



National Association of State Directors of Special Education, Inc.

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July 28, 2008

Tracy R. Justesen
Assistant Secretary for OSERS
U.S. Department of Education
400 Maryland Avenue, SW
Room 5107, Potomac Center Plaza
Washington, DC 20202-2600

RE: Notice of Proposed Rulemaking (ED-2008-OSERS-0005)

Dear Mr. Justesen:

The National Association of State Directors of Special Education (NASDSE) appreciates the opportunity to comment on the Notice of Proposed Rulemaking that appeared in the May 13, 2008 Federal Register. NASDSE is the not-for-profit organization that represents the state directors of special education in the 50 states, the District of Columbia, the U.S. territories, the Department of Defense Education Agency, the Bureau of Indian Education and the Freely Associated States.

NASDSE members are very concerned about the timing of these proposed regulations. We are at a loss to understand the urgency of these particular regulations at this time for several reasons:

- OSEP has not yet published final regulations for the Part C program in response to an NPRM that was published more than a year ago. Part C directors and implementers have been waiting for final regulations in order to ensure that they are implementing the Part C program with the fidelity required by regulations. NASDSE regrets that the Department has delayed publication of these important regulations. We view the Part C regulations as a more important priority at this time than these proposed regulations we are addressing with these comments.
- OSEP has not yet published revisions to the State Performance Plan/Annual Performance Report indicators. Proposed changes to the indicators also were published nearly a year ago and the state directors of special education have been waiting to see what changes they will need to implement in order to make appropriate changes to their data collection systems.

NASDSE believes that, given the monitoring and determinations processes being implemented by OSEP for the State Performance Plan (SPP) and Annual Performance Report (APR), that these two unresolved issues are far more important than this NPRM. We are concerned that OSEP staff will be pulled away from addressing these two major issues to work on finalizing

these regulations that do not have the same sense of urgency.

- States are in the process of finalizing their state regulations. The process of developing state regulations is both lengthy and costly, requiring public hearings and an open comment period. Publishing new final regulations for Part B at this time will require states to go through yet another state regulatory process. With the next reauthorization of IDEA already on the horizon for 2010, we are concerned about the added expense and staff hours that these new regulations will require. We believe that OSEP's analysis under the Paperwork Reduction Act as required by law has failed to take into account either the person hours required to undertake another regulatory process at the state level or the dollar amounts involved in this process.

We recommend that given the lack of any demonstrated emergency to adopt new regulations at this time, that these proposed regulations be placed on hold until the Part C regulations are finalized and the revisions to the Indicators have been published.

Please see below for our specific comments on several of the proposed regulations.

1. Section 300.9 Consent and 300.300 Parental Consent

NASDSE members and the NASDSE Board of Directors have given a great deal of thought to the proposed language for 300.300 that would give parents the unilateral right to withdraw their child from special education without any recourse being provided to the school or school district. Although we recognize that some state directors of special education have expressed differing opinions, as an organization we remain deeply troubled by this proposed regulation. We have made great strides over the past 30 years since the passage of P.L. 94-142 to develop partnerships between parents and schools to ensure that the needs of students are met. Recent changes in the law have put a greater emphasis on ensuring that the IEP team represents a true partnership between the school and parents. NASDSE's IDEA Partnership has worked tirelessly over the past few years with parents specifically on improving communication and, in conjunction with the OSEP-funded CADRE Center, the Partnership has worked to improve alternate means of dispute resolution to develop better, low-cost, effective approaches to resolving differences between schools and parents.

We believe that the proposed regulation represents a real blow to all of these efforts to develop a team approach to developing a program of supports and services that will guarantee FAPE to children and youth. Unilateral decision making is the diametric opposite of shared decision making.

Furthermore, as it was eloquently stated in comments from one state, the right to FAPE is the child's right. At what point does it then become the parent's right to give it away? Where does the child's or teen's view get heard? Since the enactment of IDEA '97, OSEP, NASDSE and other stakeholders have actively encouraged young people to 'take control' of their IEP meetings. We are encouraging young people to become involved in this decision making process. Is their voice to be completely ignored in this process?

We note, also, that the school and school district remain responsible for ensuring that these students reach proficiency under the No Child Left Behind Act (NCLB). We question how students, when their supports are pulled out from under them, can achieve proficiency and how the Department of Education could continue to hold schools and school districts accountable for the educational outcomes of these students when they are not receiving supports that an IEP team (that included the parents) felt were necessary. The Department, states and local school districts have been working very hard ever since the enactment of NCLB to make that law and IDEA more compatible. We are concerned that this proposed regulation undermines these

efforts.

For the above reasons, NASDSE therefore urges the Department not to go down this path of unilateral withdrawal.

However, if the Department remains determined to implement this proposed regulation, we urge the Department not to make this proposed regulation more cumbersome by adding additional requirements for the schools and school districts to comply with – requirements that are being proposed by other groups submitting comments. We believe that the only requirement on the part of the school district should be to ensure that the parent provides a statement in writing stipulating the withdrawal of his/her child from special education. Since this is a request coming from parents, we do not believe that it is incumbent upon the school district to take any additional steps except as noted in the proposed regulation.

Also, if the Department decides to implement the proposed regulation, NASDSE agrees with the proposed language that states that if a parent unilaterally withdraws his/her child from special education that the local education agency (LEA) “is not required to amend the child’s education records to remove any references to the child’s receipt of special education and related services.” We note that if a parent objects to information contained in his/her child’s school record, that parent may exercise his/her right to a hearing under the Family Educational Rights and Privacy Act (FERPA) to seek to correct misinformation in the child’s education record.

2. Section 300.177 Sovereign Immunity

NASDSE believes that state education agencies must do all that they can to promote the hiring of individuals with disabilities. However, we are concerned that this proposed regulation is drafted rather ambiguously and that it will lead to confusion on the part of the states as to what exactly is being required of them. It also has the potential to increase unnecessary litigation because individuals who believe that they have been discriminated against in hiring or in their employment have recourse under other laws (e.g., the Americans with Disabilities Act, currently under revision in Congress and Section 504 of the Rehabilitation Act). Specifically, we are concerned as to how the Department will interpret “positive efforts to employ, and advance in employment (emphasis added), qualified individuals with disabilities....” This regulation does not provide any clarity as to what is expected of state education agencies that is not currently expected of them. Additionally, we are concerned that the Department might add this to the already long list of issues for which states are currently being monitored (e.g., the SPP and APR). Would this issue become another indicator? NASDSE would adamantly oppose this.

NASDSE recommends that this language either be stricken completely or rewritten with more clarity to provide specific guidance to states as to what the Department’s expectations are. We also specifically request that the Department address the question we raise as to how the Department intends to monitor states’ efforts in regard to this proposed regulation.

3. Section 300.512 Hearing Rights

NASDSE supports the position taken by the Department with respect to this language, which leaves the decision to the states as to whether or not parents may be represented by non-attorneys at due process hearings.

4. Section 300.600 State Monitoring and Enforcement

For the most part, the new regulatory language proposed for this section is consistent with current law and practice and NASDSE does not have any objection to it. However, language added to (e) is troublesome. The proposed language states: “...the noncompliance is corrected

as soon as possible, and in no case later than one year after the State's identification." We agree that most noncompliance can and should be corrected within one year. However, this hard and fast rule is not supported by the Department's own commentary in the prologue to these proposed regulations that states: "In most cases, when a State makes a good faith effort, the needed corrective actions can be accomplished and their effectiveness verified within one year." However, there may be some instances, such as when addressing systemic noncompliance, where the state has made a good faith effort but much work is needed (e.g., putting new personnel in place). In examples such as these, the state cannot ensure that the school district has corrected their policies, practices and procedures.

In addition, there is no statutory authority that requires correction of noncompliance within one year after the state's identification. Under Indicator 15, for example, states must report on the percent of noncompliance corrected within one year of identification and for any noncompliance not corrected within one year, the state must describe those actions, including technical assistance and enforcement actions the state has taken. This proposed regulation thus appears to give states two different policies to follow with respect to noncompliance.

The proposed one-year timeline also would be difficult for states due to time lags in data collection. States do not receive instantaneous information regarding noncompliance. States cannot address some findings when the most current data may not be available. It could result in mistakenly identifying some actions as ongoing noncompliance when in fact a local school district has already resolved the issue. Or, the opposite could occur and a state agency might believe that an instance of noncompliance has been resolved when new data indicates that it has not.

For all of the above reasons, NASDSE recommends that section (e) be rewritten to conform with the practice currently laid out in Indicator 15.

5. 300.602 State Use of Targets and Reporting

NASDSE does not support the proposed language in 300.602(b)(2) that would require states to report to the public on the performance of each school district on the targets in the state's annual performance report (APR) no later than 60 days following a state's submission of its APR to the Department. There is no date specified in §1416(b)(1)(C)(ii) of the IDEA by which states must publicly report each school district's performance on the targets in the state performance plan (SPP). We note that it takes time to complete the data analysis and that most states have several hundred school districts whose data must be carefully analyzed. We therefore recommend that the proposed language be revised to require a state to publicly report within a reasonable period of time and no later than 60 days after the U.S. Department of Education has released its own determinations letters to the states.

6. 300.606 Additional information to be Made Available to the Public

We believe that the states are already providing this information to the public and do not believe that any further regulation is required in this area with respect to the public reporting of state's performance related to its SPP targets or LEA performance with respect to SPP targets.

With respect to the proposed language to be added to §300.606 that would require states to provide public notice of any enforcement action that the Secretary is "proposing to take or is taking an enforcement action", NASDSE believes that the language "proposing to take" is unclear and should be stricken from the regulation as "proposing to take" suggests that the action may indeed not be taken if there is some intervening event.

7. 300.815 – 300.817 – Subgrants to LEAs and Allocations of Funds

We understand that the intent of these proposed regulations is to provide some funding to help school districts, particularly charter school districts, with their Child Find activities. However, we note that as the federal government has not come close to meeting its long-recognized commitment to fund special education, that there is a critical need to use federal dollars to support educational supports and services for children and youth who have already been identified as having special needs. States have different needs and have policies in place to help new charter schools meet their Child Find obligations. We also note that not every state has a charter school law. We therefore recommend that these proposed regulations be modified to state that state education agencies **have the option** of making subgrants to eligible LEAs, including public charter schools that operate as LEAs, that are responsible for providing education to children even if an LEA is not currently serving any students (ages 3-21 or in the case of Section 619, ages 3-5) with disabilities.

Once again, we thank you for the opportunity to submit these comments. Please feel free to contact me at bill.east@nasdse.org or NASDSE's deputy executive director, Nancy Reder, at nancy.reder@nasdse.org if you have any questions regarding our comments.

As always, we look forward to continuing to work with the Department and with OSEP to implement the provisions of IDEA to ensure successful outcomes for all students with disabilities.

Sincerely,



Bill East, Ed. D.
Executive Director