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John H. Hager
Assistant Secretary
Office of Special Education and Rehabilitative Services
United States Department of Education
400 Maryland Ave., S.W.
Potomac Center Plaza - Room 5126
Washington, DC 20202-2641

Dear Assistant Secretary Hager:

On behalf of the more than 1.3 million members of the American Federation of Teachers (AFT), I am writing to provide comments and recommendations regarding changes to federal regulations (34CFR Parts 300 and 303), which we believe are needed to implement the Individuals with Disabilities Education Improvement Act of 2004 (IDEA). The AFT represents teachers; school-related professionals and paraprofessionals; higher education faculty; other professionals in education and healthcare; federal, state and local government employees; and retirees. Many of our members are directly involved in the education of students with disabilities.

The AFT welcomes many of the changes in the IDEA. We particularly support changes that strengthen accountability standards for students with disabilities, provide schools greater flexibility in applying discipline procedures for these students, and laud the pilot program to reduce paperwork, thus increasing valuable instructional time.

We are, however, very concerned that the language in the final 2004 legislation will allow parents and school districts to exclude members of the IEP team from meetings to review a student's IEP. During the 1997 IDEA reauthorization process, the AFT strongly advocated that general education teachers play a critical role in meetings related to the student's individualized education program. This language remained largely intact in the 2004 reauthorization. The inclusion of the general education teacher was especially important in light of the Act's focus on affording students with disabilities greater access to the general curriculum and state assessments. We believe that the regulations should ensure that teachers and other service providers are not excluded from IEP meetings, and that strides made in reducing paperwork are not rendered meaningless by new reporting requirements attached to the excusal provision.

In order not to exacerbate the shortage of special education teachers, the AFT urges the Department to insure that all states develop a High Objective Uniform State Standard of Evaluation (HOUSSE) for new and veteran special education teachers and allow maximum flexibility for teachers to demonstrate their qualifications.

In addition to these concerns, the AFT has a number of other recommendations about areas the Department of Education should consider while drafting the new regulations.

IEP Team Participation

- **IEP Attendance Section 614 (d)(1)(C):** This section clarifies when the attendance of an IEP team member is not necessary. Subparagraph (i) establishes that a member would not be required to attend all or part of the meeting, if the student's parent and the school district agree in writing that the attendance is not necessary because the member's area of the curriculum or related services is not being modified or discussed at the meeting. Subparagraph (ii) of this section allows a member of the IEP team to be excused from attending all or part of the meeting when the meeting does involve the member's area of the curriculum or related services, if the parent and the school district consent in writing to the excusal and the member submits written input to the parent and IEP team before the meeting.

Comments and/or recommendation: Most students with disabilities are expected to meet grade-level standards and participate in state and local assessments. Thus, the importance of the collaborative planning that occurs at IEP meetings cannot be overstated. In large urban schools, IEP meetings are often the only time that parents, teachers and service providers who work with a student with a disability meet to discuss the student's learning and behavioral needs.

Excusing members from team meetings that do not involve the member's area of curriculum or related services is good time management; however, permitting parents and school administrators to excuse members from meetings that do involve the members' area of expertise may result in the student's needs being inadequately or inappropriately addressed.

When the provisions requiring general education teacher participation were originally added in the 1997 reauthorization, Congress recognized the crucial role of general education teachers in implementing the IEP by including them in the IEP team. If excused, how will general education teachers provide effective input regarding their prescribed role in the IEP team including input on issues pertaining to the general education

curriculum? More important, if they are not part of the team meeting, how will the general education teacher and the student's parent gain a true appreciation of how the child's disability affects his or her participation in the general education curriculum and environment, and how best to teach the child?

The IDEA Improvement Act of 2004 specifically permits parents and local educational agencies (LEAs) to use alternate means of participation, such as video conferences and conference telephone calls. If properly utilized, this should minimize, if not eliminate, the need to excuse members from participation.

In addition to being ineffective, language requiring excluded IEP team members to submit their views in writing will create a greater paperwork burden for teachers and other school professionals. U.S. Department of Education personnel studies show that largely because of existing paperwork burdens, 98 percent of school districts experience special education staffing shortages.

The "excusal" provisions raise a host of issues, many of which must be addressed in a new section 300.345 of the regulations titled "IEP Attendance." Section 300.345 should include specific provisions that:

- Allow states to establish a higher standard of participant involvement and require a full IEP team when the IEP is initially developed and reviewed. (The House Report notes that Section 608 of the Act is not intended to reduce state input or practice in this area. Allowing a state to maintain its authority to require a full IEP team when a student's IEP is developed and reviewed is consistent with the House Report.)
- Clarify who will decide on behalf of the LEA whether a member should be excused and whether the excused member will have a say in the decision.
- Clarify whether the decision to excuse an IEP team member must be made in advance of the meeting, and, if so, how far in advance. The excused member must be afforded reasonable time to be informed of the excusal and to provide written input prior to the meeting.
- Establish procedures to ensure that parents understand the purpose of the member's participation so they can make informed decisions regarding excusal, including how the parents' questions will be addressed if the member with expertise has been excused from the meeting.
- Require the written agreement between the parents and school district to indicate the reason for the excusal based on criteria established in Section 300.345 of the regulations. The regulations should clarify that the cost of providing coverage for the classroom

teacher, a disagreement between the administration and the teacher or service provider regarding the appropriate program or level of support for the student, or difficulty in scheduling the attendance of IEP team members are not legitimate reasons to excuse the member.

- Require school districts to document attempts to involve members in the IEP meeting, including the use of teleconferencing and other technology.
 - Clarify whether all meetings (such as those related to initial placements, transition planning, and reviews requested by teachers and service providers) are treated equally for purposes of the excusal provisions.
 - Indicate the components of the “written input” to be completed by excused members prior to the IEP team meeting.
- **Changes in IEP after the Annual Meeting [Section 614(d)(3)(D)]:** This section includes a new provision allowing parents and LEAs to make changes in the IEP after the annual review without an IEP team meeting. Instead of making the changes at a meeting, the parents and the LEA may develop a written document to amend or modify the student’s current IEP.

Comments and or/ recommendation: Under current law, specific adjustments in instructional methods made by either a general education or special education teacher to assist a student with a disability to achieve his or her annual goals would not require IEP team action. However, if changes are contemplated in the child’s measurable annual goals, benchmarks, short-term objectives or in the services or program modifications or other components described in the child’s IEP, the IEP team must be reconvened to address those changes.

AFT members tell us that it is common practice in many districts for administrators and supervisors to direct teachers and providers to change students’ IEPs to maximize group size, to reduce services or to discontinue services altogether. Our members are directed to make these service “adjustments” for administrative and budgetary reasons, not to meet the needs of the students. Sometimes, supervisors unilaterally make these adjustments over the objections of teachers and providers or without any prior discussion with school personnel who work directly with the student. Often parents are not informed of the change. When they are, it is usually by phone rather than at an IEP meeting.

In the light of our experience under current law, Section 300.346 of the regulation should clarify the following questions:

- Which school personnel will be able to make changes in the IEP after the annual meeting? If the change involves a particular team member's area of expertise, how will the member be involved in the decision? If the member is not involved, will the member have the right to register his or her objection and the rationale for the objection?
- What changes can be made after the annual meeting? Will permissible changes be limited to present levels of performance, annual goals, test accommodations and service enhancements? Or will the LEA representative and parents be able to change the program and placement; the location of services (either to a more or less restrictive environment); the group size, duration and frequency of service; and reduce or discontinue services?
- Will this procedure be limited to the period of time between the annual review and the initiation date of the new IEP, or will such procedures be allowed after the implementation of the new IEP?

Evaluation and Eligibility Determinations

- **Requests for Initial Evaluation [Section 614(a)(1)(B)]:** This section indicates that requests for an initial evaluation may be made by either a parent of a child, a state education agency (SEA), another state agency or a LEA.

Comments and/or recommendation: Because the Act now includes a provision regarding the authority to request an initial evaluation, clear direction must be provided to school districts about the role and responsibilities of professional members of the school staff in the referral process. This clarification is especially important in relation to the "child find" provisions of IDEA that require school districts to identify, locate and evaluate all children who are in need of special education and related services.

Professional members of the school staff (teachers, guidance counselors, speech-language professionals, school psychologists and social workers) work with students daily and understand their learning and behavioral needs. These professionals often are involved in school district procedures regarding the provision of instructional interventions and support services for students who are struggling to meet the state's learning standards. Through their professional preparation and experiences, these professionals also are familiar with the learning characteristics associated with students with disabilities. Among school personnel, they are in the best position to suspect if a student has a disability that may impede his or her ability to progress in the general

education program. Their right to request an initial evaluation should be explicitly recognized in the regulation.

Section 300.531 should include language that clearly allows teachers and other professional members of the district's staff to make a direct referral for an initial evaluation, if they suspect that a student has a disability. Further, to preserve the integrity of the child-find process, federal regulations should require SEAs to prescribe procedures to ensure that such requests are processed in a timely and appropriate manner.

- **Eligibility Determination [Section 614(b)(5)]:** This section adds language to clarify that lack of instruction in reading would include the essential components of reading instruction as defined in Section 1208(3) of the No Child Left Behind Act (NCLB).

Comments and/or recommendation: Section 300.534 of the regulations should be amended to clarify the meaning of "lack of instruction" and to add the essential components of reading instruction pursuant to NCLB. This section also should clarify the LEA's obligations with regard to students deemed ineligible due to lack of appropriate instruction in reading. Specifically, to ensure that the child is not denied further learning opportunities due to the LEA's failure to provide instruction in the essential components of reading as defined in NCLB, this section should require that upon determining that a child is ineligible due to lack of appropriate instruction in reading, the LEA must provide appropriate instruction promptly and with the intensity required to enable the student to become a proficient reader and to progress in the general curriculum.

- **Lack of Parental Consent for Special Education and Related Services [Section 614(a)(1)(D)]:** This section prohibits school districts from using due process procedures to override a parent's refusal to consent to the initial provision of special education programs and services. According to IDEA, in the absence of parental consent a school district would not be in violation of the requirement to make available a free and appropriate education (FAPE) to the student for the failure to provide the recommended special education programs and services. In addition, the school district would not be required to convene an IEP meeting or develop an IEP for a student whose parents fail to provide consent for the initial provision of services.

Comments and/or recommendation: By prohibiting a school district from using due process procedures to provide initial special education and related services, students with significant behavioral and learning problems will remain in general education classrooms without necessary

supports, potentially affecting the quality of learning of all students in the classroom. Sections 300.504 and 300.505 of the regulations should be amended to ensure that the parent is fully informed of the impact that the lack of parental consent to the initial provision of services will have on the child, including the inability to claim the protections for “children not yet eligible for special education and related services” under Section 615(k) of the Act. The regulations also should clarify that the lack of consent will not prohibit the district from providing appropriate general education services to address the student’s learning and behavioral problems.

- **Reevaluations [Section 614(a)(2)]:** This section adds new language to specify that a reevaluation also must be conducted if the district determines that the educational or related-services needs, including improved academic achievement and functional performance of a student, warrant a reevaluation. Section 614(a)(2) of the Act establishes limitations on the conduct of reevaluations. Such evaluations may not be conducted more than once a year unless the parent and school district agree otherwise, and must be conducted at least every three years unless the parent and the school district agree that a reevaluation is unnecessary.

Comments and/or recommendation: Section 300.536 of the regulations should clarify that the decision regarding triennial reevaluation is made after the IEP team and other qualified professional complete the tasks required by section 614(c), i.e., after they review the existing evaluation data and, on the basis of the review and information provided by the parents, identify whether additional data are needed to determine the child’s continuing eligibility and educational needs. This will ensure that parents have the information they need to make the decision regarding the need for reevaluation. Lastly, federal regulations should clarify the terms “academic achievement” and “functional performance,” and should specify the extent of documentation of the agreement between the parent and school district that a reevaluation is not necessary.

- **Evaluations Before Change in Eligibility [Section 614(c)(5)]:** This section adds language to the statute, which says that a school district no longer is required to conduct an evaluation of the student if the termination of the student’s eligibility is due to the student graduating from high school with a regular diploma or the student reaches the age of 21. The district is required, however, to provide the student with a summary of his or her academic achievement and functional performance, which would include recommendations on how to assist the student in meeting his or her postsecondary goals.

Comments and/or recommendation: Section 300.534 of the regulations should be amended to clarify the detail required in the student's summary of academic achievement and functional performance.

- **Specific Learning Disabilities [Section 614(b)(6)]:** This section of the Act no longer would require school districts to take into consideration whether a student has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation or mathematical reasoning. In addition, school districts may use a process that determines if the child responds to scientific, research-based intervention as part of the evaluation procedures.

Comments and recommendation: The decision to use these procedures for the determination of a learning disability rests with the local school district in the absence of any required state policy or guidance and the limited research-based alternatives that have been validated at this time. However, consistent with the U.S. Senate Health, Education, Labor and Pensions Committee report, federal regulations should be amended to encourage states to develop research-based models that can be implemented by school districts and to require SEAs to establish a uniform statewide process for determining whether a child has a learning disability.

Section 300.543 should be amended to require that the written report documenting a student's eligibility include the specific criteria the IEP team used for determining the existence of a specific learning disability, including the student's response to research-based interventions. In addition, the regulation should clarify whether the response to the research-based intervention should be determined prior to or during the 60 school-day timeline described in Section 614(a)(c)(i) of the Act.

- **Individualized Education Program [Section 614(d)A]:** This section includes the components of a student's individualized education program.
 - **Present Level of Performance:** The present level of performance and annual goals must be described according to the student's academic achievement and functional performance versus "educational performance" in prior law.
 - **Comments and/or recommendation:** Section 300.347 of the regulations should include a definition of "academic achievement" and "functional performance."

- **Special Education and Related Services:** The IEP must indicate a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the student.
- **Comments and/or recommendation:** Section 300.347 of the regulations should clarify the meaning and implications of the phrase “peer-reviewed research,” as it relates to the IEP team’s determination for special education programs and services.
- **Measurable Annual Goals:** The new law eliminates the requirement for benchmarks or short-term objectives for most of the students with disabilities (students who do not take alternate assessments aligned to alternate achievement standards). However, the law requires “measurable annual goals, including academic and functional goals” and a description of how the child’s progress toward meeting the annual goals will be measured.
- **Comments and/or recommendation:** Federal guidance interpreted the requirement for measurable annual goals under IDEA 1997 to mean goals that help the student develop the skills needed to master the content area, not content area goals. Does the new language in IDEA 2004 requiring annual goals to include academic and functional goals change that interpretation? Specifically, does the new language require content area goals? Under current law, benchmarks and short-term objectives are typically used to “measure” progress toward annual goals. Federal regulations should provide guidance regarding acceptable alternatives.
- **Accommodations:** The IEP must now include a statement on appropriate accommodations necessary to measure academic achievement and functional performance on state and district-wide assessments versus the current description of “individual modifications” on such assessments.
- **Comments and/or recommendation:** Section 300.347 should be amended to include a definition of “test accommodations.”
- **Transition Services Planning:** The provision of transition planning is now a single-stage process beginning at age 16. In addition, new language is added requiring the IEP to indicate “appropriate measurable postsecondary goals based upon age appropriate transition assessments relating to training, education, employment, and where appropriate, independent living skills.” The definition of transition services in Section 602(32) of the Act was amended to clarify that such services must be designed within a results-oriented process that is focused on improving the academic and functional achievement of the student to facilitate the student’s movement to post school activities. The definition also clarifies that transition

services must be based on the student's strengths in addition to his or her preferences and interests.

- **Comments and/or recommendation:** Section 300.347 should be amended to clarify that states may establish an earlier student age upon which the transition planning process could begin and may continue to require the IEP to include, when appropriate, a statement of the interagency responsibilities and any needed linkages. In addition, Section 300.344 should be amended to permit states to continue to allow representative of an agency other than the school district that may be responsible for providing or paying for transition services to be invited to the IEP team meeting.
- **Use of Technology [614(f)]:** This section permits parents and LEAs to agree to use technology to permit alternative forms of participation in IEP team meetings and other matters.

Comments and/or recommendation: While the use of technology such as video conferences and conference calls promotes efficient use of IEP team members' time and may reduce some logistical difficulties, the AFT strongly believes that any agreement between parents and LEAs should:

- Be in writing, outlining the scope of the uses and the responsibility of the participating IEP team members; and
- Not discriminate against any IEP team member on the basis of her or his access to the relevant technology.

Not only does the AFT recognize that in many large urban school districts parents of students lack access to common technology like home computers, but we also believe that it is incumbent upon the LEA to ensure that school professionals are not excluded due to a lack of accessible technology in the workplace.

Paperwork Reduction

- **Paperwork Reduction [Section 609]:** This section includes a provision to establish a pilot program to reduce the paperwork burden on teachers and school districts. Specifically, it provides an opportunity for 15 states to identify ways to reduce paperwork burdens and other administrative duties that are directly associated with the federal IDEA requirements to increase the time and resources available for instruction and other activities aimed at improving educational and functional results for students with disabilities.

Comments and/or recommendation: Although initially limited to 15 states, it is anticipated that this effort will result in increased

instructional time and may potentially streamline state and local procedures. The regulations should clarify that prior to the submission of the application, the state educational agency must seek public comment on the application including a review by the state advisory panel.

State Eligibility

- **Related Service Providers and Paraprofessionals [Section 612(a)(14)]:** This provision removes the “highest qualified provider” standard from the law. (Prior law required that the professional standards for personnel providing special education or related services be based on the highest requirements in the state applicable to a specific profession or discipline.)

Comments and/or recommendation: Clarification in U.S. Department of Education policy will be required to determine how the deletion of the “highest qualified” standard from the Act will affect the status of prior agreements between the department and states requiring school personnel providing services to students with disabilities in school settings to hold the highest requirement in the state applicable to a specific profession or discipline.

Local Educational Agency Eligibility

- **Early Intervening Services [Section 613(f)]:** This section allows school districts to use up to 15 percent of their IDEA funds to help students who need additional academic and behavior supports to succeed in general education. In implementing early intervening services, a school district may carry out certain activities, including professional development for teachers and other school staff, to help them deliver “scientifically based academic instruction and behavior interventions” and provide educational and behavioral evaluations, services and supports, including scientifically based literacy instruction. IDEA funds may be used to support early intervening activities that are coordinated with activities funded under NCLB as long as such funds are used to supplement, and not supplant, NCLB funds for these activities.

Comments and/or recommendation: The AFT strongly endorses the use of early intervention services as a remedy for students with behavior and learning problems, especially those representing different racial and ethnic backgrounds. Section 300.233 of the regulations should be amended to incorporate the allowable use of IDEA funds for early intervening services and to clarify the term “scientifically based academic instruction and behavior interventions.” We believe however,

that the department must establish guidelines to ensure that these resources are directed to serving students at risk of being placed in special education.

- **Professional Development [Section 613(a)]:** This section continues to require school districts as a condition to receive federal IDEA funds, to submit a plan to the state department of education. This plan must include an assurance that all personnel necessary to carry out IDEA requirements are appropriately prepared and trained including that those personnel have the content knowledge and skills to serve students with disabilities subject to Section 612(a)(14) and Section 2122 of the No Child Left Behind Act.

Section 2122 of NCLB includes several requirements in regard to the components of a local application including but not limited to a needs assessment of local needs for professional development and a description of how the school district, teachers, paraprofessionals, principals, and other relevant school staff and parents have collaborated in the planning of activities and in the preparation of the application.

Comments and/or recommendation: Section 300.221 of the regulations should be amended to reflect the provisions of Section 2122 of NCLB in regard to the development and implementation of a personnel development plan.

Discipline Procedures

- **Placement in Alternate Educational Setting [Section 615(k)]:** This section affords teachers and school districts greater discretion in regard to disciplining students with disabilities, while protecting the rights of these students. The new discipline procedures specifically refer to violations of a code of student conduct in relation to removal of students from their current placement for up to 10 school days. School officials may now consider “any unique circumstances on a case-by-case basis” when determining whether to change the placement of a student who violates the code of conduct.

Comments and/or recommendation: Section 300.520 of the regulations should be amended to incorporate the aforementioned statutory language and to clarify the meaning of the phrase “unique circumstances” as they relate to the authority of school personnel to make a change of placement on a “case-by-case” basis. In addition, Section 300.520 of the regulations should include the full definition of

the terms “weapon” and “serious bodily injury” rather than citing another statute where the definition can be found.

- **Manifestation Determination [Section 615(k)(1)(E)]:** This section indicates that the manifestation determination is made by the parent, school district and relevant members of the IEP team (as determined by the parent and school district). The determination is made upon consideration of “all relevant information in the student’s file, including the child’s IEP and teacher observations” and “relevant information provided by the parent.”

Comments and/or recommendation: Section 300.523 of the regulations should be amended to incorporate the revised statutory language regarding manifestation determination. The regulation should clarify the process for determining which “relevant members” of the IEP team should participate making the manifestation determination (such as allowing each party, i.e., the parent and the school district, to designate such members), and the process for making the manifestation determination (such as by majority vote, consensus, etc.).

We appreciate the opportunity to comment on required changes to implement the Individuals with Disabilities Education Act and strongly urge you to consider our recommendations.

Sincerely,

Antonia Cortese
Executive Vice President

AC: kb