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VIA E-MAIL: IDEAComments@ed.gov

Troy R. Justesen, Director
Office of Special Education Programs
U.S. Department of Education
400 Maryland Avenue, SW.
Potomac Center Plaza, room 5126
Washington, DC 20202-2641

RE: Comments to Proposed IDEA Part B Regulations

Dear Dr. Justesen:

Michigan Protection and Advocacy Service, Inc. (MPAS) is Michigan's designated protection and advocacy program, mandated to serve persons with disabilities in the Great Lakes State. MPAS receives over 8,000 requests for help each year; 30-40% relate to problems with special education. MPAS knows about the issues that arise in special education in Michigan and is grateful for the opportunity to comment on the proposed regulations which implement the 2004 amendments to the Individuals with Disabilities Education Act.

Proposed §300.34(b): Delete "the optimization of device functioning, maintenance of the device, or the replacement of that device." IDEA 2004 specifically states that the Department must not lessen the protections provided in the July 20, 1983 regulations. 20 U.S.C. §1406(b). In the proposed language, the so-called cochlear implant exception has been expanded beyond the authority of the statute to include "optimization of device functioning." The additional language should therefore be stricken. Further, if a school is not required to provide necessary services to assist a child who has a cochlear implant on the use of the device (so they may hear properly during classroom instruction) the underlying purpose and intent of IDEA to provide each child with a free appropriate public education will be defeated.

Proposed §300.151: Re-insert the language of current §300.660 which states that monetary reimbursement is an appropriate award in IDEA cases. Complaint systems are perhaps the only mechanism by which unrepresented families can quickly and inexpensively correct legal violations. Complaint systems also reduce litigation and due process hearing requests and can promote better long-term relationships between schools and parents. By removing the monetary reimbursement language from the complaint regulation, states may assume that such reimbursement for remediation is never an appropriate complaint remedy, when in some cases such a remedy is appropriate. Making the complaint process less useful and comprehensive may in turn increase litigation and due process hearings.

Proposed §300.152(c)(1): Retain existing §300.661(c)(1), requiring States to set aside only the portions of a complaint about which due process has been commenced, and strike the language requiring States to set aside the entire complaint. The proposed regulation would require the State to set aside an entire complaint if due process has been commenced with respect to any subject at all that is raised in the complaint. Under the current regulations, if a parent files a State complaint and then initiates a due process hearing, the State will only set aside those portions of the complaint that are the subjects of the due process hearing. By allowing maximum use of the complaint process to resolve disputes, the current system is both efficient and effective and should be retained.

Proposed §300.152, §300.153: Retain current §300.662(c), and make clear that complaint management systems can be used to enforce written agreements between school districts and families. Many new IDEA 2004 provisions are intended to create opportunities for quick, efficient, and inexpensive methods of resolving disputes. The proposed regulation will permit families to file complaints only within a year of the violation, will eliminate the current option to file claims for compensatory education for up to 3 years from the violation, will eliminate the extended timeline for "on-going" violations, and will delete the provision that requires complaint management systems to enforce hearing officers' decisions. In addition, the regulation does not allow families to use their state's complaint process to enforce written agreements reached at mediation or resolution sessions. By restricting the complaint management system as proposed, one of the quickest, most efficient and least expensive methods of resolving disputes would be eliminated, leading to higher use of due process and court remedies.

Proposed §300.165: Re-insert the language in Sections 300.280-284 of the July 20, 1983 regulations requiring stakeholder participation in the planning process. State-level stakeholder participation is critical to providing an effective service system. The proposed regulation deletes several long-standing provisions protected under 20 U.S.C. §1406(b). The original language should therefore be restored.

Proposed §300.220: Define "specific findings of noncompliance" to include state focused monitoring initiatives. The proposed regulation limits states' power to order revision of local plans to specific findings of noncompliance. This language is ambiguous with regard to focused monitoring initiatives undertaken with OSEP's blessing by many states. The proposed language should clarify that "specific findings of noncompliance" may include findings and recommendations under focused monitoring.

Proposed §300.300 *passim*: Define "consent," "informed consent," and "agreement." The proposed regulations describe several forms of consent, including "informed consent," "consent," and "agreement," specifically in §300.300(a)(3), §300.301(d)(2)(iii), §303.303, §300.321(e)(1), §300.321(e)(2)(ii), §300.324(a)(4), and §300.505. Many of these sections allow parents to waive specific procedural rights. MPAS recommends that §300.9 be amended to give these terms common definitions from existing case law. The common definitions applied by courts include notions of voluntary, knowing consent, usually in writing and including notice of alternatives, a right to revoke consent, and a right to disagree. In our experience, these common definitions and protections make for clearer, more certain and more defensible agreements, and prevent more protracted disputes.

Proposed §300.303(b)(1): Clarify that, while a school district may not be required to conduct its own reevaluation of a child with a disability if less than a year has passed since its last evaluation, if a parent provides evaluation information to the school district within that year, this information must be considered at an IEP team meeting for the student. Without such clarification, parents who are informed by the doctors or therapists treating their child of a new disability diagnosis or about different educational approaches will be unable to ensure that school districts consider this new information in a timely fashion. This proposed regulation is in accordance with the current and draft regulatory framework governing IEP development. See current § 300.343 (requiring public agencies to "ensure that the IEP team – (2) Revises the IEP as appropriate to address . . . Information about the child provided to, or by, the parents, as described in § 300.533(a)(1)"); see also § 300.533(a)(1)(i) (referring to "Evaluations and information provided by the parents of the child"). These sections are re-numbered in the draft regulations respectively at: §300.324(b)(1)(ii)(C) and §300.305(a)(2).

Proposed §300.305(e)(2): (Diploma): Define the term "regular diploma" as "a diploma that reflects student achievement comparable to that required for a non-disabled student to graduate from high school." The regulations do not clarify that the type of "regular diploma" that allows a local educational agency to terminate special education services for a child with a disability without parental consent must be a diploma that reflects student achievement at a level comparable to that of peers without disabilities. The statute appears to assume, but does not explicitly require, that when a student with a disability graduates from high school with a "regular diploma," the student will have achieved a level of competency comparable to his or her non-disabled peers. However, in reality many school districts and states award "regular diplomas" to students with disabilities based on years of attendance, without regard to what the student was taught or his or her achievement level. No student with a disability under age 21 should be "force graduated" unless he has received a regular diploma that is based on achievement that is comparable to the achievement of students who do not have disabilities. The regulations should incorporate the traditional OSEP interpretation that districts cannot graduate a special education student who has remaining IEP goals to meet.

Proposed §300.309(c): Set forth a timeline for completing the "response to intervention" part of any finding that a child has a specific learning disability. The 2004 IDEA Amendments set forth a 60- day time limit on eligibility determinations, allowing states to adopt shorter timelines. The proposed rule grafts a second, preliminary timeline, defined only as "an appropriate period of time," under which research-based interventions must be tried before a child can be identified as having a specific learning disability. Given the Congressional intent (Congress did "not intend for early intervening to prevent or delay a student from receiving an evaluation to determine the presence of a disability and the

need to special education and related services," S. Rep. No. 108-185, at 20 (2004), *available at* http://thomas.loc.gov), the proposed regulation must set a time limit on how long an "appropriate period of time" is before a child will be deemed to meet this part of the specific learning disability definition.

Proposed §300.320(a)(3)(ii): add language that states that "the periodic reports are provided at least as often as progress reports for regular education students are provided," and that periodic reports must explain, in reasonable detail and with specific progress measures, the extent to which the student is making progress in each of the annual goals on the IEP. The legislative history reaffirms the districts' obligations to define and measure a student's progress towards annual goals and to report that information to families in a comprehensive, regular, and understandable manner: "[P]rogress reports are especially important for students whose IEPs contain non-academic goals and whose progress may not be measured easily by standardized tests or grades. These progress updates must provide parents with specific, meaningful, and understandable information on the progress children are making." S. Rep. No. 108-185, at 25 (2004), *available at* http://thomas.loc.gov.

Proposed §300.320(a)(5), §300.321(a)(2): Define "regular education environment" to include the regular classroom and the non-academic environment. The language in proposed regulation §300.320(a)(5) must be further defined in order to properly comport with the statutory language in IDEA 2004. The draft regulation states that there should be an explanation in the IEP of the extent, if any, a child will not participate with nondisabled peers in the *"regular education environment."* This is a change from the IDEA 2004 and the regulations in 1999, which use the phrase "regular class." The shift in language from regular class to regular education environment can be construed to limit the inclusion to non-academic areas such as lunch, library and recess. If this phrase took on such a

meaning it would contradict the plain meaning and intent of the statute. 20 U.S.C. §1414(d)(A)(i)(V). Congress found that "education of students with disabilities can be made more effective by . . . access to the general education curriculum in the regular classroom, to the *maximum* extent possible. . ." (emphasis added) 20 U.S.C. §1400(c)(5)(A). Congress intended students with disabilities to participate in the regular education classroom. The regulations must comport with this intent.

Proposed §300.322(d): Retain the language of current regulation §300.345(d) (ways to document contact with parents). The 1999 regulations at Sec. 300.345(d) and the 1983 regulations at Sec. 300.345(d) provided that a record of attempts would include "detailed records of telephone calls, visits to the home and copies of correspondence sent home." The 2005 regulations are silent on the ways in which attempts to arrange a meeting could be carried out and documented. Since IDEA 2004 specifically states that all the rights provided in the July 20, 1983 regulations shall remain, this part of the regulation should properly reflect the 1983 and 1999 regulations, otherwise the Department will be in violation of 20 U.S.C. §1406(b) of the Act.

Proposed §300.323(d): Restore current 300.342(b)(3) to require districts to notify teachers about specific responsibilities within each IEP. In our experience, IEP implementation issues comprise the largest area of complaints and could be resolved with participation and specific information going to all school staff who are involved in implementing a child's IEP. Since IDEA 2004 specifically states that all the rights provided in the July 20, 1983 regulations shall remain, this part of the regulation should properly

reflect the 1983 and 1999 regulations, otherwise the Department will be in violation of 20 U.S.C. §1406(b) of the Act.

Proposed §300.324: Re-insert §300.346(a)(iii) which requires the IEP team to consider a child's performance on any general State or district-wide programs, as appropriate. This section is removed from the draft regulations. Consideration of the district-wide assessments is an important consideration in light of the intent of Congress to align IDEA to NCLB.

Proposed §300.324(a)(6): Add a requirement that a district must send the parent a copy of an IEP amendment upon completion of drafting the amendment and "upon request." The proposed rule states that parents are provided with a copy of the amendment "upon request." A parent may not know that they have the right to request a copy of the amendment. Parents are required to have the opportunity to meaningfully participate in IEP meetings about their children. Without all the information and the opportunity to review the final written document they cannot fully participate in the process.

Proposed §300.501: Restore the specific requirement in current §300.345(e) that a district must provide an interpreter if necessary to ensure parent participation in IEP meetings. One of the core requirements of IDEA is to ensure meaningful participation of parents. Parents cannot participate in the process in a meaningful way if they do not have the means to understand the proceedings (i.e., not in their language). Since IDEA 2004 specifically states that all the rights provided in the July 20, 1983 regulations shall remain, this part of the regulation should properly reflect the 1983 and 1999 regulations. Requiring parents to assert ADA and Section 504 rights in the IEP process is cumbersome and potentially futile, as many courts would require an exhaustion of IDEA remedies before entertaining a separate civil rights challenge.

Proposed §300.504(b): clarify that placing the procedural safeguards on the web site does not substitute for otherwise providing the safeguards as required by §300.504(a). The regulation permits a public agency to place a copy of their procedural safeguards on their website; however the regulation does not clarify that placing the safeguards on the web site does not substitute for individually providing the procedural safeguards to parents as required pursuant to §300.504(a). Many families do not have access to the internet and it is important to clarify that written copies of the safeguards must be given to the parents under all of the circumstances enumerated in § 1415(d)(1)(A) and §300.504(a). The regulations should clarify that placing the notice on the agency's website does not negate the duty of the district to provide the notice individually to the parent per this provision. Also, if the parent elects to use the three-year IEP process through a State pilot program as explained under Section 1414(d)(5), the regulations should clarify that the requirement that the parent receive the notice annually is not affected. Finally, parents should receive the safeguard information in a usable form, including current contact information for people and places that are available to provide assistance in exercising procedural rights and an outline showing the relationship of the various parties and their respective roles.

Proposed §300.506(c)(i): Maintain the language that is in the current §300.506(c)(1)(i)(A) and (B) and (c)(1)(ii). The regulation states that a mediator cannot be an employee of the SEA or LEA involved with the current case. Prior regulations did not allow mediators to be employees of <u>any</u> SEA or LEA. The way the proposed regulations are drafted a special education coordinator from one county could be a mediator for another LEA in the same state. This could cause a loss of trust on the side of the parents. Without trust parents will seek due process over mediation, which is more costly.

Proposed §300.506(b)(8): Drop the last phrase, "arising from that dispute." The regulations state that discussions in mediation cannot be used in any subsequent action regarding the dispute. The statute does not limit the confidentiality to only those subsequent actions in the same dispute, but prohibits disclosure of information in any subsequent action. The Department simply needs to be consistent with the statute at 20 U.S.C. §1415(e)(2)(F)(i).

Proposed §300.507: Re-insert the language of §300.507(a)(2) that requires the public agency to inform parents of mediation. The proposed regulation removes the provision that requires the public agency to inform the parent of the right to mediation when they file for due process. The Department reasons that the language is no longer necessary because mediation is required even for informal disputes now, not just when due process is filed. However, informing parents of this right when they have filed due process may encourage using this informal and less costly process rather then due process. Our experience in Michigan compared to other states indicates that states that proactively encourage the use of mediation have a higher rate of use. Congress recognized that mediation is a different process then due process with a different set of principles and requirements; therefore it is important that parents are informed about their rights to this process.

Proposed §300.508(c): Remove the language that requires parties to submit a sufficient notice before engaging in a resolution session. This section states that a party may not have a hearing on a due process complaint or "engage in a resolution session" until the party files a due process complaint that complies with the requirements of §300.508(b)(Content of Complaint). The statute at 20 U.S.C. §1415(b)(7)(A) states that a party may not go forward with a due process hearing if they have not fulfilled the requirements of §300.508, but does not forbid parties from moving forward with the resolution session. The Senate Report specifically states that "a District's belief that a parent has failed to meet the notice requirement of §615(b)(7)(B) should not delay a resolution session between the parties. In fact, the parent may be able to more clearly articulate their problem during the session, which would give the LEA sufficient information to try to resolve the problem." S. Rep. No. 108-185, at 38 (2004), *available at* http://thomas.loc.gov (emphasis added).

Proposed §300.508(d)(3): Allow parties to amend a due process hearing complaint in the absence of prejudice or "when justice so requires." The regulations do not provide guidance as to when it is appropriate for a hearing officer to grant permission for a complaining party to amend their complaint. The purpose of the complaint is to notify the opposing party of the claims alleged. Unless the party would be prejudiced by permitting an amendment it should be permitted in order to meet the underlying intention of due process—resolving disputes. Alternatively, the regulations should follow the Federal Rules of Civil Procedure, Rule 15(a), which states that leave to amend a complaint in federal court is to be "freely given when justice so requires."

Proposed §300.513: clarify that a party has the right to seek immediate intervention from a hearing officer to resolve pre-hearing issues and disputes. Throughout the Act there are issues/disputes that may present the need for an immediate resolution, including but not limited to tolling the complaint timeline, sufficiency of complaint and answer (§300.508), scheduling a resolution session, and addressing delays (§300.510(b). The regulations should be clear that a hearing officer has the right to hear these pre-hearing issues/disputes and make a decision on how the parties should proceed.

Proposed §300.516: Clarify that the 90 day timeline begins either from the date of a hearing officer's decision or from the date of a state review officer's decision if the state has a two-tier process. IDEA permits states to have a one-tier system (hearing officer only), or a two-tier system (hearing officer's decision is subject to an impartial review). 20 U.S.C. §1415(g)(2). However, parties cannot appeal to a court until the entire administrative process has been exhausted. The regulations must clarify that the 90-day timeline or the State's alternate timeline begins to run from the date of the final administrative decision by either the hearing officer or the reviewing officer or panel in order to prevent the inappropriate dismissal of cases.

Proposed §300.518: clarify that the "current educational placement" is the last agreed-upon placement. Although §300.518 does not change the current regulatory "stay-put" language, the event that triggers stay-put has changed with the additional due process complaint requirement now described in §300.507. Before, if a parent disagreed with an IEPT recommendation, s/he could disagree and invoke stay-put at the meeting; that is not possible under the due process complaint requirement. Bringing stay-put back to the last agreed-upon placement would encourage parents to be more deliberate and careful about requesting due process hearings while not punishing them for such care and deliberation.

Proposed §300.519(d)(2): Make surrogate parent standards for school-appointed and court-appointed parents similar. The regulation requires that court-appointed surrogates for wards of the state only meet the requirement that they are not employees of the LEA or other agency involved in the child's care and does not require such surrogates to meet the requirement that the surrogate have no conflict of interest or that the surrogate have adequate knowledge and skills to be a surrogate. Wards of the state are particularly in need of surrogate parents who meet all three requirements. For example, private residential treatment programs often house schools, and appointment of a surrogate parent from that program would create a conflict of interest in which the educator was also the student's parent. There is no reason to distinguish between court-appointed surrogates and school-district appointed surrogates on these requirements. No child should have a surrogate parent who has a conflict of interest or lacks adequate knowledge and skill to be a surrogate.

Proposed §§300.530, 300.536: Restore the "change in placement" language in the current definition. Without any specific statutory language, the proposed regulations create out of whole cloth an extremely complex and internally inconsistent definition of "change in placement" for school discipline (§300.536). Under the proposed regulations, a "change in placement" occurs if the exclusion is for more than 10 consecutive days OR if the child has been subjected to a series of removals that constitute a pattern because the removals total more than 10 days in a school year (the current regulatory standard); and the child's behavior is substantially similar to the child's behavior in the incidents that resulted in a series of removals, taken cumulatively, is determined under §300.530(f) to have been a manifestation of the child's disability; and because of additional factors such as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. Here are a few of the problems created by these new provisions:

- The language "substantially similar" is very vague and does not reflect the reality of how and why students with a disability "act out." Students frequently change their conduct even when the disability is the underlying reason for the acting out (or other negative behavior).

- Unless a student is removed from school for more than 10 school days in a row or is expelled, the student will be eligible for continuing special education services only if the school exclusion meets the new definition of change in placement. This approach violates the Congressional purpose of assuring that all children with disabilities – even those expelled for behavior that is not disability-related – will continue to get the special services that will benefit the student and the broader society.

- Section §300.530(d)(4) is inconsistent with the statute in that it appears to give districts the authority to deny special education services to students who have been excluded from school for more than 10 days in a school year as is required by 20 U.S.C. §1415k(1)(C) and (D).

- The new definition of "change in placement" is confusing and burdensome for districts and parents. Under the statute and the current regulations, if a child is suspended for a time period that exceeds 10 consecutive days or the suspensions amount to a change in placement, the school must conduct a manifestation determination to determine if the child's behavior was a manifestation of his or her behavior. If so, the discipline protections of IDEA must be followed. However, under the new proposal, a necessary criterion for determining whether a proposed school exclusion constitutes a "change in placement" is whether the child's conduct was a manifestation of her disability. Thus, under this proposal, the LEA must conduct a manifestation determination review to determine if it should conduct a manifestation determination review. This complex and circular process will burden and bewilder parents and districts.

Proposed §300.534(d): Clarify that a finding of ineligibility based on an evaluation that is more than 3 years old cannot be the basis for an exception under the provision. A district is required by child find obligations pursuant to 20 U.S.C. §1412(a)(3) to ensure students who need to be evaluated and require special education services receive evaluations and services. A district cannot avoid the requirement to provide service by relying on old, outdated evaluations. Some disabilities are not normally diagnosed until later in the child's education even though symptoms are evident earlier. Issues that may not have been present at the time of the initial evaluation may arise later in the child's life or issues that did arise may be more pronounced as the child get older and these changes may require new evaluations.

Thank you for the opportunity to make these comments. Please contact me at (517) 487-1755 if you have any questions.

Very truly yours,

Mark McWilliams
Director, Education Advocacy