



## *National Association of State Directors of Special Education, Inc.*

*1800 Diagonal Road, Suite 320, Alexandria, VA 22314*

*Tel: 703/519-3800 \$ Fax: 703/519-3808 \$ TDD: 703/519-7008 \$ www.nasdse.org*

February 28, 2005

TO: Office of Special Education and Rehabilitative Services (OSERS)

FROM: Bill East, Executive Director

RE: Comments on Regulations for the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)

---

On behalf of The National Association of State Directors of Special Education (NASDSE), we thank you for this opportunity to provide comments to OSERS as you begin to develop regulations to implement the IDEIA. Our comments will be brief because our members, the state directors of special education, have asked that we emphasize the importance of providing streamlined regulations that regulate only where the law is not clear. It is of critical importance to the states that OSERS allow the states maximum flexibility to implement the new law. Because state education agencies operate so differently, have different state laws and regulations that affect their individual implementation of the law, our members have overwhelmingly asked us to convey their concern that the regulations do not “over-regulate.”

Refraining from over-regulating is even more critical in light of provisions of IDEIA that are designed to align the new law with the No Child Left Behind Act (NCLB). The U.S. Department of Education has urged the states to individualize their implementation of NCLB in such areas as standards, assessments and their development of high, objective uniform state systems of evaluation (HOUSSE). Each of these areas also are addressed in the IDEIA. Without maximum flexibility to implement the IDEIA, states will face difficulty in aligning these two laws at both the state and local levels.

We urge you to bear in mind that while all states have responsibility for implementing all aspects of the law, the number of people available to do so varies considerably from state to state. Small states have small staffs – some as small as four or five individuals – to implement the entire law. By reducing the amount of federal regulations and providing flexibility to the states, you will be allowing them to implement the law in a manner consistent with their state needs. In no way will this affect the overall implementation of the law because all states will remain bound by the monitoring and enforcement provisions of Section 616, provisions that will ensure state and local compliance. All states want the same outcomes – maximum educational outcomes for students with disabilities. IDEIA is a law built on the premise of individualization. To individualize student educational programs requires flexibility and that flexibility must extend to the state education agencies that are charged with ensuring positive outcomes for students with disabilities.

In addition, we believe that OSERS has an optimum opportunity to review the implementing regulations from IDEA '97 and delete those that conflict with the new law, are overly prescriptive, or impede the ability of states to implement the law consistent with their individual needs.

With the above concern in mind, the NASDSE Board of Directors has identified the following areas of the law that it believes require greater clarification:

## 1. Overarching comments

- Define “days.” The law contains numerous timeframes within which certain tasks need to be accomplished. However, “days” is rarely defined. The regulations should clearly state whether the number of days refers to “school days,” “business days” or “calendar days.” In doing so, the regulations should take into account summer holidays when school personnel may not be available, especially in small school districts.
- Clarify when “complaint” means “complaint” (as traditionally defined in regulations but not by law) and when it actually is referring to matters subject to a due process hearing.
- In the OSERS regional meetings and in comments that we understand have been submitted by others, we have heard of numerous requests that the regulations require states to keep in place their regulations that were enacted to comply with IDEA '97, even if those regulations are no longer required by the new law. NASDSE adamantly opposes such a requirement. States should be required to adjust their laws and regulations to ensure compliance with the new law, but under no circumstances should they be required to retain provisions that are no longer required by the IDEIA. Of course, as always, states have permissive authority to have laws and regulations that are more stringent than the federal law, but this should never be mandated by federal law or regulations.

## 2. Highly Qualified Teachers (HQT) – Section 602(10)

- NASDSE’s members remain deeply concerned about the ability to recruit and retain special education teachers who will be able to comply with the requirements of this section. Because of the lack of clarity in this section of the law, NASDSE suggests that the regulations include the following report language that clarifies the definition of highly qualified as it pertains to special education teachers working in a consultative manner:

“...for the purposes of the Elementary and Secondary Education Act of 1965 and the Individuals with Disabilities Education Act, a special education teacher who provides only consultative services to a highly qualified teacher (as such term is defined in section 9101 (23) of the Elementary and Secondary Education Act of 1965) should be considered a highly qualified special education teacher if such teacher meets the requirements of section 602 (10)(A) of this legislation. Such consultative services do not include instruction in core academic subjects, but may include adjustments to the learning environment, modifications of instructional methods, adaptation of curricula, the use of positive behavioral supports and interventions, or the use of appropriate accommodations to meet the needs of individual children.”

- Although the law establishes a limitation on the right of action on behalf of a student or class of students for the failure of a state or local education employee to be highly qualified, the law is silent with regard as to how a state should meet its general supervisory responsibility for ensuring that provisions for HQT standards are met. Findings of noncompliance, whether they are the result of state monitoring or a result of the filing of a complaint by a parent, are the same. In each case, a strict timeline would need to be established for coming into compliance. Congress would not have included

the language in Section 602 (10)(E) if it did not intend to protect teachers from becoming the cause of findings of noncompliance. Therefore, we recommend that the regulations include language that clarifies that the sole remedy for a finding that a special education teacher is not highly qualified are the provisions defined under NCLB and that such failure to meet the standard does not imply the failure to provide FAPE.

Many questions have been raised regarding the FAPE entitlement, highly qualified teachers and placement of students in private schools by an IEP team. Several states have interpreted the FAPE entitlement to mean that private schools that have students placed there by an IEP team must have highly qualified teachers instructing those students, even though NCLB does not require private schools to comply with its HQT provisions. While recommending the above language, we also recommend that the regulations include language that states are not prohibited from requiring private schools that have students placed there by an IEP team provide highly qualified teachers. Once again, this would provide maximum flexibility to the states to ensure positive outcomes for students.

NASDSE, in conjunction with the National Education Association (NEA), has developed the attached flow chart that represents our best effort to clarify the HQT definition contained in Section 602 (10). We recommend that OSERS provide supplemental **guidance** (as opposed to regulations) that includes such a flow chart to depict how teachers can become highly qualified.

- Under the definition of HQT, the regulations need to clarify whether the teacher has to be highly qualified at the “level of instruction” or at the “grade-level placement.”
- In (C) of this Section, it refers to teachers who are teaching children to alternate achievement standards. The text of this section, however, refers to teachers teaching students who are “assessed against alternate achievement standards.” Not all states are developing alternate achievement standards under NCLB, although they may have alternate assessments. The regulations should clarify whether the emphasis in this section is on “alternate achievement standards” or “alternate assessments” or both. If it only refers to “alternate achievement standards,” does this mean that this section would not apply in those states that have not developed alternate achievement standards?

### **3. Related Services – Section 602(26)**

- The regulations need to clarify whether the mapping of a cochlear device is considered a related service or does the language that prohibits LEAs from paying for implanted medical devices extend to mapping as well? NASDSE recommends that the regulations clarify that cochlear mapping is not a related service.

### **4. Transition Services – Section 602(34)(a)**

- NASDSE’s members remain deeply concerned about the ability of LEAs to address the “functional achievement” of students in light of NCLB’s emphasis on academic progress. The regulations need to clarify exactly what constitutes functional achievement in the context of both IDEIA and NCLB.

## 5. High Risk Pools – Section 611(e)(2)(iii)

- The regulations need to clarify that, when a state opts out of the optional risk pool and therefore flows through 1% of its potential state set-aside to LEAs, these funds flow through according to the state’s regular flow-through formula and these funds do not have to be targeted (or distributed) to LEAs based on their provision of high-cost services to students.

## 6. Private School Placements – Section 612(a)(10)

- **(A)(i)** adds numerous new requirements for providing services to students parentally placed in private schools. The language that is the most confusing is the following language in this section, “in the school district served by a local education agency.” This language presents two concerns: First, is the LEA where the private school located responsible for paying for, or responsible for providing these services, even if the child’s parents reside in another school district? Both aspects are troubling, especially in those school districts that contain numerous private schools where children’s parents may reside in different local school districts, or even in some cases, different states. NASDSE’s members urge that the regulations clarify that the states can determine which LEA – that where the private school is located or where the parents reside – is responsible for providing the services to parentally placed private school students. The majority of NASDSE’s members believe that it should be the district where the parent resides; however, some of our members already have in place a system whereby the services are provided by the LEA where the private school is located. Allowing this to be a state option would best meet the needs of all states.

The regulations must also clarify that, if the services are provided by the LEA where the private school is located, the LEA can seek reimbursement from the LEA where the parents reside. The statute is silent on this. However, NASDSE urges that the regulations, to the extent consistent with the law, allow flexibility as to which school district is responsible for providing the services. Many school districts that contain numerous private schools have severe shortages of highly qualified special education teachers and related services personnel. Even if the districts were reimbursed for providing services, they lack the trained personnel to do so.

- **(A)(ii) Child find.** The law imposes increased child find responsibilities on the LEAs with respect to locating students with disabilities in private schools. The regulations need to acknowledge that in many states, students who are home schooled are considered to be in private school placements. Many states do not regulate home schooling (see e.g, Muller, Eve, *Home Schooling Students with Disabilities – A Policy Analysis* (July 2004), published by NASDSE’s Project Forum) and it would be very difficult to locate these students unless the parents come forward with their concerns or they are referred through another agency. The regulations need to clarify that the LEA child find responsibility with respect to home-schooled children should be defined by the states.

## 7. Early Intervening Services – Section 613(f)

- The regulations need to clarify how services will be provided to students when an LEA elects (or is required by Section 616) to provide early intervening services. Are these

services to be provided by special education personnel or by general education personnel? NASDSE recommends that since these students are not yet eligible for special education services and given the extreme shortages of special education personnel, that these services are to be provided by general education personnel, although special education personnel should be consulted and involved as needed.

- The regulations should provide some guidance (although not strict timeframes) for how long students should remain in an early intervening/pre-referral status before a referral is made for an evaluation for special education services. Strict timeframes for early intervening should not be imposed because they may conflict with response to intervention strategies being provided under Section 614(b)(6).
- The regulations should clarify the relationship between early intervening services provided under this section with those services provided under Section 614(b)(6). In both instances, these services should generally be provided by general education personnel, with the involvement of special education personnel as needed.
- The regulations should clarify that if an LEA is required to provide early intervening services because it has been cited through monitoring for the over-identification of minority students for special education services under Section 616, that the state can require an LEA to provide early intervening services.
- The regulations should clarify the role of the SEA in defining and/or requiring LEAs to provide early intervening services.

## 8. IEPs – Section 614

- **(a)(1)(C)(i)(I).** The regulations need to define 60 days as “working” or school days. Further, the law allows a state develop its own timeframes, but does not specify if those timeframes must be more stringent than the federal law. The House Education and Workforce Committee has posted a document, “Frequently Asked Questions,” on its website. This FAQ says that states may develop timeframes that are longer than the federal law requires. Is this a correct interpretation of the law?
- **(b)(6).** The regulations need to clarify that response to intervention (RTI) is a pre-referral activity that should be carried out by general education personnel prior to be referral being made for evaluation for special education. The regulations need to differentiate between RTI as a pre-referral intervention and RTI as part of the documentation of a student’s need for special education services. NASDSE has endorsed the proposed regulatory language submitted by the Learning Disabilities Roundtable that defines RTI. However, NASDSE remains concerned that the language proposed by the LD Roundtable continues to rely too heavily on IQ testing. NASDSE would like to continue to work with the Department to better define RTI and provide clearer direction to states and LEAs on best practices for implementing this new section of the law.
- **(d)(1)(A)(i)(IV).** The regulations should clarify that IEPs are not required to include the methods, materials and techniques to be used to provide educational services (e.g., a specific reading program).

- **(d)(1)(viii).** The regulations should clarify that under a three-year IEP, there would still be an annual review for post-secondary goals.
- **(d)(1).** The regulations should clarify that short-term goals and objectives are only required for students with significant cognitive disabilities, but that states have the flexibility to require them should they choose to continue their current practices. The regulations should not require, nor should states be required to include in their regulations, language requiring short-term goals and objectives for all students.

## 9. Due Process – Section 615

- Please refer to our comments under number 1 above. The terms “complaint” and “due process” should be clarified wherever they are used throughout the law.
- **(b)(7)(B) and (c)(2)(A).** These sections contain requirements that relate to the content of the notice requesting due process, the non-complaining party challenging the sufficiency of the notice, the hearing officer determining the notice’s sufficiency, etc. The requesting party is not entitled to a due process hearing if the notice is determined to be deficient. At the same time, such challenge is happening, subsection (f)(1)(B) requires the parties to enter into a resolution session, unless the parties agree to waive the meeting or agree to use mediation. The law appears to intend that these processes occur simultaneously, thus, establishing or strengthening a potential adversarial relationship, while at the same time, trying to resolve the dispute. The regulations should include language that clarifies how these two seemingly contradictory processes, can occur at the same time.
- The regulations should clarify where, in those states that have a one-tier due process system, the parents should send their notice requesting due process. In these states, both the LEA and SEA need notification at roughly the same time in order for the timeframes to be met. The regulations should either clarify that process, or specifically allow states to clarify that process in their own regulations. NASDSE prefers the latter approach, e.g., allowing the states to specify the process.

## 10. Monitoring – Section 616

- The relationship between the performance plan required by this section to the annual performance report (APR) should be explained and clarified.

## 11. Part C – Section 635

- Section 635(c) adds a new provision providing flexibility to serve children beyond the age of three in the Part C program. However, because the law is vague as to the amount the Secretary can set-aside for this program in 635(e), we recommend that the regulations include the language from the Conference Report that clarifies that the amount of funding to be set aside by the Secretary is 15% of the appropriation for Part C that is above the trigger of \$460 million:

“The Secretary shall reserve 15 percent of the amount appropriated under section 644 for any fiscal year that such amount exceeds \$460,000,000 to make allotments to States that are carrying out the policy described” in section 635(c).

## 12. Administrative Allocation for the Bureau of Indian Affairs (BIA) – Section 611(h)

- NASDSE is concerned that the Department has interpreted this section to mean that the BIA no longer can retain 5% of 80% of its funding for administrative purposes as it has been allowed to do in the past. NASDSE believes that this interpretation is based either on a misinterpretation of the law or a drafting oversight in the law and that the BIA's administrative funding was not intentionally eliminated. Therefore, we strongly urge that the regulations clarify that the BIA will be allowed to retain 5% of 80% of its funding for this purpose.

We have one concluding comment. NASDSE participates in numerous stakeholder coalitions that all work to improve outcomes for students with disabilities. Several of these coalitions have prepared joint comments that are being submitted to OSERS with their recommendations for regulations. However, we want to make it clear in this letter, that although we generally support these coalition efforts, NASDSE does not support or endorse comments submitted by two of the coalitions that we belong to – those of the Consortium for Citizens with Disabilities (CCD) and the National Alliance of Pupil Services Organizations (NAPSO). We believe that those recommendations are overly prescriptive in most instances and in others, directly conflict with NASDSE's positions. Finally, NASDSE has endorsed the comments submitted to you by the Learning Disabilities Roundtable, a group of 14 organizations that has worked for more than a year to draft proposed regulatory language addressing the new provisions for identifying students with specific learning disabilities. Although NASDSE has endorsed those comments, we believe that much work remains to be done in clarifying how response to intervention models can be used successfully to work with and identify these students.

NASDSE thanks you for the opportunity to provide these comments and looks forward to working with OSERS and OSEP as you move forward on the development of the implementing regulations. Please feel free to contact Bill East at [bill.east@nasdse.org](mailto:bill.east@nasdse.org) or Nancy Reder, NASDSE's deputy executive director, at [nancy.reder@nasdse.org](mailto:nancy.reder@nasdse.org) or call either of them at (703) 519-3800 should you have any questions regarding these comments.