



COUNCIL OF CHIEF STATE SCHOOL OFFICERS

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Mr. Troy R. Justesen
Deputy Assistant Secretary for
Special Education and Rehabilitative Services
U.S. Department of Education
400 Maryland Avenue, S.W.
Potomac Center Plaza, Room 5126
Washington, D.C. 20202-2641

Dear Mr. Justesen:

The Council of Chief State School Officers (CCSSO) thanks you and the officers and employees of the U.S. Department of Education for this opportunity to comment on proposed regulations to implement amendments to Part B of the Individuals with Disabilities Education Act (IDEA) enacted by the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA). We also thank you for the hard work and thought that have gone into these proposed regulations. These comments are submitted on behalf of the Council. They reflect broad involvement and input from our Special Education Task Force, our State Collaborative on Assessment and Student Standards (particularly on assessing special education students), and staff of the Council.

General Comment

CCSSO embraces the principle that every child, including every child with disabilities, should have the opportunity to achieve to high educational standards. We and our members are committed to dramatically improving educational outcomes for students with disabilities. We also recognize that IDEA is in large measure a civil rights law that includes important protections for students with disabilities and that IDEA has been critical in effecting a national sea-change in assuring educational opportunities for students with disabilities.

At the same time, while there are many positive provisions in the IDEIA, the law has become increasingly complex and prescriptive. We cannot overstate our concerns as to the administrative burdens on State educational agencies (SEAs) and local educational agencies (LEAs). CCSSO submits that the U.S. Department of Education (ED) needs to provide flexibility and reduce burden to the maximum extent possible in issuing regulations for Part B of the IDEA so that States and LEAs have a range of options for improving educational outcomes for these students. While a central purpose of the law is to integrate students with disabilities with their peers in the educational mainstream, the law may inadvertently hamper that goal by in effect creating a

separate, highly complex regime for the education of students with disabilities. In doing so, IDEA presents some special challenges for States that are seeking better ways to ensure that the education of students with disabilities is an integral responsibility of all of their general education staff and to ensure that the needs of students with disabilities are addressed as an integral component of addressing the needs of all students in formulating and implementing policy by educational agencies. These concerns cannot be fully addressed in the context of this regulatory exercise, but they merit continuing thought and discussion, and they underscore the need to provide flexibility and reduce burden to the extent possible in issuing these regulations.

Highly Qualified Teachers (HQT) – Proposed sections 300.156 & 300.18

Neither the Act nor the proposed regulations provide sufficient flexibility to meet the realities faced by States and LEAs in trying to cope with a shortage of special education teachers and the fact that a significant proportion of special education teachers need unique skills to work with students with disabilities. By layering content knowledge requirements derived from the No Child Left Behind Act (NCLB) on top of requirements for special education certification for special education teachers who teach core academic subjects, the law and proposed regulations risk exacerbating these problems. CCSSO embraces the principles that teachers of students with disabilities should be highly qualified and that most students with disabilities should be held to grade-level standards. However, whether due to their specific disabilities or to lower past expectations, many students with disabilities are not close to learning at that level at the current time. Almost all of these students need to be moved forward on a trajectory to reach grade-level standards. CCSSO submits that this goal can best be accomplished by ensuring that these students are instructed by teachers who are expert in special education and highly qualified to work with and develop these students starting at the instructional level where they are found. .

While the primary challenge is with the IDEIA, the Council recommends the following changes to the proposed regulations:

- Add provisions that States may have separate, integrated HOUSSE procedures for special education teachers that balance content knowledge and skills in working with students with disabilities;
- Clarify that the flexibility for teachers teaching students assessed against alternate achievement standards includes students assessed against "modified" achievement standards, consistent with ED's flexibility initiative for accountability under the No Child Left Behind Act;
- Interpret the statutory alternative for multi-subject new teachers to be highly qualified in math, language arts, or science to apply to social sciences as well as the natural sciences. Nothing in the law limits "science" to the natural sciences;
- Capacity in the range of these subjects (math, language arts, and science) lends itself to establishing appropriate entry level expectations for new elementary school teachers, and it is clear from the statutory context that Congress intended these provisions for multi-subject teachers to apply at the elementary level as well as the secondary level. However, it is unclear how these provisions apply to elementary school teachers. In many States, college students preparing to become elementary school teachers major in elementary education, not a specific subject. Thus, requiring a major in these subjects would in effect abrogate the flexibility provided by this statutory provision for elementary school

teachers. CCSSO recommends that the final regulations include provisions that permit special education teachers of core academic subjects at the elementary level to be highly qualified, for purposes of these provisions, if they major in elementary education and have course work in math, language arts, and science;

- Do not expand highly qualified teacher requirements to pre-elementary teachers. Such regulations would exceed the law and exacerbate the problems caused by a shortage of special education teachers;
- Some States certify their special education teachers as regular education teachers but require them to have an endorsement as special education teachers. The regulations should clarify that this meets the requirements for a special education teacher in the IDEA;
- Clarify that the fact that a special education teacher is not highly qualified is not a denial of FAPE to that teacher's students with disabilities; and
- Clarify in the regulations or in guidance the types of special education teachers who do not directly teach core academic subjects and are therefore not required to meet NCLB requirements for content knowledge, consistent with conference committee report language.

HQT and Private School Students – Sections 300.138, 300.156 & 300.18

Citing provisions in NCLB, the proposed regulations provide that the highly qualified teacher requirements do not apply to teachers hired by private schools, including teachers who provide FAPE to students placed in the school by a public agency. By contrast, with respect to students placed by their parents in private schools, the proposed regulations provide that personnel providing equitable services to these students must meet the same standards that apply to personnel providing services in the public schools, in effect making the highly qualified teacher requirements applicable. It is anomalous as a policy matter to have higher standards for teachers merely providing limited equitable services for parentally placed private school students than for teachers responsible for providing FAPE in a private school.

CCSSO recommends that the final regulations confer discretion on each State to determine whether and to what extent the highly qualified teacher requirements should apply to both categories of teachers who serve private school students. The SEA is in the best position to weigh the needs of private school students for highly qualified teachers and to assess what effect these requirements would have on the shortage of special education teachers in the State. Alternatively, if ED is not prepared to permit States the discretion to apply these requirements to private school teachers, we recommend that ED revise the proposed regulations to give States discretion over whether the requirements apply to teachers providing equitable services to students placed by their parents in a private school.

Although we recognize the technical legal arguments for the distinction that ED has drawn, the law is very ambiguous, standing alone and when read in conjunction with the Elementary and Secondary Education Act (ESEA). It is difficult to read it to apply the highly qualified teacher requirements to teachers who provide equitable services in private schools, but not teachers who provide FAPE in those schools. Section 612 (a)(14) of IDEA provides that "each person employed as a special education teacher in the State who teaches elementary school, middle

school, or secondary school is highly qualified by the deadline established in . . ." section 1119 of the ESEA. It does not distinguish public from private school teachers. On the other hand, the definition of "Highly Qualified" in section 602 (10), with respect to special education teachers, refers to "public elementary school or secondary school special education teacher[s]." Likewise, provisions in Sections 1119 and 9101 of ESEA refer to public school teachers. Although teachers who provide equitable services in private schools are subject to public supervision and control, they are not public school teachers. They neither teach in a public school nor teach public school students. In sum, the law is ambiguous and does not appear to support the distinction that appears to be drawn in the proposed regulations. We believe this gives ED room to revise the proposed regulations to vest discretion in the States to determine to what extent the highly qualified teacher requirements should apply to special education teachers serving private school students.

Data Burdens and Monitoring – Sections 300.600-603; 300.640-646

The IDEIA expands the burden on States and LEAs in collecting and reporting data and using that data for monitoring purposes. In addition to annual data reports previously required, which have not changed substantially, the States are now required to prepare a performance plan within one year of enactment of the IDEIA and, based on that plan, to prepare annual performance reports for the public and ED. The law requires ED to monitor States and States to monitor LEAs using quantifiable indicators in each of the priority areas of providing FAPE in the least restrictive environment; State exercise of general supervisory authority, including child find, effective monitoring, use of resolution sessions, mediation, arbitration, and transition services (for ED monitoring of State); and disproportionate representation of racial and ethnic groups in special education.

While these matters are important, CCSSO has concerns about the burdens these requirements will place on SEAs, many of which have very limited staff to implement the IDEA. In addition, although the law includes a statement that the primary focus of federal and state monitoring shall be on improving educational results and functional outcomes for all children with disabilities, the required priority areas for indicators are generally about inputs, process, and whether certain procedural rights for students with disabilities are met, not about educational results. In that respect, IDEA as amended is misaligned with NCLB, which principally holds schools, school districts, and States accountable for the academic achievement of their students, not for meeting specific substantive and procedural requirements in the law. Indeed, under IDEIA, a primary focus of ED monitoring of the State – and therefore of indicators that the State will have to report on – is on the State's exercise of its oversight role for specific procedural requirements. Most of these problems inhere in the law itself rather than the proposed regulations. However, CCSSO has several recommendations for changes in the regulations and for their implementation to try to mitigate these problems:

- The proposed regulations provide that ED will establish the indicators for the performance plans and performance reports and that the States must collect data on each of the indicators. This reflects a one-size-fits-all approach to program implementation and accountability that has proved problematic under NCLB. It intrudes on the prerogatives of the States in determining how to measure performance in light of the issues and problems faced within each State. Nothing in the statute requires that the Secretary

establish uniform indicators to be used by all the States for monitoring and for measuring performance by LEAs. Under the Act, ED would have authority to establish its own indicators for evaluating the States, but it should do so in a manner that is collaborative and that permits variations by State. Also, ED would have an opportunity to review the State's indicators for LEA review incident to its authority to approve the State's performance plan. However, we believe it is inappropriate for ED to prescribe a uniform set of indicators for every State and LEA. Indeed, the preamble to the proposed regulations states that notes 253 through 258 of the Conference Report indicate that State performance plans, indicators, and targets are to be developed with broad stakeholder input. This reflects congressional intent that each State would have a role in developing the indicators and targets that will be used in measuring its performance.

- Consistent with language in the IDEA, the performance reports should focus on educational outcomes for students with disabilities. This means that indicators, targets, and data collection on other measures should be kept to a minimum and that a substantial part of the annual performance report should consist of cross-references or links to the State report card and local report cards under NCLB with regard to the academic performance of students with disabilities.
- Development of the performance plan, and then of the annual performance reports, involves major, complex policy and data system undertakings. Many States will require significant upgrades and revisions to their data systems to meet the expansive data collection and reporting requirements. Caps on State administrative funds will make it difficult for the States to pay for these changes from federal funds. It will be an extreme challenge to implement these data requirements in the next year. Also, ED cannot reasonably expect that States will have performance plans in place this December, virtually contemporaneous with ED's planned issuance of final regulations governing these plans. Nor can ED reasonably expect that it will issue or negotiate indicators for the plans without substantial lead-time for their review and appropriate incorporation in performance plans. We note also that it has been 8 years since OMB issued guidelines on data collection, involving the reporting of data on multi-racial and ethnic individuals. USED has not yet issued guidance on the OMB guidelines. States need this guidance well before making data system changes called for under IDEA, or they will face the prospect of having to make unnecessary, successive, and costly changes in their data systems. Accordingly, ED needs to exercise its transitional authority under Section 303 of the IDEIA – and it should do so in the final regulations – to give States, at a minimum, one additional year to develop their initial performance plans, and a year after that plan is developed for their initial annual performance reports.
- CCSSO supports provisions in the proposed regulations indicating that some of the valid and reliable information provided in the annual performance report may be gathered on a sampling basis or in monitoring of individual LEAs by the State, and suggesting that the data need not be collected each year from each LEA. These points are vital to mitigate the data burdens described above and should be clarified in the final regulations.
- CCSSO also supports discrete reductions in data burden in the law and proposed regulations that involve revising the State application to consist essentially of assurances rather than narrative information; eliminating provisions for documentation to be provided to ED in a number of areas; and authorizing paperwork waivers for up to 15 States.

Enforcement – Proposed Sections 300.603-300.609

Although CCSSO recognizes that the enforcement provisions in the proposed regulations reflect the statute, we wish to note our general concerns about these provisions. The Act includes detailed provisions for the approval or disapproval of performance plans and for taking various interventions against a State by ED. Based on a review of the report and other information, the U.S. Secretary of Education determines if the State meets Part B requirements; needs assistance in meeting the requirements; needs intervention; or needs substantial intervention. The Act lays out a series of optional enforcement measures for these categories, including possible withholding of funds and referral to the Department of Justice for enforcement action. The tone and substance of the monitoring and enforcement provisions are overly prescriptive and negative. They are unnecessary because generally applicable enforcement provisions applicable to all elementary and secondary education programs already exist in the General Education Provisions Act.

Services to Parentally Placed Private School Students – Sections 300.131-300.132

CCSSO does not dispute the interpretation in the proposed regulations that the IDEIA has changed IDEA provisions on the responsibility to find and equitably serve with Part B, IDEA funds students with disabilities placed by their parents in private schools, so that this responsibility now applies to students enrolled in private schools located in the district served by the LEA, not to students based on their residence. Part B funds are sub-allocated to LEAs in large part based on enrollments of students in schools in the district, so the new basis for determining equitable services should not cause funding distortions as between districts within the same State. However, CCSSO is concerned that States receive no funds under IDEA based on students who do not reside in the State, but are now responsible for finding and serving these students with their IDEA funds if they attend a private school in the State. (By contrast, for States that lose special education students to private schools in other States, the new provisions may create a financial windfall.) We do not know the extent of the financial impact, and we recommend that ED defer implementation of this change and provide States interim flexibility in this area under its transitional authority until it has studied the financial scope of this unfunded mandate on the States. If it is substantial, special appropriations earmarked for these services may be needed.

Proposed section 300.132(b) provides that it is the SEA's responsibility to develop and implement a services plan for each parentally placed private school student designated to receive Part B services. This provision needs to be revised to provide that this is a responsibility of LEAs, not the SEA.

Discipline – Proposed Sections 300.530-300.536

CCSSO is concerned that the statute did not do more to simplify discipline procedures for students with disabilities who engage in misconduct. We support the obligations to continue educational services for students with disabilities who are removed from their class for misconduct, but believe that Congress, in light of those obligations, should have further deregulated the procedures in this area. Recognizing the historical bases justifying protections in

this area, we believe a better balance could have been struck between the rights of students with disabilities who engage in misconduct and the rights of other students, including students with disabilities, who may be threatened or at least have their educational program disrupted by misconduct. CCSSO supports efforts in the proposed regulations to provide at least some flexibility for appropriate short-term removals, by clarifying that the general authority to remove a student with disabilities is for up to 10 "consecutive" days, so as not to preclude subsequent short-term removals in the same school year, apart from removals that are deemed changes in placement. We also support statutory and proposed regulatory changes that would place less burden on the LEA in determining whether misconduct is the manifestation of the student's disability and would extend the time and bases for longer term removals.

Litigation Problems -- Various Proposed Provisions

CCSSO continues to have concerns about prospects for substantial litigation and the diversion of resources from administration of educational programs to legal costs under the IDEA. However, we support provisions of IDEA, as implemented in the proposed regulations, that would help to deter particularly unreasonable litigation and otherwise reduce legal costs. These provisions include:

- Requiring an informal resolution session prior to formal due process proceedings (which should facilitate settlements);
- Precluding attorney fees related to resolution sessions and IEP meetings;
- Providing for a two-year statute of limitations for due process complaints;
- Providing for court award of attorney fees against the parent's attorney to the State or LEA if they are the prevailing party and the complaint was (or became) frivolous, or without foundation, or against the parent or parent's attorney if the complaint was presented for any improper purpose, such as to harass or needlessly increase the cost of litigation;
- Denying attorney fees to parents who fail to accept a timely written offer of settlement within 10 days if the ultimate resolution of the complaint is found to be no more favorable to the complainant than the rejected settlement;
- Prohibiting the party requesting a due process hearing from raising issues not raised in the due process request notice, absent agreement by the other party;
- Broadening the circumstances in which mediation may be requested; and
- Providing that a parent does not have a legal cause of action based on the highly qualified teacher requirements

Due Process Complaints – Proposed Section 300.500 et seq.

The law includes timing provisions on due process complaints that appear to be at cross-purposes. A response that a complaint is insufficient must be filed within 15 days of receipt of the complaint, and that issue must be resolved within 5 days, but a substantive response (if the LEA had not previously sent a notice on the subject of the complaint) must be filed sooner – within 10 days of receipt of the complaint. Also, a resolution meeting to seek informal settlement must be held within 15 days of receipt of the complaint, which would be on the last day that a decision could be made on the issue of the sufficiency of the complaint. The proposed regulations incorporate these provisions.

It makes no sense to require a substantive response to a due process complaint before the deadline for a response that the complaint is insufficient and having that issue resolved. Also, requiring these responses at the same time that a resolution meeting must be held may compromise the purpose of the resolution meeting to foster settlements. ED needs to interpret these provisions in a way that permits the procedures to be implemented in a linear and sensible way.

Early Intervening Services – Proposed section 300.226

CCSSO welcomes the opportunity for the more flexible use of IDEA Part B funds to provide early intervening services for children, thus, hopefully, preventing the need for special education services among many children. We agree that improved instruction in general education and the delivery of early intervening services in general education classrooms are critical to reducing the need for special education services and to serving students with disabilities in more inclusive settings.

SEAs have special interests in the extent to which LEAs provide early intervening services, particularly in connection with the role of the SEA to monitor disproportionality by race and ethnicity of identifications and placements of students in special education. CCSSO accordingly recommends that section 300.226 of the proposed regulations be amended to provide that decisions by LEAs to use funds under Part B of IDEA for early intervening services be made consistent with State policy and in consultation with the SEA.

Efficiency/Discretion – Various Provisions

The IDEA and proposed regulations make a number of changes that eliminate unnecessary steps, vest greater discretion in the States or LEAs, or otherwise promote common sense in administering the law. CCSSO supports these changes, which include:

- Prohibiting more than one reevaluation of a student with disabilities in a single year, unless the LEA and parent agree;
- Permitting LEAs to dispense with triennial evaluations when the parents and LEA agree this is not necessary;
- Permitting a member of the IEP team to be absent from an IEP meeting if the parent and LEA agree in writing the member's attendance is not needed;
- Eliminating the need to include in the IEP's statement of annual measurable goals for the student (other than students assessed against alternate achievement standards) benchmarks and short-term objectives;
- Permitting the parent and LEA to agree – where changes in an IEP are needed after the annual IEP meeting – to forego a meeting and simply amend the written IEP;
- Reducing the number of times that a notice of procedural safeguards must be given to parents of children with disabilities; and
- Making the creation of a high cost pool optional for each State.

CCSSO also supports provisions in the proposed regulations that would –

- Require that States adopt criteria for determining whether a child has a specific learning disability. Under these provisions, a State may not require, but may prohibit, that LEAs use criteria based on a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability. The proposed regulation also requires that the State permit use of a process that determines if the child responds to scientific, research-based intervention. States could also use alternative procedures to determine if a child has a specific learning disability; and
- Eliminate requirements for follow-up contacts with other responsible agencies in connection with transition services for students who are 16 through 21 years old.

These revisions in the statute and regulations are generally a step forward in eliminating unnecessary steps and giving LEAs and States appropriate latitude in administering the law.

Thank you again for the opportunity to comment on the proposed regulations. We appreciate the Department effort that has gone into their preparation, and we look forward to continuing to work with you on the implementation of the IDEIA and on the full range of national elementary and secondary educational issues.

Sincerely,

A handwritten signature in cursive script that reads "G. Thomas Houlihan".

G. Thomas Houlihan
Executive Director