

August 18, 2017

Hilary Malawer,
Assistant General Counsel, Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue SW., Room 6E231
Washington, DC 20202

RE: Docket ID: ED-2017-OS-0074: Evaluation of Existing Regulations

Dear Ms. Malawer:

The Council of Parent Attorneys and Advocates (COPAA) is an independent, nonprofit organization of parents, attorneys, advocates, and related professionals. COPAA members nationwide work to protect the civil rights and secure excellence in education on behalf of the 6.5 million children with disabilities under the Individuals with Disabilities Education Act (IDEA) and over 700,000 children with 504 plans under Section 504 of the Rehabilitation Act of 1973 in America. COPAA's mission is to serve as a national voice for special education rights and is grounded in the belief that every child deserves the right to a quality education that prepares him or her for meaningful employment, higher education and lifelong learning, as well as full participation in his or her community. COPAA is writing in response to the U.S. Department of Education's (ED) request for public comment on regulations that may be appropriate for repeal, replacement, or modification as directed by Executive Order 13777 and as part of the "Enforcing the Regulatory Reform Agenda" led by the Administration.

COPAA's longstanding history and substantial work conducted on behalf of children with disabilities and their families across the country directs us to first tell you that the test of any regulation, guidance, technical assistance and/or other administrative activity must be *whether the regulation/guidance advances educational equity and serves the interests of all students*. Therefore, COPAA believes ED's narrow slant and sole focus in this regulatory review tilts too far toward reducing burden on "entities significantly affected by Federal regulations, including State, local, and tribal governments, small businesses, consumers, nongovernmental organizations, and trade associations" while completely disregarding the most important entity served by our nation's education laws – students.

Therefore, it is on behalf of all children with disabilities and their families that COPAA makes the following recommendations:

1. Maintain all Federal Regulations pertaining to all education laws.

Our nation's education laws, upheld by the courts and regularly reauthorized and consistently aligned to create unified federal policy, provide the strong basis for U.S. public schools to promote and uphold equity and access to a public education for America's children. These laws came about because of widespread discrimination that was confronted by strong citizen activism and court cases brought by individuals facing discrimination. Millions of students and their families rely on these laws to ensure their child is provided a free, appropriate, public education (FAPE) in the least restrictive environment.

Congress has also authorized federal agencies to help put laws into effect by creating and enforcing regulations. Every time a new regulation or a change to regulation is promulgated, an extensive notice and comment period is conducted. This process, called Notice of Proposed Rulemaking (NPRM),

which lists any proposal in the *Federal Register (FR)*, is the process by which members of the public can consider the proposed regulation and send in comments.

Given our focus on educational rights, COPAA strongly recommends that ED maintain all regulation, joint regulation and guidance related to the following laws:

- The Civil Rights Act of 1964
- The Elementary and Secondary Education Act (ESEA), currently known as the Every Student Succeeds Act (ESSA)
- Education Amendments Act of 1972 (particularly Title IX)
- The Rehabilitation Act of 1973 (Particularly Section 504)
- The Individuals with Disabilities Education Act (IDEA)¹
- The Higher Education Act (HEA)
- The Americans with Disabilities Act (ADA)
- The Workforce Investment and Opportunity Act (WIOA)
- The Carl D. Perkins Vocational and Technical Education Act (PERKINS)
- Freedom of Information Act (FOIA)
- Family Educational Rights and Privacy Act (FERPA)

We especially wish to point out that Congress, over the last 15 years, has consistently sought to create and strengthen alignment among and between federal education laws so that all students can be held to the same standards and given equitable access to a high-quality education that leads to post-secondary career training and/or college enrollment. This holds true for all related regulations and guidance pertaining to these laws. In fact, prior to 2002, students with disabilities were not included in state assessment and accountability systems; however, because of Congress' actions to align ESEA/ESSA and IDEA, more students with disabilities have been afforded the opportunity to learn and master grade level academic content and graduate high school with a regular diploma. The WIOA has also been intentionally aligned to the IDEA [and ESSA] by Congress to assure that workforce readiness is a goal for youth with significant disabilities so that they have access to competitive integrated employment, as defined by statute and interpreted through regulation, and can achieve greater economic self-sufficiency and independence. This iterative and intentional work must be left intact.

Thorough regulations [and concurrent guidance] help to ensure the implementation of the IDEA as well as reinforces existing legal protections under all other civil rights and education laws. And, as COPAA testified in 2016 before the U.S. House Education and Workforce Committee, "Student rights and educational opportunity must not be compromised by politics that seek to ignore the foundational tenet of administrative law."ⁱ While some commenters will ask you to modify or rescind parts of or whole regulations because they can be described as a 'burden' to implement, COPAA believes the litmus test ED must use should be based on *whether the regulation/guidance advances educational equity and serves the interests of all students*. It is especially essential when reviewing regulation focused on ensuring that every eligible child is provided FAPE in the least restrictive environment; is held to the same high-standards as all other children; and, is provided access to the same post-secondary opportunities.

¹ The Secretary may not implement, or publish in final form, any regulation prescribed pursuant to this Act which would procedurally or substantively lessen the protections provided to handicapped children under this Act, as embodied in regulations in effect on July 20, 1983 (particularly as such protections relate to parental consent to initial evaluation or initial placement in special education, least restrictive environment, related services, timelines, attendance of evaluation personnel at Individualized Education Program meetings, or qualifications of personnel), except to the extent that such regulation reflects the clear and unequivocal intent of the Congress in legislation. See: 20 U.S.C. Sec. 1232

2. Maintain all guidance pertaining to all education and civil rights laws.

Executive branch agencies publish guidance or other policy statements, which further clarify how an agency understands and implements existing laws and regulations. Guidance and other policy statements describe suggested or recommended actions and serve a very important function in assuring that laws are implemented correctly. The process to create the guidance is extensive and very often such guidance serves the purpose of addressing systemic issues or failures.

We share below some examples of guidance, which is by no means exhaustive and should not be taken to be, that we believe are critical to maintain.

- 2017-08-17 Performance Accountability Guidance for WIOA Title I-IV Core Programs
- 2017-01-06 Every Student Succeeds Act Consolidated State Plan Guidance
- 2017-01-06 Every Student Succeeds Act State and Local Report Cards Non-Regulatory Guidance
- 2017-01-06 Every Student Succeeds Act High School Graduation Rate Non-Regulatory Guidance
- 2016-12-28 Guidance on Civil Rights of Students with Disabilities (Guide, DCL, Q&A)
- 2016-12-19 Guidance on Assistance to States for the Education of Children with Disabilities; Preschool Grants for Children with Disabilities
- 2016-12-07 ESSA Assessment Use of Funds
- 2016-12-28 OCR Parent/Educator Resource Guide: Section 504, Elementary/Secondary Schools
- 2016-11-21 Non-Regulatory Guidance: Fiscal Changes and Equitable Services Requirements under the Elementary and Secondary Education Act of 1965
- 2016-10-20 Early Learning in the Every Student Succeeds Act: Expanding Opportunities to Support our Youngest Learners
- 2016-11-29 Student Support and Academic Enrichment Grants
- 2016-11-29 Supporting School Reform by Leveraging Federal Funds in a Schoolwide Program
- 2016-09-27 Non-Regulatory Guidance for Title II, Part A: Building Systems of Support for Excellent Teaching and Leading
- 2016-08-01 OSEP Guidance Documents on Behavior and Discipline
- 2016-07-27 Education for Homeless Children and Youth Program
- 2016-06-29 Transitioning to the Every Student Succeeds Act FAQ
- 2016-06-23 Ensuring Educational Stability for Children in Foster Care
- 2016-05-04 Transitioning to the Every Student Succeeds Act (ESSA) FAQ
- 2016-12-28 FAQs About the Rights of Students with Disabilities in Public Charter Schools under the IDEA
- 2016-03-09 Workforce Innovation and Opportunity Act (WIOA) Requirements for Unified and Combined State Plans

3. Maintain the majority of Memos and Dear Colleague Letters.

Most Memos and Dear Colleague letters (DCL) are helpful to parents of students with disabilities and their families and should be kept. Memos and DCL's are issued by federal agencies, such as The Office of Special Education Programs (OSEP) and Office for Civil Rights (OCR) to provide information, and clarification to help explain and interpret existing laws and regulations. Memos and DCL's do not have the same legal force as federal laws or regulations and are non-binding. They are, however, policy statements that give helpful guidance in interpreting complex laws and rules.

While this list is not exhaustive and should not be taken to be, the following are examples of Memos or DCL's issued in the past several years that are important tools to protect parent and student rights:

- 2017-07-06 DCL: Speech and Language Services for Students with Autism Spectrum Disorder
- 2017-05-22 Eligibility Determinations for Children Suspected of Having a Visual Impairment Including Blindness under the Individuals with Disabilities Education Act
- 2017-03-31 Significant Disproportionality in IDEA: Essential Questions and Answers
- 2017-01-09 Updated Dear Colleague Letter on Preschool Least Restrictive Environments
- 2016-12-28 Dear Colleague Letter with the Office for Civil Rights on Charter Schools
- 2016-12-28 Dear Colleague Letter on Restraint and Seclusion of Students with Disabilities
- 2016-12-27 Frequently Asked Questions: The Rights of Students with Disabilities in Public Charter Schools under the Individuals with Disabilities Education Act
- 2016-10-20 FAQ on Early Childhood Privacy and Confidentiality and Side-by-Side Guide of the IDEA and Family Educational Rights and Privacy Act Provisions
- 2016-08-01 Know Your Rights in Charter Schools
- 2016-08-05 DCL: Education of Children with Disabilities Attending Public Virtual Schools
- 2016-08-01 DCL: Ensuring Equity, Providing Behavioral Supports to Students with Disabilities
- 2016-07-26 DCL and Resource Guide: Students with Attention- Deficit/Hyperactivity Disorder
- 2016-06-14 IEP Translation—Statement of Interest in *R. v. The School District Philadelphia*
- 2016-06-15 DCL: Gender Equity in Career and Technical Education
- 2016-05-13 DCL: Transgender Students 2
- 2016-04-29 OSEP Memo: Response to Intervention (RTI) and Preschool Services
- 2016-04-16 OSEP DCL on Children with Disabilities Residing in Nursing Homes
- 2016-03-09 WIOA Requirements for Unified and Combined State Plans
- 2015-12-05 DCL: The IDEA for Students with Disabilities in Correctional Facilities
- 2015-11-16 DCL: Free and Appropriate Public Education (FAPE)
- 2015-10-23 DCL: IDEA/IEP Terms
- 2015-09-28 DCL to SEAs Regarding Oversight of Federal Funds to Charter Schools
- 2015-07-27 OSEP Memo 15-10 Local Educational Agency Maintenance of Effort Q/A
- 2015-04-17 OSEP Memo 15-08 Letter to Delisle: Children with disabilities with high cognition
- 2015-04-15 DCL: Use of Due Process Procedures After a Parent Has Filed a State Complaint
- 2014-11-12 DCL: Effective Communication for Students with Hearing, Vision, Speech Disabilities in Public Elementary & Secondary Schools (and Fact Sheet, FAQ)
- 2015-01-07 English Learner Students and Limited English Proficient Parents
- 2015-02-23 Letter to Baus: Clarifying circumstances for parent's entitlement to an Independent Education Evaluation at public expense
- 2014-01-08 DCL: The Nondiscriminatory Administration of School Discipline
- 2014-04-24 DCL: Retaliation is a violation of Federal Law
- 2014-06-02 Letter to Savit: Districts may not shrink the window for individuals conducting publicly funded IEEs to observe students in class unless it limits its own evaluators
- 2014-10-01 Guidance to Ensure All Students Have Equal Access to Educational Resources
- 2013-01-25 Students with Disabilities in Extracurricular Athletics
- 2012-01-20 DCL and Q/A on the ADA 2008 for Students with Disabilities in Public Schools
- 2013-07-19 DCL: Highly Mobile Students
- 2013-08-05 DCL to Bowman: McKinney-Vento and Students with Disabilities

4. Rescind a select few Dear Colleague Letters (DCL) that actually run counter to the IDEA and impede a parent's right to be equal partners with the school system.

There are a handful of DCL's that are harmful and have stifled a parent's ability to be full partners in the IDEA/IEP process. These interpretations of the statute and regulations have negatively impacted family access and decision making in the IEP process.

The right to participate in the Individualized Education Program (IEP) team and participate fully as a team member is a central tenet to the IDEA. As such, COPAA has advocated consistently for policies that assure "the education of children with disabilities can be made more effective by ... strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home."ⁱⁱ

Additionally, the child's evaluation under IDEA is the cornerstone to the development of an effective IEP. Unfortunately, decisions made by ED regarding a handful of specific issues impacting the parent's right to information and role on the team are inconsistent with the purpose and statutory requirements of IDEA.

COPAA recommends that ED rescind the following Dear Colleague letters:

• Parent's right to include/invite participants to IEP meetings:

- Letter to Anonymous (2003)
- Letter to Byrd (2003)

Rationale: These letters must be rescinded. IDEA, 20 U.S.C. § 1414(d)(1)(B)(vi) and the regulations, 30 C.F.R. § 300.321(a)(6) and (c) allows parents and school district—at their discretion—to include on the IEP team individuals with knowledge or special expertise about the child and upholds a parent's right to invite related services professionals and other IEP team members to IEP meetings.

• Parent(s) and expert(s) right to observe [the child] in the classroom:

- Letter to Mamas (2004)

Rationale: This letter must be rescinded. As stated above, Congress has repeatedly found that "the education of children with disabilities can be made more effective by ... strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home."

§601(C)(5). To meaningfully participate parents and the experts they choose to work with/support their child often need to observe the child in the classroom. To fully participate as members of the IEP team, they should have the right to observe the child's education in progress, a proposed placement, whether accommodations and services are being provided, and other matters.

• Independent Education Evaluations (IEE): The right of the family to include recommendations [to the IEP team] from the evaluator.

- Letter to LaDolce (2007)

Rationale: This letter should be rescinded because IDEA 34 C.F.R. 300.503(c) requires IEP teams to consider parentally obtained independent education evaluations (IEE). While the agency [state/district] may place restrictions on the criteria for the evaluation (34 C.F.R §300.502(a)(2)), the findings and recommendations of the IEE are integral to making final decisions about the child's IEP.

• Failure to consent to IEP under IDEA should not impact eligibility for Section 504

- Letter to McKethan, 25 IDELR 295, 296 (OCR 1996)

Rationale: This letter should be rescinded because when parents reject the IEP developed under the IDEA, they “would essentially be rejecting what would be offered under Section 504. The parent could not compel the district to develop an IEP under Section 504 as that effectively happened when the school followed IDEA requirements.” This reasoning runs contrary to the intent of Section 504 protections.

In conclusion, we believe that by maintaining all current federal education regulations combined with rescinding the above-mentioned letters that children with disabilities will greatly benefit.

We appreciate the opportunity to comment and would welcome an opportunity to meet with the Department to discuss our recommendations. We stand committed to assuring all students have access to full educational opportunity in our nation’s schools. For any questions or for additional information, please feel free to contact me.

Sincerely,



Denise Marshall
Executive Director

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www.copaa.org

ⁱ Almazan, S., (2016). Testimony on: *Next Steps for K-12 Education: Implementing the Promise to Restore State and Local Control*. Subcommittee on Early Childhood, Elementary and Secondary Education U.S. House of Representatives, retrieved at:

https://edworkforce.house.gov/uploadedfiles/testimony_almazan.pdf

ⁱⁱ §601(C)(5)