

National Association of State Directors of Special Education, Inc.

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September 18, 2017

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

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

Dear Ms. Malawer:

The National Association of State Directors of Special Education (NASDSE) writes in response to the above referenced docket number. NASDSE is the national nonprofit organization, incorporated in 1938, that represents the state directors of special education, the IDEA Part B data managers and the IDEA 619 coordinators in the states, the District of Columbia, the federal territories, the Freely Associated States and the Department of Defense Education Agency.

NASDSE's mission is to work with state education agencies to ensure that all children and youth with disabilities receive the educational supports and services they need from birth to be prepared for post-school education, career and independent living choices.

NASDSE accomplishes its mission by establishing and maintaining relationships with those individuals and groups responsible for the development of policies, educational and other programs serving individuals with disabilities, and those responsible for implementation at the school, local district, state and national levels. NASDSE promotes leadership development through collaborative relationship building with these stakeholders based on its Leading by Convening initiative and strategies.

NASDSE – and our members – believe that strong federal protections for individuals with disabilities are a cornerstone of our nation's commitment to uphold equity and access to public education and all aspects of life for all of our nation's people.

NASDSE stands behind the federal laws that we believe are the most significant to correcting discrimination and sustaining equity in our education system. These laws, as well as their federal implementing regulations are essential to assuring protections for infants, toddlers, children and youth with disabilities and their families, include the following;

- The Civil Rights Act of 1964

- The Elementary and Secondary Education Act (ESEA (known as the Every Student Succeeds Act (ESSA) currently)
- The Rehabilitation Act of 1973 (particularly Section 504, reauthorized in the Workforce Innovation and Opportunity Act)
- The Individuals with Disabilities Education Act (IDEA)
- The Higher Education Act
- Americans with Disabilities Act (ADA)

We note that the wholesale evaluation of existing regulations for the purpose of repeal, replacement, or modification (Executive Order 13777 Sec. 3(g)(ii)) is highly unusual and misguided. The process of promulgating regulations is codified in the Administrative Procedures Act (APA) and is a bedrock of administrative law.

The regulations listed by the *Regulatory Reform Task Force* for possible “repeal, replace or modify” by the U.S. Department of Education have already gone through an open, transparent and prescribed procedure as mandated by the APA. For all regulations, the rulemaking process begins after Congress passes a bill and the President signs it into law. Before the draft rule is published by the federal agency, it is reviewed by the Office of Management and Budget (OMB). The public then has 30 to 90 days to provide feedback on the proposed draft regulation. Agencies must consider all comments, document responses to them, and develop a revised regulation that is then sent to OMB for final review. In some cases, these regulations undergo a second comment period before final regulations are published.

Federal agencies must also assess the costs and benefits of the proposed regulatory action (Executive Order 12866), provide estimates of time necessary for reporting of information required by the regulations (Paperwork Reduction Act of 1995), provide opportunities for consultation by elected officials in those state and local governments affected by the regulations (Executive Order 12372) and determine whether the regulations require transmission of information that another agency gathers or makes available (20 U.S. Code § 1221e–4, Educational impact statement). These processes ensure that development of regulations is based on a wide range of input and that the statute in question will be implemented as intended.

NASDSE believes the Administration’s proposal under Executive Order 13777 is completely unnecessary, costly and redundant. Furthermore, while NASDSE appreciates that the Department extended the timeline for responding to the request for feedback, even two months is not sufficient to review the entire scope of regulations and guidance issued by the Department of Education. The short time frame further contributes to questions surrounding this process. For example, if the Department truly wanted meaningful comprehensive feedback, it could have done a ‘rolling review,’ e.g., examining regulations/guidance on a law-by-law or Department division basis.

Executive Order 13777 requires each Regulatory Reform Task Force to attempt to identify regulations that:

- (i) eliminate jobs, or inhibit job creation;
- (ii) are outdated, unnecessary, or ineffective;
- (iii) impose costs that exceed benefits;
- (iv) create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;

(v) are inconsistent with the requirements of section 515 of the Treasury and General Government Appropriations Act, 2001 ([44 U.S.C. 3516](#) note), or the guidance issued pursuant to that provision, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or

(vi) derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified (Executive Order 13777 Sec. 3(d)).

It is important to note that the normal process of promulgating regulations already takes these factors into account.

Agencies should review their regulations from time to time to ensure that they remain relevant and effective. However, we believe that eliminating regulations for the sake of elimination is misguided and will be harmful. All agencies should conduct their activities in a way that furthers their mission. The U.S. Department of Education should work to ensure that its regulations “promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access” (U.S. Department of Education Mission Statement, <https://www2.ed.gov/about/landing.jhtml>). Any efforts of the Department to repeal, replace, or modify regulations without regard to the impact on the students and families served by this Department carries the risk of doing harm to the very students and families it serves.

The U.S. Department of Education fulfills a vital role in providing federal regulations and guidance to states so that districts and schools can meet their legal obligations to assure children with disabilities are provided an equitable opportunity to acquire a free appropriate public education.

With respect to non-regulatory guidance, the process is different. The Department of Education is not required to seek stakeholder input before issuing non-regulatory guidance. Often, the ‘guidance’ is treated as regulatory in the sense that the guidance is treated as a requirement, rather than good practice.

NASDSE’s Specific Recommendations

- NASDSE suggests that any further consideration of any process carried out under this Executive Order only be undertaken with explicit stakeholder input and that any proposals to modify any regulations must undergo the regular notice and comment process.
- We agree that old guidance that is either completely of-date or that has been superseded by new guidance can be eliminated. We would include in that list Memo 09-02, which has been superseded by new guidance and regulations (e.g., the regulation on disproportionality and the Department’s Results Driven Accountability initiative).
- If the Department’s Regulatory Reform Task Force feels compelled to take specific action under the Executive Order in spite of the strong opposition that has been voiced against this initiative, then NASDSE suggests some clarification as to how non-regulatory guidance should be interpreted by states as well as how it can be applied by the Department of Education during monitoring or making findings of noncompliance against states. We suggest that ‘guidance’ be treated as such, i.e., guidance and that information contained in guidance documents not be treated or implemented as

requirements. For example, Memo 09-02 (identified above) has been implemented by the Department as a requirement, rather than guidance.

- NASDSE members do have specific concerns regarding the recently promulgated regulation on significant disproportionality. Because we have concerns that the calculations required by the regulation will not work and add significant burden to states and local school districts (LEAs), we suggest that, before final implementation, that OSEP hold a meeting with representatives of the Part B data managers, who are tasked with calculating the data required by the regulation, to gain further knowledge of the on-the-ground data implementation concerns. For example, is unclear that there is any research available upon which to rely in making decisions for the various thresholds.
- In addition, we encourage OSEP to reconsider the requirement to determine significant disproportionality for three and four years being aware that in a state without universal preschool a majority of the children enrolled in public preschool are children with disabilities.

We cannot overemphasize the importance of retaining regulations and guidance that protect students and families under the laws cited above. NASDSE welcomes an opportunity to meet with members of the Regulatory Reform Task Force to discuss our specific concerns. Please feel free to contact Nancy Reder, NASDSE's deputy executive director, at nancy.reder@nasdse.org if you have any questions regarding our feedback.

Sincerely,



Theron (Bill) East, Jr., Ed.D.
Executive Director