement and accountability are two of the key principles upon which President Bush's No Child Left Behind Act is based. The Administration emphasized that the reauthorization of IDEA should also be based on these principles.

NDSS and our constituents are very disappointed in the proposed regulations because they contradict these principles. The proposed regulations will strip away dozens of significant provisions from the current regulations that help families make informed decisions about their child's education and see them implemented. The cumulative impact of these proposed regulatory changes is anti-family.

In January and February, through testimony at public meetings and in written comments, parents and their representative organizations, like NDSS, made many recommendations to ensure that the Department would develop IDEA regulations designed to support parent involvement in the educational process. Instead, the Department chose to ignore virtually all of these recommendations and developed proposed regulations that diminish the rights of children and their parents in the name of "flexibility."

“Flexibility" was achieved by eliminating requirements in the current regulations that are critically important to children and their parents. One of the Department’s rationales as expressed in the “preamble” discussion of the proposed regulatory changes in the Notice of Proposed Rulemaking (NPRM) is that some requirements are redundant because they are “inherent” in IDEA and other statutes. Another rationale in the preamble is that these requirements are a regulatory burden and are unnecessary because school districts are sufficiently serious about their obligations. Office of Special Education Programs monitoring letters and reports provide ample evidence that many states and local school districts are in non-compliance with IDEA. The Department is not considering how unfair and unreasonable it is for parents to be responsible for monitoring the school districts that do not take their obligations seriously or to be tracking provisions in numerous statutes. The Department needs to define regulatory burden and flexibility in a way that is pro-family.

The Department's decision to publish the proposed regulations as a single reference document, which incorporates the statutory requirements, is appreciated. However, not enough has been done to clarify the statutory requirements. Most of them have simply been reprinted as part of the regulations. The rationale stated in the preamble is that the Department is simply trying to uphold the intent of Congress. However, Section 607 (a) of IDEA 2004 states that regulations should be issued if they are necessary for compliance. Compliance with IDEA will be weaker if states and school districts are free to come up with their own interpretations of ambiguous provisions. There will be inconsistency across the country, increased litigation and the courts will end up deciding the requirements for compliance. The Department must meet its responsibility to issue *all* the regulations that are necessary to ensure proper implementation of the law.

Our specific recommendations are described in detail below, but we are particularly concerned about the following:

- In the provision that requires Individualized Education Programs (IEPs) to contain an explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular class, the proposed regulations change the statutory phrase “regular class” to “regular education environment.” This new term could make it more difficult for parents who want their child to be educated in the general education classroom. The phrase should be changed back to “regular class.”

- It should be clarified that the school district must prove that the child’s behavior was not a manifestation of his/her disability before applying the same disciplinary procedures that apply to students without disabilities. Also, it should be clarified that the appropriateness of the IEP and the child’s ability to understand the impact and consequences of their behavior should be considered.

- It should be clarified that when parents are asked to “agree” to waive any rights under IDEA that agreement is fully informed, in writing, voluntary and revocable like “informed consent.”

- It should be clarified that the IEP team can make individualized decisions about the use of short- term objectives for any child with a disability for whom the short term objectives are no longer required.

- It should be clarified that nothing prohibits a state from providing additional rights, protections and benefits to children with disabilities and their families.

NDSS is also concerned about the absence of regulations for the multi-year IEP and paperwork reduction pilots in this NPRM. Many states are already holding meetings to plan their proposals for these pilots. It is critically important that the Department issue proposed regulations, hold public meetings across the country, have a 75 day public comment period and incorporate the recommendations of stakeholders into the final regulations, *before* proposals are accepted. These pilots have the potential to create a significant negative impact on children with disabilities and their families. Therefore, it is necessary to proceed cautiously, and with full stakeholder input, into the regulations and into the development of State proposals for these pilots.

IDEA was enacted as a family-centered law to protect the rights of children with disabilities and their parents. The future of children with Down syndrome and other disabilities depends on the crucial guidance that the IDEA regulations will provide. We urge you to seriously consider the following recommendations and incorporate them into the final regulations for IDEA. These recommendations maintain the pro-family and pro-child provisions in the current regulations and make the other clarifications that are necessary to ensure compliance. Please contact us if there is any way that NDSS, or the families we represent, can assist you.

Sincerely,

Madeleine Will
Director

Ricki Sabia
Associate Director

SUBPART A- GENERAL

Definitions Used in This Part

1. Agree
Add new regulation §300.5

Recommendation: The final regulations should state, in every provision in which the word "agree" or "agreement" appears, that the requirements of "consent" (as defined in §300.9) must be met. In the alternative, the final regulations under "Definitions Used in this Part" should add the following definition of "agree."
Agree means the act of participating in a decision, for which the requirements of consent have been met pursuant to §300.9

Rationale: Under IDEA 2004, parents can agree to waive many obligations of the public agency. Most of these agreements would waive fundamental rights that have always been guaranteed. Congress could not have intended for parents to make these critical decisions without being fully informed in their native language (or other mode of communication), without the right to revoke the decision and without a written record. The statute uses "consent" instead of "agree" when a unilateral decision of the parent is involved, but that should be the only distinction.

2. FAPE
Proposed regulation §300.17

Recommendation: The final regulations should re-letter (d) to become (e) and add a new (d) to the definition of a free, appropriate public education (FAPE) clarifying that the IEP team may decide to provide services in a post-secondary or community-based setting to students who have not yet received a regular high school diploma or "aged out" of receiving services.

Rationale: The final regulations need to clarify that it is permissible for these students to participate in dual enrollment programs and/or receive special education and related services in postsecondary and community based settings. The President's Committee on Persons with Intellectual Disabilities (PCPID) in their 2004 report stated, "IDEA serves students through 21 years of age, depending on state law, and provides students with intellectual disabilities, ages 18-21 years, with limited options. Many of these students have had to stay in high school or participate in a "center" type program, which usually has consisted of segregated employment and earnings at below the standard minimum wage. The President's Committee supports new emerging opportunities for students with intellectual disabilities to become involved in various transitional programs located at two year colleges or four year universities, or to participate in vocational education and training programs in integrated community-based settings…Dual enrollment, a relatively new development for students with intellectual and other disabilities, allows them to complete high school while attending a two or four year college with same-age peers, pursue an academic or vocational curriculum, or a combination of both, in an inclusive

setting. Such opportunity permits students with disabilities to remain eligible for services under IDEA, if deemed appropriate by the IEP."

Over one hundred such programs at two and four year colleges and universities are listed on the US Department of Education-funded website: **www.thinkcollege.net**. These transitional opportunities lead to greater employment, independence, and community living. The final regulation needs to be clear that it is permissible (although not required) for school districts to support dual enrollment programs and services for these students in age-appropriate postsecondary and community-based environments.

3. Highly Qualified Teachers
Proposed Regulation §300.18

Recommendation: The final regulation for §300.18(b)(1) should add the following paragraph:

States are prohibited from creating new categories to replace emergency, temporary or provisional licenses, which provide for any lowering of the standard for full certification in special education

Rationale: The creation of new categories for instant certification in order to avoid the statutory prohibition against temporary, emergency, provisional or waived certification would undermine the law's requirements and water down the "highly qualified" standard.

Recommendation: The final regulation for 300.18(c)(2) should be edited as follows:

> (2) Meet the requirements of subparagraph (B) or (C) of section 9101(23) of the ESEA as applied to an elementary school teacher, or, *in the case of a secondary school teacher*, meet the requirements of subparagraph (B) or (C) of section 9101(23) of the ESEA as applied to an elementary school teacher, *be able to teach to the State's alternate achievement standards for grade(s) in which the students are enrolled*, and have *sufficient* subject matter knowledge *to be able to provide instruction aligned to the academic content standards for the grade levels in which the students are enrolled, as determined by the State. States rules must be consistent with guidance published by the U.S. Department of Education August 2005, "Alternate Achievement Standards for Students with the Most Significant Cognitive Disabilities Non-Regulatory Guidance."*

Rationale: NCLB Regulation §200.1(d) provides that a State may, through a documented and validated standards-setting process, define alternate academic achievement standards, provided those standards are aligned to the State's academic content standards, promote access to the general curriculum and reflect professional judgment of the highest achievement standards possible. The U.S. Department of Education's August 2005 "Alternate Achievement Standards for Students with the Most Significant Cognitive Disabilities Non-Regulatory Guidance" states on page 21, "If a State chooses to establish alternate achievement standards, such standards must be aligned with the State's

academic content standard for the grade in which the student is enrolled (or, in the case of students in un-graded classrooms, the grade level commensurate to the student's age)." On page 26, a description of how to align alternate achievement standards with the State's academic content standards, states that the content must be clearly related to grade-level content and the State must adapt or extend the grade-level content standards to reflect instructional activities appropriate for this group of students. The final IDEA regulation for §300.18(c)(2) must be consistent with this NCLB regulation and the guidance. A special educator teaching students who will be assessed against alternate achievement standards will need to understand and be able to teach to the alternate achievement standards for which the students are enrolled, as well as have sufficient grade level subject matter knowledge to be able to provide instruction that is aligned to the State's grade-level academic content standards, promote access to the general curriculum and encourage the highest achievement possible. The only way to move these students along the continuum towards grade-level achievement standards is to align the instruction to grade-level academic content standards. In addition the language "in the case of instruction above the elementary level" is confusing and should state clearly that this requirement relates to secondary school teachers.

4. Special Education
Proposed Regulations §300.38(a)(2)(11) and §300(a)(4)

Recommendation: Proposed regulations §300.38(a)(2)(11) and §300(a)(4) should be retained in the final regulations.

Rationale: Maintaining the references to travel training in the definition of special education is critically important to ensure a safe and successful transition to post-secondary education and employment.

5. Universal Design
Proposed Regulation §300.43

Recommendation: The final regulation should restate the definition from the Technology Act of 1998, rather than merely providing the statutory reference. In addition, this definition should be edited to include the universal design of academic content standards, curriculum, instructional materials and assessments:

Universal Design means a concept or philosophy for designing and delivering products and services, *including academic content standards, curriculum, instructional materials and assessments*, that are usable *for children* with the widest possible range of *academic and* functional capabilities, either directly (without requiring assistive technologies) or with assistive technologies.

Rationale: Referring to a definition in another statute, instead of supplying the definition in the context of the regulations, creates an unnecessary obstacle for parents trying to understand their children's rights under IDEA. It also creates an unnecessary obstacle for educators and other stakeholders who would find it difficult to check up on cross

references to other laws. The edits to the definition of universal design from the Assistive Technology Act of 1998, are necessary to clarify that this term, in the context of IDEA, applies to standards, curriculum, instructional materials and assessments.

The U.S. Department of Education August 2005 guidance, "Alternate Achievement Standards for Students with the Most Significant Cognitive Disabilities," describes on page. 26 the requirements for aligning alternate achievement standards to the State's academic content standards for the grade in which the student is enrolled. This universal design of academic content standards includes adapting or "extending" those content standards to reflect instructional activities appropriate for this group of students. The guidance also stresses the need for these students to access the general curriculum, as required by IDEA. Universal design of curriculum is a necessary part of the process of all students accessing the general curriculum, including students with the most significant cognitive disabilities. The National Instructional Materials Accessibility Standard provides a basis for universally designed instructional materials. The Title I regulations at 34 C.F.R. §200.2(b)(2) require that a State's assessment system be "designed to be valid and accessible for use by the widest possible range of students, including students with disabilities and students with limited English proficiency." The new guidance provides practical information about universally designed assessments.

SUBPART B- STATE ELIGIBILITY

Least Restrictive Environment (LRE)

1. Least Restrictive Environment Requirements-General
Proposed Regulation §300.114(a)(2)

Recommendation: The final regulation should use the term "regular classroom" as opposed to "regular education environment."

Rationale: "Regular class" is used later in that same sentence, as well as in the preamble to this proposed regulation, in other proposed regulations, in the current regulations and in IDEA 2004. Changing the statutory term "regular class" to the term "regular educational environment" could make it more difficult for parents who want their child to be educated in the general education classroom since it can be interpreted to mean almost any involvement with non-disabled peers in a regular education school. The term "regular class" needs no clarification in the regulations.

2. Placements
Proposed Regulation §300.116

Recommendation: The final regulation should retain the word "preschool." 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 competitive employment in the community.

Recommendation: The words, "unless the parent agrees otherwise," should be deleted in final regulation §300.116(b)(3) and (c).

Rationale: Parents should not be asked to waive their child's right to be educated at the school closest to home or the school he or she would have attended if not disabled. These are longstanding rights that were part of the 1983 regulations. According to IDEA 2004, the federal regulations must maintain the same level of protection as provided by the 1983 regulations, unless Congress clearly and unequivocally states its intent otherwise. The preamble states that this clause was added in both paragraphs to enable parents to choose to send their child to a charter, magnet or other specialized school without causing a violation of the LRE mandate. This choice has always been available to parents, so the new clause is unnecessary. Therefore parents who make this choice for their child with a disability would not violate the LRE mandate as long as the child will be educated with non-disabled peers to the maximum extent appropriate.

Children With Disabilities Enrolled by Their Parents in Private Schools

1. Child find for parentally-placed private school children with disabilities.
Proposed Regulation §300.131

Recommendation: The final regulation needs to state that the child find provision applies to all parentally-placed children who are the appropriate ages to receive FAPE in the State, including preschool-aged children as well as youth who have not yet received a regular diploma or "aged out" of receiving IDEA services.

Rationale: Specifying only "children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools" is confusing. Parentally-placed preschool aged children must be identified through the child find

process. Similarly, youth with disabilities who have not yet received a regular diploma and have not "aged out" of receiving IDEA services must also be identified. This includes students with intellectual disabilities participating in transitional programs in postsecondary institutions or in community based settings who are not receiving services through their IEP. Over one hundred such programs at two and four year colleges and universities are listed on the US Department of Education-funded website: **www.thinkcollege.net.** These transitional opportunities lead to greater employment, independence, and community living.

2. **Provision of services for parentally-placed private school children with disabilities—basic requirement.**
   Proposed Regulation §300.132

Recommendation: The final regulation needs to clarify that parentally-placed preschool children, as well as youths who have not yet received a regular diploma or "aged out" of receiving IDEA services, are included in this provision.

Rationale: Specifying only "children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools" is confusing. Parentally-placed preschool aged children must be considered for service plans. Similarly, youth with disabilities who have not yet received a regular diploma and have not "aged out" of receiving IDEA services must also be considered for service plans. This includes students with intellectual disabilities participating in transitional programs in postsecondary institutions or in community based settings who are not receiving services through their IEP. Over one hundred such programs at two and four year colleges and universities are listed on the US Department of Education-funded website: **www.thinkcollege.net**. These transitional opportunities lead to greater employment, independence, and community living.

State Complaint Procedures

1. **Adoption of State complaint procedures-Remedies for denial of appropriate services**
   Proposed Regulation §300.151

Recommendation: The final regulation for §300.151(b)(1) should add the phrase "the awarding of monetary reimbursement" from current regulation §300.660(b).

Rationale: The preamble states that the reference to monetary reimbursement was omitted to avoid implying that monetary reimbursement would be appropriate in the majority of State complaints. There is no provision in IDEA 2004 that supports this deletion. This regulation simply lists the remedies that must be addressed in the resolution of a State complaint in which the SEA has found a failure to provide appropriate services. The list does not imply that all of these remedies will be granted in the majority of the complaints. Removing the reference to monetary damages makes it likely that parents will not realize that the SEA can provide monetary reimbursement, if

that remedy is appropriate under the circumstances. In fact, they may be told, pursuant to §300.151, that monetary damages are not required to be considered as a remedy.

2. Minimum State Complaint Procedures
Proposed Regulation §300.152

Recommendation: The final regulation for §300.152(b)(1)(ii) should state that the "agreement" must fulfill the requirements for consent in §300.9.

Rationale: Congress could not have intended for parents to make a decision to delay resolution of a State complaint without being fully informed in their native language (or other mode of communication), without the right revoke the decision and without a written record.

Recommendation: The final regulation for §300.152(c) should be edited to retain the provisions in current regulation §300.661(c).

Rationale:
In paragraph (c)(1) of the current regulation, the deleted language states that if the complaint contains multiple issues, of which one or more are part of a due process hearing, any issue in the complaint that is not a part of the due process action must be resolved using the time limit and procedures described in paragraphs (a) and (b) of this section. This language ensures that the resolution of all the issues in a complaint will not be delayed because one or more are part of a due process hearing. The preamble states that this deletion was done to simplify the procedure. It is not acceptable to simplify a procedure by delaying the parent's right to resolve any part of a complaint. There is no provision in IDEA 2004 that supports this deletion.

In addition, paragraph (c)(3) of the current regulation was deleted. It provided that a complaint alleging a public agency's failure to implement a due process decision must be resolved by the SEA. The preamble states that this language was deleted because the enforcement and implementation of due process hearing decisions are in the province of the State and Federal courts. The State complaint process is simpler than litigation and is more accessible than the courts to parents who do not have an attorney. There is no provision in IDEA 2004 which would require the parents to go to court instead of file a complaint to enforce a due process decision. In fact, the construction clause in Sec. 615(f)(3)(F) of the statute refers to the right to bring a state complaint.

3. Filing a Complaint
Proposed Regulation §300.153

Recommendation: The final regulation for §300.153(d) should amend one year to two years and use the following language from current regulation §300.662(c):

…unless a longer period is reasonable because the violation is continuing, or the complainant is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint is received.

Rationale: There is no reason to believe that Congress would have created a two year statute of limitations for due process hearings and intended the regulations for State complaints to continue to have a shorter time limitation. Also, there is no evidence that Congress intended to change the current regulatory requirement for a three year limitation on the parent's right to file a State complaint when the violation is on-going or compensatory services are being requested.

Methods for Ensuring Services

1. Participation in Assessments
Proposed regulation §300.160

Recommendation: The final regulation should retain all the language in proposed regulation §300.160, including the new provision in paragraph (e) which requires the use of universal design principles. Language should be added to clarify that these requirements also apply to assessments aligned to modified achievement standards under the new NCLB policy.

Rationale: All the requirements in this section are critical in order for students with disabilities to demonstrate their knowledge and to hold the public agencies and the schools accountable for their achievement. These requirements must be applicable to any type of assessment that is permitted under NCLB, whether or not that assessment was permitted at the time IDEA 2004 was passed. NDSS has expressed its concerns about the premature timing of the new policy permitting the use of assessment aligned to modified achievement standards. However, if the Department plans to go forward with this new policy, the assessments must comply with the requirements in this regulation, in addition to any regulations that will be developed under NCLB.

2. Public Participation
Proposed regulation §300.165

Recommendation: The final regulation should retain all the provisions from current regulations §300.280 through §300.284.

Rationale: The preamble states that these provisions were deleted (1) because they required extensive documentation to the Secretary, which was a regulatory burden for the States and (2) because the States have to meet the requirements of 20 U.S.C. 1232d (b)(7). The deleted provisions are not just about documentation for the Secretary. They contain requirements that are essential for parent participation because they spell out the SEA responsibilities to the parents. A reference to requirements in another statute does not adequately inform parents of the procedures they have a right to expect from their State under IDEA. In addition, some of the critical requirements in the current regulations

are not explicitly listed in U.S.C. 1232d (b)(7). This is a concern when we see a trend away from protecting parent's rights that aren't explicitly stated. Parent participation is supposed to be a pillar of IDEA and NCLB. Every effort must be made to secure it, especially in the development of policies and procedures that affect the lives of over 6 million children and their families.

State Advisory Panel

State Advisory Panel-Advisory panel procedures
Proposed regulation §300.167

Recommendation: The final regulation for §300.167 should include a paragraph that contains the provisions in current regulation §300.653 regarding advisory panel procedures.

Rationale: Many of these procedures including early meeting/agenda notification, reimbursement of reasonable and necessary expenses and interpreter and other necessary services are essential to ensure diverse parent participation. Without these required procedures, parents with busy work schedules, parents who are economically disadvantaged and parents who need foreign language or sign language interpreters may not be able to serve on State advisory panels.

Other Provisions Required for State Eligibility

Access to Instructional Materials
Proposed regulation §300.172

Recommendation: The final regulation should replace the phrase "in a timely manner" in §300.172 (b) (2) and (3) with the requirement that the materials must be provided at the same time as the students without disabilities receive their materials. Also, it should be clarified in paragraph (a), that students do not need to be blind or have print disabilities to fit into the description of students who need accessible materials and that providing materials in an accessible format includes changes in the depth, breadth, and/or complexity of the material.

Rationale: It is unacceptable for accessible materials to be received past the time that the other students receive their materials. This time lag cheats the students with disabilities out of participating in educational opportunities that are available to their peers. In the same manner, students with intellectual disabilities, who often do not receive accessible materials, are routinely cheated out of educational opportunities. It is critically important that the final regulation for §300.172 is clear in its requirement that the SEA must provide accessible materials to children with any type of disability who need materials in an accessible format, even if the NIMAS standard and NIMAC center do not specifically "cover" those children. It is equally important for it be clarified that the formatting changes may include changes in the depth, breadth, and/or complexity of the material. This would be necessary to make the materials accessible for students with intellectual

disabilities. The Administration is to be commended for developing the NIMAS standard; addressing the critical need for students who are blind and print disabled to receive accessible instructional materials, and providing funds to CAST to further develop the standard to address the needs of all students with disabilities. However, children with intellectual and other disabilities cannot wait to receive accessible materials until the standard is further developed, revised and adopted. In order for all students with disabilities to have access to the general curriculum, all students with disabilities must have access to accessible, universally designed, instructional materials.

SUBPART C- LOCAL EDUCATIONAL AGENCY ELIGIILITY

Permissive Use of Funds
Proposed Regulation §300.208

Recommendation: The final regulation for §300.226 should clarify that an LEA may use funds to provide services and supports in post-secondary and community-based settings for students with disabilities who have not yet received a high school diploma or "aged out" of receiving special education services. Such services and supports could include, but should not be limited to, participation in dual enrollment programs and other partnerships with postsecondary institutions, employers and/or community-based organizations; other services and supports provided through the IEP team process, and services and supports for parentally-placed students with disabilities.

Rationale: It is important to clarify in the final regulation that LEAs *may* (but are not required to) provide this support with IDEA funds. The President's Committee on Persons with Intellectual Disabilities (PCPID) in their 2004 report stated, "IDEA serves students through 21 years of age, depending on state law, and provides students with intellectual disabilities, ages 18-21 years, with limited options. Many of these students have had to stay in high school or participate in a "center" type program, which usually has consisted of segregated employment and earnings at or below the standard minimum wage. The President's Committee supports new emerging opportunities for students with intellectual disabilities to become involved in various transitional programs located at two year colleges or four year universities, or to participate in vocational education and training programs in integrated community-based settings…Dual enrollment, a relatively new development for students with intellectual and other disabilities, allows them to complete high school while attending a two or four year college with same-age peers, pursue an academic or vocational curriculum, or a combination of both, in an inclusive setting. Such opportunity permits students with disabilities to remain eligible for services under IDEA, if deemed appropriate by the IEP."

Over one hundred such programs at two and four year colleges and universities are listed on the US Department of Education-funded website: **www.thinkcollege.net.** These transitional opportunities lead to greater employment, independence, and community living. The final regulation needs to be clear that it is permissible (although not required) for school districts to support dual enrollment programs and services for these students in age-appropriate postsecondary and community-based environments.

Purchase of Instructional Materials
Proposed regulation §300.210

Recommendation: The final regulation should replace the phrase "in a timely manner" in §300.210 (b)(3) with the requirement that the materials must be provided at the same time as the students without disabilities receive their materials. Also, it should be clarified in this section that students do not need to be blind or have print disabilities to fit into the description of students who need, and must be provided, accessible materials. It also needs to be specified that providing materials in an accessible format includes changes in the depth, breadth, and/or complexity of the material. It must be clarified that (3) refers to all "children with disabilities who need instructional materials in accessible formats but for whom the NIMAC may not provide assistance".

Rationale: It is unacceptable for accessible materials to be received past the time that the other students receive their materials. This time lag cheats the students with disabilities out of participating in educational opportunities that are available to their peers. In the same manner, students with intellectual disabilities, who often do not receive accessible materials, are routinely cheated out of educational opportunities. It is critically important that the final regulation for §300.210 is clear in its requirement that the SEA must provide accessible materials to children with any type of disability who need materials in an accessible format, even if the NIMAS standard and NIMAC center do not specifically "cover" those children. It is equally important for it be clarified that the formatting changes may include changes in the depth, breadth, and/or complexity of the material. This would be necessary to make the materials accessible for students with intellectual disabilities. The Administration is to be commended for developing the NIMAS standard; addressing the critical need for students who are blind and print disabled to receive accessible instructional materials, and providing funds to CAST to further develop the standard to address the needs of all students with disabilities. However, children with intellectual and other disabilities cannot wait to receive accessible materials until the standard is further developed, revised and adopted. In order for all students with disabilities to have access to the general curriculum, all students with disabilities must have access to accessible, universally designed, instructional materials.

Early Intervening Services
Proposed Regulation §300.226

Recommendation: The final regulation for §300.226 should require LEAs to provide parents with notification that their child will be receiving early intervening services; a description of early intervening services and special educations; information about the differences between early intervening services and special education services, and the process to be followed for each.

Rationale: Congress has made it clear that parents are to be full participants in their child's education. To do so, parents must be able to make informed decisions about when

to request an evaluation if their child is experiencing academic and/or behavioral difficulties in school and early intervening services are not the solution.

Recommendation: The final regulation for §300.226 should specify the time period that a child may receive early intervening services before an evaluation under Section 614 should occur, if the academic and/or behavioral difficulties persist.

Rationale: It is critically important to develop a process to prevent "early intervening services" from creating a barrier for students who should be receiving the full scope of services and protections provided by IDEA. The construction clause clarified that this section shall not be construed to delay appropriate evaluation of a child with a disability, however, a time period is still necessary.

Recommendation: Modify the final regulation for 300.226(d) to add the following:

(3) the length of time a child receives early intervention services
(4) the impact of the early intervening services
(5) the amount of Part B funds used for early intervening services

Rationale: Schools should be able to account for the amount of time a student receives early intervening services and their impact. In addition schools should report the amount of Part B funds used to support early intervening services and the services actually provided. This data would provide a basis for knowing if the early intervening services are effective and how the funds are being used.

Recommendation: The final regulation for §300.226(d)(2) should be rewritten as follows.

(2) the number of children served under this section who receive special education and related services during the subsequent two year period.

Rationale: The regulation repeats the statutory language, which refers to students who *subsequently* receive services during the *preceding* two year period. This language is confusing and needs to be clarified.

SUBPART D- EVALUATIONS, ELIGIBILITY DETERMINATIONS, IEPS AND EDUCATIONAL PLACEMENTS

Parental Consent

Parental Consent-Parental Consent for services
Proposed Regulation §300.300

Recommendation: The final regulation for §300.300 should retain the language from current regulation §300.505 which states that the public agency must take reasonable measures to obtain consent from the parents for the initial evaluation, for initiating services and for reevaluations.

Rationale: The public agency should have to take reasonable measures to obtain parental consent before the public agency is excused from doing an evaluation, a reevaluation or from providing FAPE, in light of the potential negative consequences to the child. Parents may need to be contacted in their native language, contacted at a different time of day or a message may need to be left. The effort to obtain consent should be meaningful and appropriate to the circumstances.

Recommendation: The final regulation for §300.300 should retain the requirement from current regulation §300.505 that "reasonable measures" must be documented pursuant to current regulation §300.345(d) as follows:

> In this case the public agency must have a record of its attempts, using the native language of the parent, to obtain informed consent, such as—
> (1) Detailed records of telephone calls made or attempted and the results of those calls;
> (2) Copies of correspondence sent to the parents and any responses received; and
> (3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

Rationale: The recommended language also appears in §300.345(d) of the 1983 regulations. Therefore, the protection provided by documenting the types of reasonable measures listed in that provision can't be diminished without clear Congressional intent. Congress has placed great emphasis on parent participation in educational decisions. The regulations should be clear about the lengths to which the public agency is expected to go to obtain parental consent before the public agency is excused from doing an evaluation, a reevaluation or from providing FAPE.

Evaluations and Reevaluations

1. Initial Evaluation-Procedures for initial evaluation
Proposed Regulation §300.301(c)

Recommendation: The final regulation should clarify that State timelines for evaluation are only permitted to be used if they are shorter than 60 days.

Rationale: State timelines for evaluation should not be permitted to delay the process by being longer than the 60 day timeline in IDEA. IDEA sets a floor, not a ceiling, with respect to State statutes and regulations.

2. Evaluation Procedures-Other evaluation procedures
Proposed Regulation §300.304(c)

Recommendation: The final regulation for §300.304(c)(1)(ii) should state that "not feasible" is intended to be a very high standard that represents a rare set of circumstances.

Rationale: A child can not be properly evaluated for the existence and extent of a disability if the public agency is not required, except in very rare instances, to provide and administer assessment and other evaluation materials in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally and functionally. A child should not be left behind because the assessment and other evaluation materials are inappropriate.

3. Additional Requirements for Evaluations and Reevaluations
Proposed Regulation §300.305

Recommendation: The final regulation for §300.305(a)(1)(ii) needs to have a comma added after "current classroom-based" to make it clear that three types of assessments are being mentioned; current classroom-based, local or State assessments.

Rationale: The corresponding current regulation, §300.533(a)(1)(ii) refers only to current classroom-based assessments. The proposed regulation adds a reference to local or State assessments. The language is confusing without the comma.

Recommendation: Paragraph (3) of the final regulation for §300.305 (e) should require that the following information be included in the summary of the child's academic achievement and functional performance:

- A statement containing the child's disability, and a statement of the current nature and extent to which the child's disability impacts academic and functional performance (sufficient to establish eligibility under the ADA and Section 504, if appropriate);
- A statement of the program modifications, accommodations and supports found to be essential to the child's success; and
- A statement of the modifications, accommodations and supports that would facilitate a successful transition to postsecondary education or employment.

Rationale: Under IDEA 2004, LEAs are not required to provide a re-evaluation when a child graduates from secondary school with a regular diploma, or ages out of eligibility under State law. In place of an exit evaluation, the statute incorporates the Summary of Performance provison from the Senate bill. The Senate Report makes it clear that the information in the new Summary of Performance is to provide "specific, meaningful, and understandable information to the student, the student's family, and any agency, including postsecondary schools, which may provide services to the student upon transition." In order to achieve these goals, it is imperative that the regulations explicitly require adequate information regarding the students' disability, impact of the disability, and any needed modifications, adaptations, accommodations in order to have full access to postsecondary education or employment. Since accessing these supports and services may be dependent on estabishing eligibility under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act, it is imperative that the information included in the Summary of Performance satisfies the requirements in these statutes.

Additional Procedures for Evaluating Children with Specific Learning Disabilities

Determining the existence of a specific learning disability
Proposed Regulation §300.309

Recommendation: The final regulation for §300.309 should add the following new paragraph to clarify the requirement in paragraph (a)(3), that the group determine that its findings under paragraph (a)(1) and (2) of this section are not primarily the result of a visual, hearing, or motor disability; mental retardation; emotional disturbance; cultural factors; or environmental or economic disadvantage.

> (4) Construction clause. Nothing in §300.309 shall be construed to mean that a child who has a disability listed in paragraph §300.309(a)(3) or an environmental, cultural or economic disadvantage can not also be identified as having a concomitant specific learning disability.

Rationale: Many children who fall into the categories listed in §300.8(c)(10)(ii) or §300.309(a) (3) have concomitant specific learning disabilities that go unidentified. These students end up with lower academic and functional achievement than they should, because an important contributing factor to their learning problems has not been addressed.

Individualized Education Programs

1. Short-term objectives
Proposed Regulation §300.320 (a)(2)(ii)

Recommendation: The final regulation for §300.320 (a)(2)(ii) should state that to the extent the State does not continue to require short-term objectives or benchmarks, the IEP team should decide whether to use short-term objectives or benchmarks for students who take assessments aligned to the grade-level achievement standard.

Rationale: Short-term objectives are the appropriate way to measure progress toward annual goals, especially functional goals, for many students who take an assessment aligned to the grade level achievement standard. The decision whether or not to use short-term objectives or benchmarks for these students should be a decision made by the members of the IEP team, including the parents. This clarification will ensure that short-term objectives or benchmarks are not prohibited or discouraged by any State, LEA or school. In a similar situation, proposed regulation §300.320(b) allows the IEP team to decide whether to do transition planning prior to age 16. The IEP team should be given the same deference with respect to short-term objectives. There is nothing in the statute that is inconsistent with this recommendation.

Recommendation: The final regulation for §300.320 (a)(2)(ii) should state that short-term objectives are required for students who take assessments aligned to modified achievement standards.

Rationale: Congress clearly intended short-term objectives to be required for students who are not taking assessments aligned to the grade-level achievement standard. Congress only referenced assessments aligned to alternate achievement standards because they were the only non-grade level assessments that were available at the time IDEA 2004 was passed. Modified achievement standards must be addressed in this regulation in order to align IDEA implementation and NCLB implementation.

2. Progress reports

Proposed regulation §300.320(a)(3)(ii)

Recommendation: The final regulation for §300.320(a)(3)(ii) should state that parents must be sent progress reports concurrent with the issuance of report cards.

Rationale: The proposed regulation language which states "such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards" may be misinterpreted as an option, not part of the requirement. The report cards are meaningless if the parents have to read them without concurrent IEP progress reports. In addition, parents whose children have disabilities should be informed of their child's progress at least as often as parents are informed of their nondisabled children's progress.

Recommendation: The final regulation for §300.320(a)(3)(ii) should retain language from current regulation §300.347(a)(7) which requires progress reports to state the *sufficiency* of the progress to achieve the goals by the end of the year.

Rationale: It is critical that parents know whether the progress their child is making is sufficient to meet the goals by the end of the school year. If insufficient progress is being made then the parents and the IEP team must address this issue in a timely fashion. Parents cannot fully participate in their child's education if they are told that their child is making progress, but are not informed until the end of the school year that the progress was insufficient to meet the goals. This recommendation is supported by the Senate Report which states that the progress report must describe the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year. The Senate bill provision is incorporated into IDEA 2004

3. Participation with nondisabled children in the regular education environment

Proposed regulation §300.320 (a)(5)

Recommendation: The phrase "regular class" should be retained instead of using "regular education environment."

Rationale: IDEA 2004 requires that IEPs contain an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class. The proposed regulations change the statutory words "regular class" to "regular education environment." This new term could make it more difficult for parents who want their child to be educated in the general education classroom since "regular environment" can be interpreted to mean almost any involvement with nondisabled children in a regular

education school. The term “regular class” needs no clarification; it is in the current regulations, in IDEA 2004 and in the preamble to this proposed regulation. This change undermines the intent of Congress.

4. Transition information
Proposed regulation §300.320 (b)

Recommendation: The final regulation for §300.320 (b) should retain the language in the proposed regulation which allows the IEP team to determine if transition services should be in an earlier IEP than the first IEP to be in effect when the child turns 16.

Rationale: The proposed regulation wisely defers to the judgment of the IEP team and involves the parents in this critical decision.

Recommendations: The final regulation for §300.320 (b) should clarify that a statement of inter-agency responsibilities and any needed linkages, as required by current regulation §300.347(b) is included in the scope of “transition services.”

Rationale: The proposed regulation requires transition services to be listed in the IEP but does not explicitly refer to a statement of inter-agency responsibilities and any needed linkages. Transition is an exceedingly complex and difficult time for parents and they rely on the statement of inter-agency responsibilities and linkages to help them navigate the transition maze.

Recommendation: The final regulation for §300.320 (b) should clarify that “transition services” may include vocational education and work-study programs.

Rationale: Vocational education is often necessary for a smooth transition to employment but many students with intellectual disabilities are denied access to these programs.

5. IEP Team Participants-Special Educator
Proposed regulation §300.321(a)(3)

Recommendation: The final regulation should clarify that the only time it would be appropriate to have a special education provider instead of a special education teacher participate in the IEP meeting, is when the child does not have a special education teacher.

Rationale: Although the proposed regulation is the same as the current regulation in this respect, this lack of clarity causes confusion about whether a related service provider can be substituted for the special education teacher. Related service providers are valuable members of the IEP team but they should not replace a child’s special education teacher.

6. IEP Team Participants-Representative of public agency to commit resources
Proposed regulation §300.321 (a)(4)(iii)

Recommendation: The final regulation should state that a representative of the public agency should be present who is knowledgeable about the availability of resources of the public agency and has the authority to commit these resources.

Rationale: It should be recognized that a large percentage of the due process complaints and litigation start when the IEP team states that a child needs certain supports or service, but they are not written in the IEP because no one is present who is authorized to commit the resources. Having a representative from the public agency at the IEP meeting who knows the availability of resources is not helpful, if he or she cannot commit these resources.

7. IEP Team Participants-Transition services
Proposed regulation §300.321 (b)(3)

Recommendation: The final regulation should include the following language from the current regulation: "If an agency invited to send a representative to a meeting does not do so, the public agency shall take other steps to obtain participation of the other agency in the planning of any transition services."

Rationale: The involvement of an agency that is likely to be responsible for providing or paying for transition services is essential to ensure that parents are fully informed and that the transition will proceed as smoothly as possible. The public agency should be required to involve such an agency in the planning of transition services even if the agency did not send a representative to the IEP meeting. This is not an unnecessary burden as it is described in the preamble to the proposed regulations.

8. IEP Team Attendance
Proposed regulation §300.321 (e)

Recommendation: The final regulation for §300.321 (e) should state that the agreement not to require a member of the IEP team to attend an IEP meeting in proposed regulation §300.321 (e) (1) should be subject to the rules for consent in §300.9.

Rationale: The attendance of all team members at an IEP meeting is the best way to ensure that the IEP is developed with fully informed parent input. Therefore an agreement not to require the attendance of one of these members can have a significant impact on the process. Although the agreement is required to be in writing, the other requirements in §300.9 are not explicitly stated. Congress could not have intended for parents to make this critical decision without being fully informed in their native language (or other mode of communication) and without the right revoke the decision.

Recommendation: The final regulation §300.321 (e) should state that the multidisciplinary scope of the meeting must be maintained and that this factor must be considered in determining whether the member's area of curriculum or related services is being discussed at the meeting or whether written input is sufficient.

Rationale: Two essential elements of the IEP meeting are the depth and scope of the decision making process when parents, teachers and service providers from all the disciplines share their ideas and expertise. Therefore, it is nearly impossible to predict that any member's area of curriculum or related services will not be discussed. It also makes it difficult to provide written input that can substitute for the member's presence. If it turns out the member's attendance should have been required, the meeting will have to be stopped and rescheduled to have that member in attendance. If IEP team members are regularly excused under this provision there will be an increase in the number of IEP meetings, which is inconsistent with the intent of Congress.

9. Parent Participation

Proposed regulation §300.322

Recommendation: The final regulation for §300.322 should state that the notice to parents must be in writing, include any requests to excuse an IEP team member as well attach any written report that an IEP team member proposes to submit in lieu of attendance.

Rationale: The recommended changes are essential to ensure informed parent participation and decision-making with respect to excusing IEP team members.

Recommendation: The final regulation for §300.322(d) should retain the language from current regulation §300.345(d) which describes the types of documentation that are required with respect to the public agency's attempts to arrange a mutually agreed upon time and place for the IEP meeting:

> (1) Detailed records of telephone calls made or attempted and the results of those calls;
> (2) copies of correspondence sent to the parents and any responses received; and
> (3) detailed records of visits made to the parent's home or place of employment and the results of those visits.

Rationale: The recommended language also appears in §300.345(d) of the 1983 regulations. Therefore, the protection provided by documenting the types of reasonable measures listed in that provision can't be diminished without clear Congressional intent. Congress has placed great emphasis on parent participation in educational decisions. The regulations should be clear about the lengths to which the public agency is expected to go to find a mutually agreed upon time and place for the IEP meeting before the meeting can be conducted without the parents in attendance.

Recommendation: The final regulation for §300.322 should add another paragraph that would retain the following language from current regulation §300.345(e): The public agency shall take whatever action is necessary to ensure that the parent understands the proceedings at the IEP meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English.

Rationale: According to the preamble, the proposed regulations did not retain this language from the current regulations because agencies are required by other Federal statutes to take appropriate actions to ensure that parents who have disabilities or limited English proficiency understand the proceedings at an IEP meeting. It is very difficult for parents to track their rights under IDEA, much less cross reference rights in other Federal statutes. The recommended language also appears in §300.345(e) of the 1983 regulations. Therefore, the protection it provides can't be diminished without clear Congressional intent.

10. IEP or IFSP for children aged three through five
Proposed regulation §300.323 (b)(2)(i)

Recommendation: The final regulation should state that the detailed explanation of the differences between an IFSP and IEP that is required in §300.323 (b)(2)(i) must describe the differences in the child's and parent's rights under the IFSP as compared to an IEP, including a description of any payments for services a parent may have to make if they choose an IFSP. Also, the final regulation should retain the requirement in the proposed regulation that requires written informed consent from the parents if they choose an IFSP.

Rationale: The child's and parent's rights are significant details that should be included in the information parents are given to help them make an informed decision about whether to use their child's IFSP as the IEP. It is critically important that such a decision follow the rules of informed consent in §300.9.

11. Accessibility of child's IEP to teachers
Proposed regulation §300.323 (d)

Recommendation: In addition to ensuring that the IEP is accessible to teachers and service providers, the final regulation should retain the language from current regulation §300.342 (b)(3) which ensures that each teacher and provider is informed of his or her specific responsibilities related to implementing the child's IEP and the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.

Rationale: The preamble states that the language from current regulation §300.342 (b)(3) was removed as unnecessary, because public agencies are required to share this information in order to meet their obligations under the Act. This seems logical, but the unfortunate reality is that many teachers and service providers tell parents they have never seen their child's IEP. Therefore, it is necessary to explicitly require that the teachers and service providers be informed of all their specific responsibilities related to the IEP.

12. Transmittal of records for children who transfer school districts
Proposed regulation §300.323 (e)(2)

Recommendation: The final regulation should state that the transmittal of records should occur within 30 business days.

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

13. Development of IEP- General-Consideration of Special Factors
Proposed regulation §300.324 (a)

Recommendation: The final regulation for §300.324(a)(1) should add a paragraph that retains the language from current regulation §300.346(a)(1)(iii) that states, as appropriate, the results of the child's performance on any general State and district-wide assessments should be considered in developing the child's IEP.

Rationale: The IEP team has to decide the appropriate assessment to recommend on the IEP as well as the appropriate accommodations. The team should consider the child's performance on past assessments in order to make these decisions.

Recommendation: The final regulation for §300.324 (a)(2) should state that behavioral interventions must be based on the results of functional behavioral assessments.

Rationale: Numerous studies have demonstrated that functional behavioral assessments lead to the development of successful behavioral interventions for children in school settings. The emphasis on research and data based interventions in IDEA supports this recommendation.

Recommendation: The final regulation for §300.324 (a)(2) should retain the language from current regulation §300.346(b) which states that special factors must be considered in a meeting to review and, if appropriate, revise an IEP.

Rationale: The preamble to the proposed regulations states that this language was removed because IDEA 2004 no longer requires the consideration of special factors in IEP review and revision. It is true that the Act is not explicit on this point. However, it is not possible to thoroughly review and revise an IEP so that it addresses all the issues listed in Section 614 (d)(4), without considering special factors. It is difficult to imagine that Congress intended to permit an IEP team to ignore critical special factors when reviewing and revising an IEP. This requirement must be clearly stated in the proposed regulation to avoid any confusion on this point.

Recommendation: The final regulation for §300.324 (a)(2) should retain language from current regulation §300.346(c) that requires the IEP team to include a statement in the child's IEP detailing the particular device or service related to the special factors (including an intervention, accommodation, or other program modification) that the child needs in order to receive FAPE.

Rationale: The preamble to the proposed regulations indicate that this requirement was removed because it is covered in proposed regulation §300.320 (a)(4). The statement of services and supports required in that proposed regulation would cover special factors in a very general way, but would not serve as a reminder to state the particular device or services related to the special considerations. The reality is that parents and educators generally review the specific provision related to the task at hand and may miss a more general requirement elsewhere in the regulations. To ensure informed parent involvement and proper implementation of IDEA, certain general requirements are important enough to repeat in the specific situations to which they apply.

14. Alternative Means of Meeting Participation
Proposed regulation §300.328

Recommendation: The final regulation should state that the parent's "agreement" to using alternative means of meeting participation must conform to the consent requirements in §300.9.

Rationale: The decisions made at these meetings are critical to the educational outcomes of the child. Discussing these decisions in a conference call has a substantially different dynamic than a face-to-face interdisciplinary team meeting. Therefore, safeguards must be in place to ensure that parents understand that their agreement is required and that it must be made under certain conditions. The definition of "consent" in Proposed regulation §300.9 makes it clear that consent must be fully informed, in writing and revocable. Congress could not have intended for such a significant decision to be made without these requirements.

15. IEP-Accountability
Current regulation §300.350

Recommendation: The final regulations should add a section that would retain current regulation §300.350.

Rationale: This regulation explicitly requires the provision of special education and related services to a child with a disability in accordance with the child's IEP and a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP. The preamble states that this regulation was eliminated because its requirements are implicit in IDEA and NCLB. In this age of accountability it is more important than ever to explicitly state the level of commitment that parents should expect from the school district, the administrators and educators. This is too important a message to eliminate in favor of implicit requirements.

SUBPART E- PROCEDURAL SAFEGUARDS

Due Process Procedures for Children and Parents

1. Parent participation in meetings
Proposed regulation § 300.501(c)

Recommendation: The language in § 300.501(c)(4) of the current regulation should be retained in the final regulation for § 300.501(c).

Rationale: This language requires the public agency to keep detailed records of telephone calls, correspondence and visits to document its attempt to ensure parental involvement in meetings. Congress has placed great emphasis on parent participation in educational decisions. The regulations should be clear about the lengths to which the public agency is expected to go to obtain the parent participation in a placement decision before the decision can be made without the involvement of a parent. The preamble states that the proposed change to current language was made to provide greater flexibility to school personnel in how they document attempts to involve parents. However, the change affects more than documentation. It removes the only reference to the methods that are expected to be used to contact parents. The public agency should not be given flexibility with these basic and essential protections of parent involvement.

Recommendation: The language in **s**ubsection (c)(5) of the current regulation should be retained in the final regulation for § 300.501(c). It 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.

Rationale: The preamble states that subsection (c)(5) would be removed because it is unnecessarily duplicative and that its obligations are inherent in the general obligation to afford parents an opportunity to participate in meetings about the identification, evaluation, educational placement and provision of FAPE to their child. However, the language in subsection (c)(5) goes beyond this obligation. The current regulation requires that the public agency ensure that the parent <u>understand</u> and participate in the meetings. This is an important distinction.

2. Independent educational evaluation
Proposed regulation § 300.502

Recommendation: Retain proposed regulation § 300.502 in the final regulations.

Rationale: This proposed regulation follows the current regulation for the most part and is an important area of the law to clarify.

3. Prior notice by public agency-Notice in understandable language
Proposed Regulation § 300.503 (c)

Recommendation: Retain proposed regulation § 300.503 (c) in the final regulations.

Rationale: This proposed regulation follows the current regulation for the most part and is an important area of the law to clarify.

4. Procedural Safeguards Notice-General
Proposed Regulation § 300.504 (a)

Recommendation: The clarification in proposed regulation § 300.504 (a)(2) that the notice must be provided to the parents upon receipt of the first filing of a State complaint or request for a due process hearing in a school year is essential and should be retained in the final regulation.

Rationale: As the preamble points out, the statute could be misinterpreted to mean the first filing any time in a child's school career without this clarification.

Recommendation: The final regulation for §300.504(a)(3) should require that parents must be informed of their right to request a copy of the procedural safeguards notice at any time. Parents should also be informed when the procedural safeguards notice has been updated so they know to request the updated version immediately.

Rationale: This notice contains critical information to help parents become full participants in their child's education. Therefore, it is necessary to ensure that parents receive the most up to date version of this notice, in a manner that is meaningful to them. This is especially important now that IDEA 2004 has reduced the frequency with which this notice will be distributed to parents. This is consistent with the clarification in proposed regulation § 300.504 (a)(2).

5. Procedural Safeguards Notice-Internet Website
Proposed Regulation § 300.504 (b)

Recommendation: The final regulation should provide that if the LEA places a copy of the notice on its website, parents should be informed by school personnel of its availability in this format. It should also be clarified that placing the notice on the website does not replace the requirement to provide a hard copy to the parents, unless the parents consent.

Rationale: The goal is to make sure that parents receive this information when they need it most. Many parents do not have access to the internet or do not use it consistently.

6. Procedural Safeguards Notice-Contents
Proposed Regulation § 300.504 (c)

Recommendation: The provision in proposed regulation § 300.504 (c)(5)(iii), with respect to the difference between the due process complaint and State complaint procedures, should be retained in the final regulation.

Rationale: Parents need this information in order to be fully informed about their options for dispute resolution.

7. Procedural Safeguards Notice-Notice in understandable language
Proposed Regulation § 300.504 (d)

Recommendation: Retain proposed regulation § 300.504 (d) in the final regulation.

Rationale: This proposed regulation follows the current regulation for the most part and is an important area of the law to clarify.

8. Mediation-Requirements
Proposed Regulation § 300.506 (b)

Recommendation: The final regulation for §300.506(b)(3)(i) should add language stating that the list of mediators include a statement of their qualifications. Also, §300.506(b)(3)(i) should state that parents must be given a copy of the list. In the alternative, language should be added that requires the public agency to inform parents of their right to review the list.

Rationale: This information is critical to keep the process transparent and equitable. Why would the public agency be required to have this list if it is not shared with the parents? Also, parents need the statement of qualifications so they can be involved in selecting the mediator, if one is not selected on a random basis (see the following recommendation).

Recommendation: The final regulation for § 300.506 (b)(3)(ii) should use the following language that is consistent with current regulation §300.506(b)(2)(ii), "If a mediator is not selected on a random (e.g., a rotation) basis from the list described in paragraph (b)(3)(i) of this section, both parties must be involved in selecting the mediator and agree with the selection of the individual who will mediate.

Rationale: The proposed regulation does not provide for any alternate method for selecting a mediator if one is not selected on a random basis. This will lead to delay and confusion as to the procedure to follow if a random process is not used. Also, the proposed regulation states that the mediator can be selected on a random, rotational or other impartial basis, without indicating what "other impartial basis" might permit. The preamble states that this change from the current regulation is to provide the SEA with flexibility in selecting mediators, but the collaborative process in the current regulations should not be usurped in the name of flexibility.

Recommendation: In the final regulation for § 300.506 (b)(6)(i) and (b)(8), the words "arising from that dispute" should be deleted.

Rationale: The preamble states that these words were added so that the limitation placed on the use of information discussed during the mediation process as evidence would only apply to actions arising from the same dispute. IDEA 2004 does not limit the confidentiality of discussions occurring during mediation in this way and neither should the regulation.

Recommendation: The final regulations for § 300.506 (b)(7) should add a sentence that allows the mediation to be enforceable through the State complaint process.

Rationale: § 300.506 (b)(7) states that mediation agreements shall be legally binding and enforceable in any State court of competent jurisdiction or in a district court of the United States. The State complaint process is simpler than litigation and is more accessible than the courts to parents who do not have an attorney.

9. Mediation-Impartiality of mediator
Proposed Regulation § 300.506 (c)

Recommendation: The final regulation for § 300.506 (c)(1)(ii) should use the language from the current regulation which states simply that the mediator must not have a personal or professional conflict of interest. The proposed regulation qualifies this by stating that the mediator must not have a personal or professional interest that conflicts with the person's objectivity.

Rationale: There is no mechanism for determining whether a personal or professional interest conflicts with a person's objectivity. The less subjective standard in the current regulations will avoid disputes on this matter and avoid the risk of compromising the integrity of the proceedings.

10. Filing a Due Process Complaint-General
Proposed Regulation § 300.507(a)

Recommendation: The final regulation should clarify what is meant by "should have known" in proposed regulation § 300.507(a)(2).

Rationale: This section provides that a parent or agency must allege a violation that occurred no more than two years before the date the parent or agency knew or should have known about the alleged action that forms the basis for the complaint, or, if the State has an explicit time limitation, IDEA defers to the State law. The interpretation of the phrase "should have known" has critical implications for parents who may be unaware of IDEA violations for very long periods of time. Many parents cannot get information from their child because the child's disability, such as Down syndrome, includes cognitive and speech/communication delays. This subjective provision will create litigation without clarification.

Recommendation: The final regulation should clarify that IDEA only defers to the State statute of limitations if it is longer.

Rationale: IDEA sets a floor, not a ceiling, with respect to State statutes and regulations. Therefore the State statute of limitations should not be permitted to be shorter than the two year timeline in IDEA. A shorter statute of limitations would only exacerbate the inequity for parents of children with cognitive and speech/communication delays.

Recommendation: The final regulation should add the following language based on current regulation §300.662(c):
…unless a longer period is reasonable because the violation is continuing, or the parent is requesting compensatory services for a violation that occurred not more than three years prior to the date the due process complaint is received.

Rationale: Current regulation §300.662(c) refers to statute of limitations for State complaints. However, consistency requires that the same rules should apply for due process hearings.

11. Filing a Due Process Complaint-Information for Parents
Proposed Regulation §300.507(b)

Recommendation: The final regulation should retain § 300.507(b) which requires the public agency to inform the parent of any free or low-cost legal and other relevant services available in the area if the parent requests the information or the parent or the agency requests a hearing.

Rationale: This language comes from current regulation §300.507(a)(3) and provides parents with critical information.

12. Due Process Complaint-Notice required before a hearing on due process complaint
Proposed Regulation §300.508(c)

Recommendation: At the end of the provision in subsection (c) there should be a new clause retaining language from current regulation § 300.507(c)(4) which states that the public agency may not deny or delay a parent's right to a due process hearing for failure to provide this notice.

Rationale: Parents may not have access to an attorney to help them prepare the due process complaint. They should be expected to fix any problems with the complaint, but the process should not be stopped while this is done. In particular, there is no reason for the public agency to delay the process by refusing to engage in a resolution session while the complaint is being corrected, since all the relevant information will be discussed at that session.

13. Due Process Complaint-Sufficiency of Complaint
Proposed Regulation §300.508(d)

Recommendation: In the final regulation for §300.508(d)(3) it should be clarified that parents do not have to go through the formal amendment process just to fix a sufficiency problem with their original complaint. The formal amendment process should be applied to parents only if the subject matter of the complaint has changed or an additional issue has been raised.

Rationale: Unlike the public agency, the parent may not have an attorney to help them with the complaint and may inadvertently leave out a detail, such as the name of the school. It causes unnecessary delay if parents have to go through a formal amendment process to correct the complaint. This is exacerbated by the fact that the time period for the resolution session begins again with the filing of an amended complaint. The placement of the amended complaint paragraph under the "Sufficiency of complaint" section of §300.508(d) gives the impression that an amended complaint is necessary. The amended complaint paragraph does not appear as part of the sufficiency of complaint section in the statute.

Recommendation: The final regulation for §300.508(d)(3) should clarify that the two year statute of limitations begins with the original complaint, not the amended complaint, if the violation in question was raised in the original complaint.

Rationale: Parents may need to amend the complaint with more details about the alleged violation. They will be penalized for their lack of legal expertise unless the statute of limitations begins with their original complaint.

Recommendation: The final regulation for §300.508(d)(4) should clarify that the timelines for the resolution session do not begin again when a parent fixes a sufficiency problem with their original complaint.

Rationale: Parents should not have to wait up to 15 days for the public agency to declare the complaint insufficient, up to 5 more days for the hearing officer to notify them and then have to start the timelines all over again when they file an amended complaint to fix this omission. This is inconsistent with the language in current regulation § 300.507(c)(4) which states that the public agency may not deny or delay a parent's right to a due process hearing for failure to provide this notice.

14. Due Process Complaint-LEA response to a due process complaint
Proposed Regulation §300.508(e)

Recommendation: The final regulation should contain a construction clause clarifying that §300.508(e) does not excuse the LEA from its responsibility to provide prior written notice under §300.503 and that failure to provide prior written notice can be an issue raised by the parents in the due process complaint or in a complaint filed by the parents with the SEA.

Rationale: If the LEA has not sent a prior written notice to the parents on the subject matter of the due process complaint, proposed Regulation §300.508(e) requires the LEA to send the parents a response to the complaint, within 10 days of receiving it, containing the information that should have been in the prior written notice. Without further clarification, this provision may send the message to LEAs that they can simply wait and see if the parents file a complaint rather than provide prior written notice under §300.503. The recommended construction clause will encourage LEAs to send the notice and also

give parents regulatory support if failure to provide the notice is raised in the due process complaint or a complaint to the SEA.

15. Resolution Process-Resolution meeting
Proposed Regulation §300.510(a)

Recommendation: The final regulation for §300.510(a)(3) (i) should require the LEA to waive the resolution meeting if the parents can provide evidence to show that, prior to the complaint, the LEA had specific knowledge of the facts later identified in the complaint and had reasonable time for a resolution.

Rationale:
The resolution session is based on the premise, as stated in §300.510(a)(2), that the LEA has not already had an opportunity to resolve the issues raised in the complaint. If, prior to the complaint, the LEA had specific knowledge of the facts later identified in the complaint and had reasonable time for a resolution, there should not be another opportunity to resolve the matter while delaying due process. If the resolution session is permitted to be used in this manner it will discourage the resolution of issues when they first arise. It will be in the LEA's interest to force the parents to file a complaint before a resolution will be considered. This scenario unjustly delays the due process hearing. It is especially unjust, under these circumstances, to force parents to attend a resolution meeting because they are not entitled to reimbursement of any related attorney's fees. Only wealthy parents will be properly prepared to participate in this meeting. The LEA cannot bring an attorney unless the parents do, but they have access to legal advice in preparation for the meeting.

Recommendation: The final regulation §300.510(a)(3)(ii) should add a sentence requiring the LEA to provide written information outlining the differences between the resolution session and mediation. This information should include the following facts: 1) confidentiality rules apply to discussions during mediation so that information from these discussions cannot be used in subsequent proceedings, whereas there is no similar confidentiality provision for the resolution session; 2) attorney fees may be reimbursed for mediation that is conducted after the filing of a request for due process, but not for a resolution session; 3) the resolution session delays the due process timeline but mediation does not; and 4) there is a three-day review period for an agreement from a resolution session but not for a mediation agreement.

Rationale: Parents need this information in order to make an informed decision about whether "to agree" to use the mediation process rather than the resolution process. This is another example where "agree" should conform to the rules for informed consent in §300.9.

Recommendation: Proposed Regulation §300.510(a)(4) should be retained in the final regulations.

Rationale: The proposed regulation reflects the Conference Report language that the relevant members of the IEP team who must attend the resolution session are to be determined by *the parents* and the LEA.

Recommendation: A new paragraph (5) should be added to the final regulation for §300.510(a) that requires the public agency to take steps to ensure that one or both of the parents are able to participate in the resolution meeting. These steps should be the same as those required in §300.322 with respect to an IEP meeting (e.g. early notification, mutually agreed on time and place). Also, the final regulation should describe the types of documentation that are required with respect to the public agency's attempts to arrange a mutually agreed upon time and place for the resolution meeting such as: (1) detailed records of telephone calls made or attempted and the results of those calls; (2) copies of correspondence sent to the parents and any responses received; and (3) detailed records of visits made to the parent's home or place of employment and the results of those visits.

Rationale: Parent participation is critical to the success of a resolution meeting and is a fundamental principle of IDEA. There must be significant efforts made to contact the parents and make mutually convenient arrangements.

16. Resolution Process-Resolution Period
Proposed Regulation §300.510(b)

Recommendation: Language should be added to state that if the public agency waives the resolution session, goes to mediation or fails to convene a resolution meeting by the 15 day deadline, the 45 day timeline for due process hearings runs from the date the complaint was filed. Also, if there an attempt at resolution, but an impasse is reached at any point, the parents must be able to move on to the due process hearing without waiting until 30 days have expired.

Rationale: At most, the resolution session may delay the timeline for the due process hearing for 30 days, while the public agency is using the resolution process as an opportunity to resolve the complaint. If the public agency has waived the resolution session, has proceeded to mediation or has not scheduled a meeting by the 15-day deadline, then the resolution process is not being used and due process timelines should run as if there were no requirement for a resolution session. The full 30 days should not be used if the public agency has reached an impasse earlier. To do so would cause an unnecessary delay in due process.

Recommendation: Paragraph (b)(3) of proposed regulation §300.510 should be deleted in the final regulation.

Rationale: The statute does not require the resolution and due process timelines to be delayed until the meeting is held, if the parent fails to participate when the public agency convenes a resolution meeting. Parents are not in charge of convening the preliminary resolution meeting. If the meeting is convened at a time and/or place that creates a

hardship for the parents, the public agency will be permitted to delay due process if this paragraph is not deleted.

17. Impartial Due Process Hearing-Impartial Hearing Officer
Proposed Regulation §300.511(c)

Recommendation: The final regulation should use the requirement that a hearing officer must not have a personal or professional conflict of interest, as opposed to the requirement in proposed regulation §300.511(c) that there not be a personal or professional conflict of interest that conflicts with the person's objectivity.

Rationale: There is no mechanism for determining whether a personal or professional interest conflicts with a person's objectivity. The less subjective standard in current regulation §300.506, which relates to the impartiality of a mediator, should be applied to hearing officers. This will avoid disputes on whether a hearing officer is impartial and avoid the risk of compromising the integrity of the proceedings.

Recommendation: The final regulation for § 300.511(c)(3) should add language stating that the parents must be given a copy of the list of hearing officers and their qualifications. In the alternative, language should be added that requires the public agency to inform parents of their right to review the list.

Rationale: This information is critical to keep the process transparent and equitable. There is no point for the public agency to be required to have this list if it is not shared with the parents.

18. Impartial Due Process Hearing-Timeline for requesting a hearing
Proposed Regulation §300.511(e).

Recommendation: The final regulation for §300.511(e) should clarify what is meant by "should have known" in the proposed regulation.

Rationale: This section states that a parent or agency must request an impartial hearing on their complaint within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis for the complaint, or, if the State has an explicit time limitation, IDEA defers to the State law. The interpretation of the phrase "should have known" has critical implications for parents who may be unaware of IDEA violations for very long periods of time. Many parents cannot get information from their child because the child's disability, such as Down syndrome, includes cognitive and speech/communication delays.

Recommendation: The final regulation for §300.511(e) should only permit the use of the State time limitation for requesting a due process hearing if the time allowed by State law is longer than two years.

Rationale: IDEA sets a floor, not a ceiling, with respect to State statutes and regulations. Therefore the State statute of limitations should not be permitted to be shorter than the two year timeline in IDEA. A shorter statute of limitations would only exacerbate the inequity for parents of children with cognitive and speech/communication delays.

Recommendation: The final regulation for §300.511(e) and §300.507(a)(2) should clarify that the two year statute of limitations is tolled when the complaint is filed and can not run out while the parent is going through the process between the filing of the complaint and the due process hearing.

Rationale: IDEA 2004 adds many complex procedures and requirements in the due process provisions. Parents should not be precluded from going to due process because of the time it takes them to navigate the process, as long as the complaint is filed within two the statutory time period.

Recommendation: The final regulation for §300.511(e) should add the following language based on current regulation §300.662(c):
…unless a longer period is reasonable because the violation is continuing, or the parent is requesting compensatory services for a violation that occurred not more than three years prior to the date the due process complaint is received.

Rationale: Current regulation §300.662(c) refers to statute of limitations for State complaints. However, consistency requires that the same rules should apply for due process hearings.

19. Exceptions to Timeline
Proposed Regulation §300.511(f)

Recommendation: The final regulation should clarify that "misrepresentations" encompass misleading as well as false statements.

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

20. Hearing Decisions-Construction clause
Proposed Regulation §300.513(b)

Recommendation: The construction clause in the final regulations should also state that nothing in §300.507 through §300.513 shall be construed to affect the right of a parent to file a complaint with the SEA.

Rationale: The construction clause in Sec. 615(f)(3)(F) of the statute refers to the right to bring a State complaint.

21. Civil Action-Time limitation
Proposed Regulation §300.516(b)

Recommendation: The final regulation should state that the State time limitation for bringing civil actions under Part B of the Act can only be used if it is longer than 90 days and begins after the completion of a State review, if there is such an appeal from the hearing officer's decision at the LEA level. Also, it should be stated that the LEA must provide written notice at the end of the hearing with respect to the time limit for filing a civil action, if the parent is not represented by counsel at the due process hearing.

Rationale: IDEA sets a floor, not a ceiling, with respect to State statutes and regulations. Therefore the State statute of limitations should not be permitted to be shorter than the 90 day timeline in IDEA. Also, the parents should have a right to a state review of the hearing officer's decision, if one is available, before the time limitation starts. In addition, a situation where parents are unaware of their rights usually leads to future litigation. Therefore, the LEA must ensure that the parents are aware of the time period in which they must file for a civil action.

22. **Civil Action-Additional requirements**
Proposed Regulation §300.516(c)

Recommendation: The final regulation should provide that the court *shall* receive the records of the administrative hearing; *shall* hear additional evidence at the request of a party; and basing its decision on the preponderance of the evidence, *shall* grant the relief that the court determines to be appropriate.

Rationale: The word "shall" appears in three places in Section 615(i)(2)(C) of IDEA 2004, but does not appear in proposed regulation §300.516(c). The purpose of the regulations is to provide clarity. By leaving out critical words that appear in the statute, the regulations create confusion and misinterpretation. The word *shall* makes it clear that the duties listed in §300.516(c) are mandated.

23. Attorney's Fees-In general
Proposed Regulation §300.517(a)

Recommendation: The final regulation for §300.517(a)(1)(iii) should state that the SEA or LEA must affirmatively prove that the parent's intent was improper in order to be awarded attorney's fees under this provision.

Rationale: This provision allows the court to award attorney's fees to a prevailing SEA or LEA against the attorney of a parent or against the parent if the parent's complaint or subsequent cause of action *was presented* for an improper purpose, such as to harass, to cause unnecessary delay or to needlessly increase the cost of litigation. The words "was presented" imply that that the parents had the intent from the time the complaint or subsequent cause of action was filed to use the case for an improper purpose.

24. Child's status during proceeding
Proposed Regulation §300.518

Recommendation: The final regulations should retain §300.518(a), except that it should be clarified that any "agreement" by parents to waive the "stay put" protection must comply with the requirements for consent in §300.9.

Rationale: The right to stay put in the current placement during any proceedings under Section 615 of IDEA is a fundamental principle of this statute. It should not be subject to any exceptions that were not clearly intended by Congress. A parent's decision to waive this right has significant educational implications for his/her child and Congress could not have intended for such a decision to be made informally. Therefore, this agreement should be subject to the requirements of "consent" in §300.9.

Discipline Procedures

1. Authority of School Personnel-General
Proposed Regulation §300.530(b)

Recommendation: Proposed regulation §300.530(b)(2) should be retained in the final regulations.

Rationale: This proposed regulation ensures that the public agency will provide services during any subsequent days of removal, after the child with a disability has been removed from his/her current placement for 10 school days. The principle that there will be no cessation of services is a fundamental element of IDEA. The preamble to the proposed regulations states: "However, because it is also important to preserve the concept from current regulations that discipline not be used as a means of disconnecting a child with a disability from education, the requirement in proposed §300.530(b)(2) would provide that a child receive educational services consistent with paragraph (d) of §300.530 after the first 10 days of removal in a school year."

Recommendation: The final regulation for §300.530(b) should add the following language with respect to applying the 10 day rule to in-school suspensions: An in-school suspension is considered a day of removal unless the child has the opportunity to continue to appropriately progress in the general curriculum, continue to receive the services specified on his or her IEP, and continue to participate with non-disabled children to the extent he/she would have in the current placement.

Rationale: The requirements for educational services and manifestation determination when a removal exceeds 10 school days, make it critically important that these days are properly counted. The May 2003 GAO report indicates the need for examples with respect to applying IDEA's 10-day rule, including illustrations on how to determine whether a day of in-school suspension should be counted as a day of removal. The only Department of Education guidance on this issue appears in a 1999 *Federal Register* notice. According to this guidance, an in-school suspension is considered a day of

removal unless the child has the opportunity to continue to appropriately progress in the general curriculum, continue to receive the services specified on his or her IEP, and continue to participate with non-disabled children to the extent he/she would have in the current placement. The regulations for IDEA 2004 should reflect the criteria in this guidance.

2. Authority of School Personnel-Additional Authority
Proposed Regulation §300.530(c)

Recommendation: Proposed Regulation §300.530(c) should be retained in the final regulations.

Rationale: Proposed regulation §300.530(c) tracks the critical language in Section 615(k)(1)(C) of IDEA 2004 which states that school personnel may only apply the relevant disciplinary procedures to students with disabilities in the same manner and duration as would be applied to children without disabilities, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability. This language was also in IDEA 1997 and establishes that the school must prove that the behavior was not a manifestation of the disability, rather than placing the burden on the parents to prove that the behavior was a manifestation of the child's disability.

3. Authority of School Personnel- Services
Proposed Regulation §300.530(d)

Recommendation: The final regulation for §300.530(d)(1)(i) should clarify that the educational services to be continued in the interim placement include the educational and related services, the supplementary aids and services and the accommodations required by the child's current IEP unless the LEA can show that certain of these are not required to provide a free, appropriate public education (FAPE). Also, the LEA should provide any services required for FAPE that are not in the current IEP.

Rationale: Congressional leaders have clearly expressed that IDEA 2004 does not permit cessation of services to a child with a disability. In addition, Section 612(a)(1) of IDEA 2004 explicitly states that students with disabilities who have been suspended or expelled continue to have a right to FAPE.

Recommendation: The final regulations should delete the words "if any" from the phrase "…determine the extent to which services are needed under paragraph (d)(1), if any…" in §300.530(d)(4).

Rationale: As stated in the rationale for the preceding recommendation, Congressional leaders have clearly expressed that IDEA 2004 does not permit cessation of services to a child with a disability. Therefore, Congressional intent is undermined by the addition of the words "if any" in proposed regulation §300.530(d)(4), which otherwise is the same as current regulation §300.121(d)(3). These two words will allow school personnel to decide

that a student with a disability who has been removed from his/her current placement for 10 school days in the same school year does not require any services. This provision applies if the current removal is not more than 10 consecutive school days and is not a change in placement.

4. Authority of School Personnel-Manifestation Determination
Proposed Regulation §300.530(e)

Recommendation: The final regulation for §300.530(e) should clarify that, consistent with Section 615(k)(1)(C) of IDEA 2004 and proposed regulation §300.530(c), the same disciplinary procedures that apply to children without disabilities can only be applied to a child with a disability if it is determined that the behavior giving rise to the violation is not a manifestation of the child's disability.

Rationale: Section 615(k)(1)(C) of IDEA 2004 and proposed regulation §300.530(c) clearly state that the same disciplinary procedures that apply to children without disabilities can only be applied to a child with a disability, if the behavior giving rise to the violation is not a manifestation of the child's disability. Unfortunately, Section (k)(1)(E) of IDEA 2004 creates confusion around this significant distinction. Subsection (E) defines the standard for the manifestation determination review and should not be interpreted to override subsection (C). The final regulation for §300.530(e) must clarify that the burden of proof remains with the LEA, rather than simply restate the confusing statutory language.

LEAs argue that it is unfair to make them prove a negative - that the behavior is not a manifestation of the child's disability - before the same disciplinary procedures that apply to children without disabilities can be applied to a child with a disability. The anecdotes that LEAs raise to make their case are generally caused by poor training on how to implement the standard in a manifestation determination review and should not be permitted to justify shifting the burden of proof. It is unreasonable and unjust to put the burden of proof on parents. They do not have equal access to the facts, witnesses and experts that pertain to a disciplinary action.

Congressional leaders in both Houses have clearly stated that IDEA 2004 will not allow an LEA to punish a child for his/her disability. It follows that Congress could not have intended for the manifestation determination to hinge on whether the child's parents have the English proficiency, the education and the financial resources to acquire access to psychologists, behavioral specialists and the evidence they need to protect their child from unjust punishment. The LEA should have to affirmatively prove its case rather than running the risk of punishing a child for behavior that he/she did not understand or could not control because of his/her disability. If there is any ambiguity with respect to how Congress intended Section (k)(1)(E) of IDEA 2004 to be interpreted, it should be resolved in favor of protecting the child from unjust punishment.

Recommendation: The final regulation for §300.530(e) should clarify that the following must be considered in a manifestation determination. Also a paragraph should be added

that states, if, in the manifestation determination review, a public agency identifies deficiencies in the child's IEP or placement or in their implementation, it must take immediate steps to remedy those deficiencies.

For determining the nexus between the behavior and the disability:

- whether the child's disability impaired the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action, and
- whether the child's disability impaired the ability of the child to control the behavior subject to disciplinary action.

For determining whether an appropriate IEP was implemented:

- whether the child's placement was appropriate, and
- whether the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement.

Rationale: Equity requires that the factors to be considered in the manifestation determination review be clearly described in the final regulations. An appropriate IEP is mandated by the FAPE requirement in Section 612(a)(1) of IDEA 2004 and proposed regulation §300.17. However, this fact bears repeating in the final regulation for §300.530(e). Also, it is critically important to consider whether the placement was appropriate and whether the services and supports were consistent with the IEP and placement. In addition, the nexus between the disability and the conduct must be carefully explored. In order to make the determination that the behavior was caused by or had a direct and substantial relationship to the child's disability, it must be shown that the child's disability did not impair his/her ability to understand the impact or consequences of the behavior or to control the behavior. These considerations are consistent with the Conference report, which states that there should be more than an attenuated association between the behavior and the disability. If there are problems discovered with the IEP or placement or in their implementation, the regulations should be clear that these deficiencies must be addressed.

5. Authority of School Personnel-Determination that the behavior was a manifestation
Proposed Regulation §300.530(f)

Recommendation: The final regulation for §300.530(f)(2) should clarify that any agreement between the parent and the LEA to change a child's placement as part of the modification of the behavioral intervention plan must conform to the rules for consent in §300.9.

Rationale: Placement is too important an issue to be done in an informal "agreement." It must be ensured that the parent is in a position to make a fully informed decision and that the decision is documented.

6. Authority of School Personnel-Definitions
Proposed Regulation §300.530(i)

Recommendation: The final regulation for §300.530(i)(3) should reprint the definition of serious bodily harm from paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.

Rationale: The addition of "infliction of serious bodily injury upon another person" as a special circumstance under Section 615 (k)(1)(G) of IDEA 2004 is a significant change in the law. Parents and school personnel need easy access to the definition of this new category under special circumstances. Looking for this definition in the IDEA regulations would be a simpler process than looking for it in an unfamiliar statute. The full definition is restated in the preamble but not in the proposed regulations.

7. Appeal-Authority of Hearing Officer
Proposed Regulation §300.532(b)

Recommendation*:* The final regulation for §300.532(b)(2)(ii) should incorporate language from current regulation §300.521 as follows:

> (ii) Order a change in the placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer, in an expedited due process hearing---
>
> > (A) Determines that the public agency has demonstrated by substantial evidence that maintaining the current placement of the child is substantially likely to result in injury to the child or to others;
> > (B) Considers the appropriateness of the child's current placement;
> > (C) Considers whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and
> > (D) Determines that the interim alternative educational setting that is proposed by school personnel who have consulted with the child's special education teacher meets the requirements of §300.530(d).
> > (E) As used in this section, the term substantial evidence means beyond a preponderance of the evidence.

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

that the standard continues to be substantial evidence, which is defined in IDEA 1997 as beyond a preponderance of the evidence.

It is also critically important for the hearing officer to consider whether the original placement was appropriate and whether the LEA has made reasonable efforts to minimize the risk of harm. Without considering these factors, how can it be determined that injury to the child or others is substantially likely to occur? All that may be required is a move to a less restrictive setting and/or the use of supplementary aids and services to minimize the risk of harm. IDEA 2004 continues to require placement in the least restrictive environment; therefore, unilateral removal by a hearing officer to an alternative educational setting should be a last resort *after* the LEA has made reasonable efforts to minimize the risk of harm and these efforts have failed to resolve the danger.

8. Appeal-Expedited hearing
Proposed Regulation §300.532(c)

Recommendation: The final regulation for §300.532 should delete paragraph (c)(3).

Rationale: IDEA 2004 does not require a resolution session as part of an expedited hearing. This proposed regulation does more than clarify the statute. It places a brand new burden on parents by inserting the requirement for a resolution session into the expedited hearing process for disciplinary actions. As stated in §300.510(a)(2), the resolution session is supposed to be a mechanism for the public agency to resolve an issue that they did not have a prior opportunity to resolve. Since the LEA is involved in the decisions that would be appealed in an expedited hearing; there is no need for a resolution session.

9. Change of Placement Because of Disciplinary Removals
Proposed Regulation §300.536(b)(2)

Recommendation: Paragraph (b)(2) should be deleted from the final regulation for §300.536.

Rationale: Paragraph (b)(2) adds the following new requirement for determining whether a change of placement occurs for purposes of the discipline provisions:

> (2) Because 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 Sec. 300.530(f), to have been a manifestation of the child's disability;

There are already many diverse interpretations for this provision. Regulatory language should engender clarity, not confusion. One possible interpretation of this paragraph is that in order for a change of placement to occur, the current behavior, taken cumulatively with the behavior in the other incidents, must first be determined to have been a manifestation of the child’s disability. This does not follow the sequence required by

IDEA 2004 and proposed regulation §300.530(e), which only permits a manifestation determination review after a change in placement has occurred.

In addition, there is no statutory explanation for predicating a "pattern of removal" on substantially similar behaviors. Many students manifest numerous different types of behaviors as a result of their disability and this should not be a factor in determining whether there has been a pattern of removal. The pattern of removal language in current regulation §300.519 recognizes that the length of each removal, the total time removed and the proximity of removals are the relevant factors because they have a cumulatively significant effect on a child's education that amounts to a change in placement. The similarity of the behavior in the removals is not relevant for this purpose.

SUBPART F-MONITORING, ENFORCEMENT, CONFIDENTIALITY AND PROGRAM INFORMATION

Monitoring, Technical Assistance, and Enforcement

1. State Monitoring and Enforcement
Proposed Regulation §300.600

Recommendation: The final regulation for §300.600(a) should include a requirement for each State to have a State Monitoring Stakeholder Advisory Committee (SMSAC) to advise the State on monitoring and enforcement activities. The SMSAC must include at a minimum, representatives of: the State Parent Training Center(s), Protection and Advocacy Agency; and parent, disability, and educator organizations. The SMSAC should provide advice on the development of the State: performance goals and performance indicators described in §300.157; performance plan described in §300.601(a)(1); the measurable and rigorous targets described in §300.601(a)(3); annual state performance report described in §300.602(b)(2); improvement plan described in §300.604(b)(1)(i); and other monitoring, improvement and enforcement activities as requested by the State.

Rationale: The monitoring stakeholder advisory committees used in the current OSEP Continuous Improvement Focused Monitoring System (CIFMS) are a very important aspect of improved state monitoring. The collaborative opportunity to work together in analyzing performance data, and advising the state on improvement strategies based on that analysis, has lead to a better focus on student performance and to improved results. It is important to clarify in the final regulations that these committees will continue.

2. State Use of Targets and Reporting
Proposed Regulation §300.602

Recommendation: The final regulation for §300.602 (b)(1)(A) should require each LEA to work with an LEA Monitoring Stakeholder Advisory Committee (LMSAC) to advise the LEA in analyzing and reporting their performance on the targets in the State's performance plan and in developing improvement plans for the LEA. At a minimum, the LMSAC should include representatives of parent, disability, and educator organizations.

Rationale: The state monitoring stakeholder advisory committees used in the current OSEP Continuous Improvement Focused Monitoring System (CIFMS) are a very important aspect of improved state monitoring. The collaborative opportunity to work together in analyzing performance data, and advising the state on improvement strategies based on that analysis, has lead to a better focus on student performance and to improved results. The benefits of working with a stakeholder advisory group are important to extend to the LEAs in implementing the new statutory monitoring requirements.

Recommendation: The final regulation for §300.602 (b) should state that the public report on the LEAs, the State performance plan and the data included in the LEA report and State plan must be in language that is accessible to and understandable by all stakeholders.

Rationale: IDEA 2004 stresses the importance of making the report on the LEAs and the performance plan available through various public means, including posting on the SEA website. This public reporting is meaningless if these documents are not developed using language and data charts that all stakeholders can understand.