NAPAS **NATIONAL ASSOCIATION OF PROTECTION & ADVOCACY SYSTEMS**

Summary of Key Issues/Talking Points
regarding the
U.S. Department of Education's Draft Regulations
34 C.F.R. Sections 300, 301 and 304

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1. Individual Education Plans:

a."Special Factors:" (current§300.346(b); draft §300.324) The current regulations require that "special factors" be considered when initially designing an IEP and when revising an IEP. The draft regulations do not require consideration of special factors when revising IEPs. Specifically, the regulations no longer require schools to consider: if behavior impedes learning, English proficiency needs, Braille instruction, communication needs for a deaf or hard of hearing child, and assistive technology needs.

Response: In order to meet the needs of students and to provide FAPE, it is essential that these factors be considered at least at the initial meeting and during the annual review meetings. The most important factor to consider each time is whether the student's behavior impedes learning because this factor is the one most likely to be in flux over time. Although the regulations do not forbid or otherwise prohibit consideration of these factors, LEAs are no longer required to consider them.

b. Use of Interpreters: (current §300.345(e); draft §300.322). The draft regulations remove the requirement that LEAs take whatever action is necessary to ensure that parents understand the IEP proceedings including the use of an interpreter for parents who are deaf or whose native language is not English.

Response: The 1983 Regulations in §300.345(e) require agencies to take necessary action to ensure interpreter services. IDEA 2004 prohibits regulations that "lessen" students' protections contained in the 1983 regulations. 607(b)(2). Although the Department states it is removing this provision because other federal statutes such as Section 504, the ADA and the Civil Rights Act of 1964 require interpreter services, since the 1983 regulations include this provision the new regulations should as well. Retaining the provision in this statute

clarifies how these other Civil Rights requirements apply in the IEP process, which is not specifically set out in these other laws. Without such clarification the issue becomes ripe for misinterpretation and litigation. Further, a parent is entitled to meaningful participation in the IEP process. Certainly, a parent cannot meaningfully participate in a meeting if they are not provided with the basic tools to communicate and understand the proceedings.

2. Specific Learning Disability (Draft §300.307-310):

The regulations regarding SLD are very confusing. But it seems clear that the Department's approach will mean that LEAs can indefinitely delay completing the evaluations of students with suspected specific learning disabilities. Only after all of the steps set out in Section 300.309(b) have been concluded (there is data that demonstrates that appropriate, high-quality research-based instruction was delivered by qualified personnel; data regarding repeated assessments of achievement at reasonable intervals during instruction have been provided to the parents; and the student has not made "adequate progress") does the evaluation officially begin and the 60 day timeline begin to run.

Response: Unless a specific timeline is required students' evaluations could be indefinitely delayed. This is inconsistent with the IDEA 2004's directive that children with disabilities must be "identified, located, and evaluated." The regulation should state that all evaluations, including evaluations for specific learning disabilities, must be completed within 60 days of the parents' consent to the evaluation. If there are circumstances that justify a longer period then 60-days (e.g. due to the nature of the research-based intervention process), parental waivers or extensions would be possible. But in the absence of a specific timeline, there is no way to ensure that children with suspected SLD are properly and timely evaluated and provided services.

3. Qualified Personnel: (current 300.136(a); draft §300.156)

Deletes the requirement that, *inter alia*, related services personnel meet the highest State standard applicable to their profession (current §300.136) in favor of "are consistent with any State-approved or State-recognized certification…." (300.156(b)(1)).

Response: This may permit states to create new categories of "related services" personnel with credentials that are less than what is generally required for the profession. So, for example, a state may require a physical therapist to have a Masters level degree and several years of training. Under the current regulations, physical therapists who provide PT in the schools must have similar credentials. If this change takes place, a state can create a new certification – with fewer requirements – for "school physical therapists." As the comments note, states have had difficult securing a sufficient number of adequately qualified personnel to meet the FAPE requirements for all students. But the answer cannot be to lower the credentials; there is no principled justification for assuming that a PT in the school needs any less education or training than a PT in another setting.

4. State Complaint Process: (current 300.660, *et seq.*, draft §300.151)

a. Complaints: The draft regulations delete the current provision that complaints that request compensatory education can go back 3 years (300.662(c)).

The draft regulations delete the current provision that a parent may use complaint procedures for longer periods if it is an "on-going" violation (300.662(c)).

The draft regulations delete the current provision that permits a parent to file a complaint alleging an LEA's failure to implement a hearing decision (300.661(c)(3)). DOE's reason is that enforcement of hearing officers' decisions is in province of the state and federal courts.

b. Mediation Agreements (current §300.506; draft §300.506(b)(7))

Draft regulations state that mediation agreements are enforceable in state and federal court. The agreements should also be enforceable through the State complaint process.

c. Resolution Meeting Agreements: (draft §300.510(c)) The draft regulations state that agreements made at resolution meetings must be put in writing, are binding and enforceable in state and federal court. The agreements should also be enforceable through the State complaint process.

Response: A State's complaint management system is the most "user friendly" and least costly mechanism by which IDEA violations can be corrected by families. The only other recourse is either to the hearing process or to courts. The regulations should support and expand this system's jurisdiction and its use – but the regulators have taken the opposite approach. This serves neither the interests of LEAs nor of parents, and is inconsistent with the expressed intent of Congress and the regulators to reduce costly adversarial proceedings.

A parent should be permitted to bring a State complaint for at least as long as permitted to bring a due process complaint (2 years is the federal standard); otherwise the regulations merely encourage litigation. Further, failure to permit the States to enforce a Hearing Officer's Decision or Settlement Agreement also encourages litigation because it is the only avenue for relief. Parents are also at a distinct disadvantage, as they may not have the resources to file in state or federal court and hire a lawyer, but could file a state complaint without the assistance of a lawyer.

5. Discipline (current 300.519-300.526, draft 300.530-300.536):

The discipline regulations present many concerning issues; however, the most troubling is a new provision that was not even contemplated when the statute was finalized. The proposed regulations contain a new definition of the phrase "change in placement" in the discipline context which dramatically reduces LEAs' duty to provide educational services

to children who have been excluded from school for more than 10 non-consecutive school days in a school year. This opens students' up for the type of serial suspensions they encountered before the 1997 statutory amendments and the 1999 regulations filled this gap.

In the current regulations a change of placement occurs if: a student has been removed from school for more then 10 days in a row, or if the removals constitute a pattern because they cumulate to more then 10 school days in the school year and because of factors such as the length of removal, total amount of time child is removed, and the proximity of the removals to one another. This definition covers whenever a student is removed from school for a single long period or for repeated short periods within the school year.

The draft regulations define "change in placement" in 300.536 as a removal for more than 10 consecutive school days OR a pattern of removals because the series of removals total more then 10 school days; and the behavior is substantially similar to the behavior in the other incidents that resulted in removal and taken cumulatively is determined to be a manifestation of the child's disability; and because of additional factors such as length of each removal, total amount of time removed, and the proximity of removals to one another.

If a child is not suspended or expelled for more than 10 school days in a row,and if the school exclusion does not constitute a "change in placement" under the new standard, school staff (not the IEP team) can determine whether or not they will provide services to the student, and can do so without parental input.

Response: IDEA 2004 specifically states at §615(k)(1)(C) and (D) that once a child is removed from school for more than 10 school days, even if the behavior was NOT a result of the disability, the child will continue to receive special education services and related services. IDEA 2004 states that even if the child is expelled due to behavior unrelated to his or her disability the student will continue to receive special education services. The draft regulations do not guarantee services to all students who are excluded for more than 10 school days. Therefore, the regulations are inconsistent with the statute rendering them invalid and in need of revision. Further, the regulatory language changing the meaning of "change in placement" evades the congressional intent to ensure students with disabilities continually receive services.

The consequence of this provision is that students could be repeatedly suspended or otherwise removed from school for up to 9 days consistently throughout the school year without receiving services or supports during any of this time unless all of the factors in the new definition are present.