



The Council of Parent Attorneys and Advocates, Inc.
A national voice for special education rights and advocacy

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Guidance for State Regulatory Advocacy

The Council of Parent Attorneys and Advocates (COPAA) is a nonprofit organization of parents, attorneys, and advocates who work to protect the civil rights of children with disabilities and ensure that they receive appropriate educational services. The following are some suggestions for seeking state regulations implementing IDEA 2004. This is not all-inclusive list and advocates should review their states' regulations for other appropriate comments to safeguard the education of students with disabilities. The suggestions for state-level advocacy below follow the order of the federal IDEA regulations in 34 C.F.R. for consistency.

Overarching Principles. IDEA's first two purposes should guide all state regulations: to ensure "that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living," and "that the rights of children with disabilities and parents of such children are protected." §601(d); see also 34 C.F.R. 300.1. States must at least comply with the IDEA minimum. They can exceed IDEA's minimum requirements with their own laws and regulations, as long as those regulations are not wholly inconsistent with IDEA 2004.¹

Subparts A & B: General & State Eligibility

34 C.F.R. §300.25(b)(2) Infant & Toddler with Disability. New federal regulations permit states to continue Part C coverage of 3-5 year olds, if parents are notified in writing of their rights and responsibilities in determining whether child will stay in Part C or be in preschool special education. Advocate for states to require fully informed written consent by parents who wish to continue under Part C. (Per 300.102, such children do not have a right to FAPE).

§300.30 Parent. Federal regulations allow foster parents to serve as parents unless prohibited by state law, regulation, or contract. Short-term foster parents unfamiliar with a child's educational needs should not be parents. Advocate for state regulations that retain 1999 regulation §300.20(b). This allows foster parents to serve as parents only if they have ongoing, long-term relationships with the child and no conflicts of interest, and only if the adoptive/biological parents' authority has been extinguished under state law.

Subpart D: Evaluations, Eligibility, IEPs & Placement

§300.301 Evaluation Timeframes. Under IDEA 2004 and §300.301, evaluations must occur within 60 days of receipt of parental consent or within state-established timeframe. The federal

¹ *Town of Burlington v. Dept. of Educ. of Mass.*, 736 F.2d 773 (1st Cir.1984), *aff'd sub nom. Burlington Sch. Comm. v. Dept. of Educ.* 471 U.S. 359 (1985); *David D. v. Dartmouth School Comm.*, 775 F.2d 411 (1st Cir. 1985); *Johnson v. Independent School Dist. No. 4*, 921 F.2d 1022 (10th Cir. 1990); *Burke Co. Bd. of Educ. v. Denton*, 895 F.2d 973 (4th Cir. 1990); *Board of Educ. v. Diamond*, 808 F.2d 987 (3rd Cir.1986).

regulation and statute spell out certain limited exceptions to this. States should not adopt longer time frames or add more exceptions other than those in IDEA 2004. A child who may have a disability needs that disability addressed quickly to avoid falling further and further behind as the rest of the class moves forward.

§300.301 Consent for Evaluations. The 60 day timeline doesn't apply if the parent repeatedly fails or refuses to produce a child for an evaluation. State regulations should require school districts to undertake serious efforts to procure consent (including calling, meeting with, and mailing certified letters to parents), explain the consequences of failing to give consent, and document these efforts. Children whose parents do not consent bear a very severe penalty in being denied IDEA services.

§300.306 Determination of Eligibility. Per IDEA and §300.306, school districts must provide parents with evaluation reports and the documentation of eligibility for free. Regulations should provide that parents can receive copies of the full evaluations so parents may participate as full and equal IEP team members and because the cost of photocopying is low.

§300.226 Early Intervening Services; §§300.307-311 Specific Learning Disabilities. [I] States should avoid harm to children already classified as having specific learning disabilities by exiting them unnecessarily under the new LD criteria. Children receiving appropriate special education who have not exited likely still need services. [II] Advocates should be aware that §300.307 allows states to ban discrepancy models. [III] New §300.311 provides procedural safeguards for children participating in processes that assess their response to scientific research-based interventions, including providing parents with information about the RTI process and their rights to an IDEA evaluation. New §300.307 allows states to adopt programs other than RTI. Children in these programs should get the same procedural safeguards. [IV] State regulations should state that early intervening and other pre-referral services cannot be used to deny FAPE and that school districts must continue to identify and evaluate children suspected of having disabilities. [V] The federal regulation commentary states that there are many RTI models and the federal regulations do not mandate a model but give the states flexibility. Advocates should carefully assess proposed state models to determine that they are valid and appropriate, and whether there is adequate research to support their use for evaluations.

§300.320(a)(2) IEPs: Short-Term Objectives. Because state regulations can exceed the IDEA minimum, states may continue to require short-term objectives and benchmarks for all children with disabilities. 71 Fed. Reg. 46663. STOs are important to determine when children are not progressing and promptly adjust educational programs, rather than waiting for the end of year and allowing the child to fall further behind.

§300.320(a)(3) IEPs: Reporting. IDEA no longer requires that progress reports for children with disabilities be given out as often as those for non-disabled children, or that reports state whether progress is sufficient to achieve the goals by year end. But state regulations should retain these requirements. They enable schools and parents to determine quickly when a child is not making appropriate progress and make changes to their educational programs during the year. A few months can make the difference in the education of a child.

§300.320 IEPs; §300.324: Functional Needs. §300.320 requires all IEPs to include measurable annual "academic & functional goals." §300.324 requires IEP team to consider the child's

functional needs. Advocate for regulations stating that these include all developmental areas affected by the child's disability, including, but not limited to, behavioral, social-emotional, functional reading and math skills, and functional life skills. Functional goals do not mean only routine activities of daily living. Had Congress intended this, Congress would have said so.

§300.320(b) Transition Services. New federal regulations provide that transition services begin with the IEP in effect when child turns 16 or earlier if IEP team agrees, and that state regulations can require them before age 16. 71 Fed. Reg. 46667. IDEA '97 had required services at age 14, a natural transition point. Transition planning and services before the transition to high school ensure better outcomes for all young adults with disabilities.

§300.321 IEP Team: Agency Rep. State regulations should affirmatively require that IEP teams include an agency representative who can commit agency resources and ensure that IEP services will actually be provided. This ensures that IEP meetings are efficient and children receive needed services. It should also result in fewer due process hearings as the personnel needed to resolve disputes will be present early in the process.

§300.321 IEP Team: Excusal. State regulations should provide that if a team member is excused under §300.321(e), the school district will inform the parents a reasonable time before the meeting of their right to have the member attend. Thus, parents will not find this out when they arrive for an IEP meeting and are under pressure to go ahead. State regulations should also require that written input provided in lieu of attending be given to school district and parents at the same time. This protects parents' ability to meaningfully participate as equal IEP team members. State regulations should require that absent team members receive copies of the IEP and training on it to ensure that children receive the required services.

§300.324 IEP Development. (a)(4) permits parent and school district to agree in writing to amend the IEP without convening a meeting. State regulations should require that parents give informed consent and be told that they have the right to an IEP meeting. The team approach is, and has always been, crucial to facilitating parental and staff participation and ensuring that FAPE is provided. IDEA 2004 permits parents to have a copy of the amended IEP. State regulations should require that parents either be given a copy or told that they can request one. This facilitates meaningful participation and many parents will be unaware of their right to a copy otherwise. Moreover, (a)(2) & (b)(2) require IEP teams to consider behavioral and positive interventions; state regulations should require behavioral interventions based on a Functional Behavioral Analysis. FBAs make interventions effective by ensuring that they address the behavior's actual cause.

Subpart E: Due Process

§300.501 Record Examination; Parent Participation. Regulations should provide that parents can receive copies of a student's records so parents may participate as full and equal IEP team members. With photocopying an inexpensive widespread technology, and electronic record copying quite easy, it no longer makes sense to limit the ability of parents to get copies.

§300.507 Filing a DP Complaint. [I] States should not shorten the statute of limitations below 2 years. Parents unfamiliar with their rights need enough time to carefully weigh the factors and evidence, consult counsel, and decide whether to file. A short timeline may result in more litigation as parties rush to protect their rights. State regulations should also affirmatively state that parents

may file compensatory education claims for periods exceeding two years when the conduct is ongoing, in accord with IDEA 2004's legislative history. Sen. Rep. No. 108-185 at 40. If a child has been denied FAPE for several years, it is not sufficient to only make up for the last 2 years. [II] State regulations should provide that filing a due process complaint tolls the statute of limitations when the allegations arise out of the same conduct, transaction, or occurrence set forth or attempted to be set forth in the original notice--even if amendments are needed. This is the standard courts routinely apply under Federal Rule of Civil Procedure 15(c).

§300.508 Due Process Complaint: Sufficiency. State regulations should state that due process complaint notices are sufficient if they meet IDEA 2004 six requirements, §615(b)(7)(A). The hearing officer cannot require pleading with specificity or more than the six elements. With minor changes, these are the same six elements as in IDEA '97. Legislative history makes clear that due process notices need not reach the level of specificity required for court pleadings and need only give the other side "an awareness and understanding of the issues forming the basis of the complaint." Sen. Rep. 108-185 at 34. In adopting the Senate bill, the Congress specifically rejected the House's proposed language that parties describe "the specific issues." IDEA 2004 imposes minimal pleading requirements and does not require specificity. *Schaffer v. Weast*, 126 S.Ct. 528 (2005).

§300.508, §300.510 Due Process Complaint: Resolution Session. The federal regulation commentary states that if a motion for insufficiency is granted and parents must amend the complaint, "[t]here is no need to hold more than one resolution meeting, impose additional procedural rules, or otherwise adjust the resolution timeline." 71 Fed. Reg. 46698. State regulations should affirmatively include this requirement. Repeated 30-day resolution periods deny a child access to justice and FAPE; one month is a long time when a child traverses an entire grade in 10 months.

§300.508 Due Process Complaint: Amendment. Parties should be allowed to amend due process notices unless it would unduly prejudice the other party. Granting leave to amend serves the purposes of justice and protects pro se parents unfamiliar with legal technicalities. Alternatively, regulations should state that leave to amend be freely given when justice so requires. Federal courts have used this standard under Fed. Rule Civ. Proc. 15(a) since 1937.

§300.509 Model Forms. States are required to design model forms for voluntary use, after consulting with stakeholders through the public participation process. Advocates will want to carefully read these forms to ensure they comply with IDEA 2004's requirements and do not add heightened standards, such as requirements to plead in the particular.

§300.510 Resolution Session: Scheduling. Regulations should require school districts to make all reasonable efforts to schedule the resolution session at a mutually-agreed upon time and place, and contact the parent within 5 days of receiving the complaint to schedule the meeting, and work in good faith with parents to select resolution team members. This is important because the new federal regulations, 34 C.F.R. §300.510(b)(4), permit school districts to dismiss due process complaints if parents do not participate. Therefore, meetings should not be scheduled at times when parents cannot participate or do not receive enough advance notice to get time off work or otherwise arrange to participate.

§300.510 Resolution Session: Parent Participation. State regulations should require school

districts to make serious efforts to secure parent participation in sessions, including telephone calls, letters, and visits, and must carefully detail their efforts in accord with 34 C.F.R. §300.322. Only after having done so, may a school district seek to dismiss a case for failure of parents to take part. The federal regulation commentary recognizes the importance of diligent efforts to notify parents because of the potential for dismissal and harm to the child. 71 Fed. Reg. 46702.

§300.510 Resolution Session: Confidentiality. Advocates should be aware that IDEA 2004 and the federal regulations do not affirmatively require confidentiality for resolution sessions. Advocates may wish to argue for confidentiality to encourage trust and working toward a resolution, and prevent use of the sessions for discovery and other inappropriate purposes. Advocates should consult state evidentiary rules about settlement discussion confidentiality. It is possible that some advocates may oppose confidentiality.

§300.510 Resolution Agreement: General. State regulations should permit a signed resolution agreement to be enforced through the SEA's Complaint Procedure, as well as court. The federal regulations allow states to do this. 34 C.F.R. §300.510(d). Resolution agreements should state prominently and in boldface (or its equivalent) that they may be voided in three business days. Given the serious effect these agreements may have, parents should clearly know their rights.

§300.511 Impartial Due Process Hearing. [I] A number of new federal regulations provide for parties to quickly seek a ruling from a hearing officer, such as when a school district fails to convene a resolution session. State regulations should provide that hearing officers must be appointed within 3 days of the SEA's receipt of a due process complaint notice. Some SEAs are delaying hearing officer appointments until late in the process, such as after the 30-day resolution period, which interferes with the ability to get rulings on motions. [II] State regulations should apply the state's Code of Judicial Conduct to hearing officers. They act as judicial officers and their rulings determine parents' legal rights. They should be held to the same high standards as judges. [III] State regulations should require objective measures to ensure that hearing officers have the requisite qualifications set out in IDEA 2004 regarding knowledge of IDEA, special education law, and legal practice. 20 U.S.C. § 1415(f)(3)(A)(I); 34 C.F.R. §300.511(c). SEAs should also include all of these components in Hearing Officer training programs and publicly share the information provided to officers in such trainings.

§300.507-13, §300.532: Deadlines/Extensions. Some state regulations permit hearing officers to extend deadlines for motions, etc. and some school district counsel have sought such extensions in hearings. The new deadlines in IDEA 2004 were set by federal statute, and hearing officers do not have the right to extend them. Advocates should also carefully review existing regulations for deadlines that may violate the IDEA 2004 deadlines (e.g. regulations setting a 2-day evidentiary exchange in expedited discipline cases).

§300.516 Civil Actions. Advocates should be aware that under IDEA 2004 and the regulations, aggrieved parties may bring civil actions within 90 days of Hearing Officer/State Review Officer decisions or within the time period set by explicit state law. Regulations should retain longer periods to enable parties to make meaningful decisions about whether to appeal, and to fully review the factors and evidence, and consult counsel. Parents not represented by counsel may wish to hire lawyers and need adequate time to find them.

§300.519 Surrogate Parents. State regulations should require court-appointed surrogates for

wards of the state to have no conflict of interest and to have adequate knowledge and skills, as federal regulations require for wards appointed by school districts. No child should have a surrogate with a conflict of interest or who lacks adequate knowledge and skill.

Discipline

§300.530 Discipline Authority.

IAES & FAPE. State regulations should affirmatively provide that all children, even those removed to Interim Alternative Education Settings (IAES), continue to receive FAPE, not less-than-FAPE. IDEA § 615(k)(1)(D) expressly requires that a child removed from his current placement continue receiving educational services “as provided in section 612(a)(1).” §612(a)(1), in turn, provides that children who are removed or suspended must receive FAPE.

IAES & Services. IDEA 2004 §615(k)(1)(D) and 34 C.F.R. §300.530(d) provide that children in IAES must continue to receive educational services to enable them “to continue to participate in the general education curriculum. . .and to progress toward meeting” IEP goals. Because state regulations can exceed federal protections, advocate that children in IAES receive services enabling them to “appropriately progress” in the general curriculum and “appropriately advance toward achieving” their IEP goals.

Short-term removals/Change in placement. Seek language in state regulations to implement important parts of the federal regulation commentary: [I] repeated removals of less than 10-consecutive days may not be used to circumvent legal provisions applicable to change in placement. 71 Fed. Reg. at 46715. [II] Bus suspensions are changes in placement if the IEP includes bus service, unless alternative transportation is provided, *id.*

Providing FBA/BIPs. IDEA 2004 §615(k)(1)(D) and 34 C.F.R. §300.530(d) provide that a child removed to an IAES must receive, “as appropriate,” a functional behavioral assessment and behavioral intervention plan to address the conduct violation so that it does not recur. Advocate for state regulations that provide an FBA and BIP for all children who are removed, rather than permitting the school district personnel determine whether they are appropriate. FBAs are important to ensure that interventions address the behavior’s cause and resolve it.

Manifestation Determination Review. [I] IDEA 2004 §615(k)(1) and 34 C.F.R. §300.530(e) define manifestation as conduct that “was caused by, or had a direct and substantial relationship to, the child’s disability,” or was “the direct result of the LEA’s failure to implement the IEP.” Be alert for proposals to impermissibly alter IDEA 2004’s requirements and define a manifestation as only conduct caused by the disability. [II] Under 34 C.F.R. §300.530(e), the team makes the manifestation determination by reviewing all relevant information in the “student’s file.” State regulations should define this to include all education records of the child. Given the importance of the MDR in determining the child’s placement, the team should consider all relevant information and not construe the term “student’s file” narrowly. [III] State regulations should require the School district to make good faith efforts to work with the parents in selecting the relevant IEP team members for the MDR.

§300.532 Appeal. State regulations should provide that in determining whether to change a child’s placement because the current placement is substantially likely to result in injury, the Hearing

Officer should consider the appropriateness of the student’s current placement and whether the school district has made reasonable efforts to minimize the risk of harm in the student’s current placement, including the use of supplementary aids and services. All of these factors remain an important part of the hearing officer’s decision, even though no longer in 34 C.F.R. §300.532. The school district is required to make reasonable efforts to keep the child in the least restrictive environment to the maximum extent possible, including the use of supplementary aids and services under IDEA 2004, §612(a)(5). See also *Light v. Parkway C-2 S.D.*, 41 F.2d 1223 (8th Cir. 1994) (interpreting IDEA to apply this consideration to disciplinary hearings even before IDEA 97 specified these factors). If a placement is inappropriate, then a child has likely been denied FAPE.

§300.532(c) Expedited due process hearings. States can impose different procedural rules for expedited hearings, but must comply with the timelines and protections in §§300.510-514 and 532. Advocates should be aware of attempts to alter these fundamental protections in state regulations.

§300.534 Discipline/Children Not Yet IDEA-Eligible. [I] State regulations should provide that if a parent does not know how to write or has a disability that interferes with providing a written statement, the school district must provide personnel and services to enable the parent to express in writing his/her concerns and meet the statutory requirements. [II] State regulations should clarify that a finding of ineligibility based on an evaluation over 3 years old cannot be the basis for finding the school district is not deemed to know a child has a disability. It is inappropriate to assert that an evaluation from many years ago relieves a school district of its responsibilities.

§300.536 Change in Placement: Short-term removals. State regulations should require a Functional Behavioral Assessment for children who, after being removed for 10 cumulative school days, receive additional short-term removals. This will help find the cause of the misconduct, break the cycle of removals, and enable children to remain in the classroom and not fall further behind.

§300.536 Change in Placement: Substantially-similar test. 34 C.F.R. §300.536(a) provides that removing a child repeatedly for less than 10 consecutive school days, is a change in placement if, among other things, the child’s behavior is “substantially similar” to behavior that caused previous removals. State regulations should define “substantially similar” to include behaviors that were caused by the child’s disability or had a direct and substantial relationship to it. A child may engage in behaviors that could appear different on the surface but are substantially similar in that they are all caused by or related to the disability. This preserves Congress’ intent that children should not be removed for more than 10 school days when the removal is a manifestation of the child’s disability.

Conclusion

Over 32 years after IDEA was enacted, many children across this country still do not receive free appropriate public educations. State regulations should ensure that children with disabilities receive meaningful educational benefit and protect the rights of parents to be equal participants in the process and to enforce the IDEA.

Sincerely,
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