

Health Justice Project

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

RE: Docket ID: ED-2017-OS-0074

Dear Ms. Malawer,

I am writing in response to the U.S. Department of Education's request for public comment on regulations that may be appropriate for repeal, replacement, or modification as directed by Executive Order 13777. As Director of the Health Justice Project at Loyola University Chicago School of Law, a medical-legal partnership clinic working to improve the health and well-being of vulnerable children and families, and as an advocate for at risk children and children with disabilities for over 17 years, I write to ask the Department to ensure the continued protection of the rights of these vulnerable populations to access a meaningful education. The Department can continue to support the opportunities of every student as well as the right of their parents to enable their success through the preservation of the protective implementing regulations and guidance for the Individuals with Disabilities Improvement Act (IDEA) and Section 504 of the Rehabilitation Act, continued support for the implementation of the Equity in IDEA rules proposed by the Department in February of 2016, and maintain the *Guiding Principles: A Resource Guide for Improving School Climate and Discipline*, the joint guidance package on school discipline issued by the USDOE and the U.S. Department of Justice (USDOJ) on January 8, 2014. Access to a quality education that appropriately meets the needs of at risk children and children with disabilities is critical to facilitating opportunities for economic self-sufficiency in life as well as lifelong health and well-being.

First, I express my support for the comments submitted by the Council of Parent Attorneys and Advocates (COPAA) on August 18, 2017 cautioning this Department not to modify or rescind parts of the IDEA's implementing regulations because of the burdens associated with its implementation, the comments of the Division for Early Childhood of the Council for Exceptional Children submitted on August 9, 2017 seeking preservation of the protective regulations and guidance of the IDEA, and the comments of the Chicago Medical Legal Partnership for Children (CMLPC) of the Legal Council for Health Justice, submitted on September 20, 2017 and proposing amendments to the IDEA's implementing regulations related to natural environment (§303.126), IFSP Content (§303.344), due process hearing procedures (§303.345-§303.449), child's status during proceedings (§300.518(a)), state dispute resolution

Health Justice Project • Beazley Institute for Health Law and Policy

25 East Pearson Street, Chicago IL 60611 • 312.915.6470 • fax: 312.915.6588 • toll free: 800.424.4839
healthjustice@luc.edu • LUC.edu/healthjustice



options (§300.430(e)), and support for maintaining the guidance provided by the July 26, 2016 “Dear Colleague Letter and Resource Guide on ADHD).

Before providing my own comments, I want to put in context the basis of my requests for the preservation of the protective features of the IDEA and Section 504 and their implementing regulations and guidance and my suggestions for enhanced protections in certain areas. I have advocated for students with disabilities in the school setting for over 17 years in four different states in traditional public schools, charter schools, separate facility schools for children with severe emotional and behavioral challenges, educational facilities housed in juvenile jails and prisons, and schools for medically fragile children. For the past nine years I have worked with pediatric health care providers through medical-legal partnerships in Ohio and Michigan to improve the health and well-being of children with disabilities and chronic health issues by providing legal advocacy in collaboration with health and mental health providers. Throughout years of engaging in this work in multiple states, I write to express to you how essential it is and students with disabilities and their parents continue to have the support of the implementing rules and regulations and guidance of the IDEA and Section 504. It is also essential that the U.S. Department of Education continue to monitor state education agencies (SEAs) and local education agencies (LEAs) to ensure compliance with these essential laws established to protect the rights of some of our most vulnerable citizens, children with disabilities. Without engaged Department oversight of SEAs and LEAs, adherence to the protective regulations of the IDEA and Section 504 and Department guidance loosen and children suffer the consequences. The IDEA, Section 504 and their supporting regulations and guidance have been carefully crafted for nearly 50 years and should be kept primarily intact. I provide some suggestions for enhancement of the protective value of these regulations primarily on behalf of children with behavioral health and mental health conditions who are frequently subjected to harmful and ineffective disciplinary removals.

My suggestions for improvements follow:

The Manifestation Determination Review (MDR) Provisions of IDEA Should Be Amended to Prevent Excessive and Harmful Disciplinary Exclusions of Students with Behavioral Health Conditions

While the MDR provisions, which go into effect after a ten-day school removal, are intended to protect students from long-term removals for behaviors caused by their disability, the limited scope of the MDR and the lack of meaningful methods for challenging school district MDR decisions leave the MDR provision lacking effectiveness. To combat some of these deficiencies, the MDR provisions of IDEA’s implementing regulations should be amended to require that an MDR take place *before* a change of placement is imposed for disciplinary purposes.

The DOE should also provide guidance on how an MDR should be conducted and how a child’s disabling conditions and behaviors should be considered in the process. Often school districts improperly consider factors such as whether a student knew right from wrong or how the student’s disciplinary experiences will impact the views of peers rather than a true review of the student’s various disabling conditions, how those conditions impact the student’s behaviors, and what was actually happening with the student and in his or her environment before, during and

after the disciplinary incident and the relationship to the disabling conditions. As a result students with disabilities are in fact frequently removed from their educational environment because of behaviors caused by their disability, sometimes for extended periods of time.

Further, an MDR should occur sooner, after three or more consecutive or five or more cumulative days of disciplinary removal in a school year.¹ Ten days of removal can have a permanent impact on the educational success and, in fact lifelong success, of a student and is too long to wait to review whether the problematic behaviors were caused by the disability and should be addressed with supports and services as opposed to school removal.

Finally, the stay put exception in cases appealing disciplinary removals and MDR decisions should be eliminated from IDEA so that parents and students have meaningful recourse to prevent harmful and often-irreparable long-term school removals when school districts get the MDR wrong and proceed with exclusionary removals of students with behavioral health conditions.

Improve Federal Oversight of IDEA Implementation

The DOE should implement policies and practices that result in more aggressive oversight of local public school districts and state education agencies in their implementation of the requirements under the IDEA and Section 504. The DOE's recently proposed rules on Equity in IDEA and guidance on disciplinary practices are good initial measures. However, willingness to intervene when school districts are imposing excessive and disproportionate disciplinary exclusion on students with disabilities is critical to ensuring that these students have access to an education and a chance at success. The Department should consider implementing an expedited complaint procedure for students who have been removed from school for extended periods of time disciplinary reasons. Department oversight has often been the only effective intervening force to ensure that the rights of vulnerable students are protected.

Thank you for your consideration of these comments. I am happy to support the Department's efforts to protect the educational rights of vulnerable children in any way that I can and I welcome any questions or requests for further information of comment.

Sincerely,

/s/ L. Kate Mitchell

L. Kate Mitchell, Esq.
Clinical Professor of Law
Director, Health Justice Project

¹ Daniel Losen and his colleagues suggested that possible solutions to concerns about the MDR process and its trigger are to change "the threshold from 10 to 3 days" or "to drop the annual resetting" of the days each school year. Daniel Losen, Jongyeon Ee, Cheri Hodson & Tia Martinez, *Disturbing Inequities: Exploring the Relationship Between Racial Disparities in Special Education Identification and Discipline*, in *CLOSING THE SCHOOL DISCIPLINE GAP* 103 (Daniel Losen ed., 2015).