National School Boards Association

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Via Electronic Submission
www.regulations.gov

Hilary Malawer
Assistant General Counsel, Division of Regulatory Services
U.S. Department of Education
400 Maryland Avenue, S.W.
Room 6E231
Washington, D.C. 20202-

Re: ED Request for Comments on Evaluation of Existing Regulations
Docket ID ED-2017-OS-0074

Dear Ms. Malawer:

The National School Boards Association (NSBA), representing through our state associations approximately 13,800 school districts nationwide, offers the following comments to the Request for Comments, *Evaluation of Existing Regulations*, ED-2017-OS-0074,[1] issued by the U.S. Department of Education (Department) on June 22, 2017. NSBA understands that through this Request for Comments, the Department is seeking to alleviate unnecessary regulatory burdens by evaluating existing regulations and guidance documents and repealing, replacing or modifying those regulations that have a negative effect on jobs, are outdated, unnecessary or ineffective, impose excessive costs, create serious inconsistencies, are inconsistent with 44 U.S.C. 3516 note, or derive from or implement Executive Orders or directives that have been subsequently rescinded or substantially modified. We note that the Department is particularly interested in regulatory provisions that are "unduly costly or unnecessarily burdensome."

In response to this request for comments, NSBA wishes to bring to the Department's attention the following regulatory provisions and guidance documents that meet one or more of the specified criteria.

[1] Request for Comments, 82 Fed. Reg. 28431 (June 22, 2017); Extension of Filing Date for Comments, 82 Fed. Reg. 37,555 (Aug. 11, 2017).

REGULATORY PROVISIONS

Provision of FAPE under Section 504—34 CFR 104.3; and Frequently Asked Questions About Section 504 and the Education of Children with Disabilities Q14,
https://www2.ed.gov/about/offices/list/ocr/504faq.html

NSBA urges the Department to rescind 34 CFR 104.33, which asserts that public elementary and secondary fund recipients must provide a free appropriate public education under Section 504 of the Rehabilitation Act. NSBA's recommendation, supported by the points below, is based on years of compliance efforts by school districts and the attorneys advising them.

- The FAPE regulation far exceeds the language and purpose of Section 504, which prohibits discrimination on the basis of disability in programs receiving federal funds;
- The regulations establish two legal standards for different recipients of federal financial assistance. For employers, higher education and other recipients of federal financial assistance, the standard is reasonable accommodation. For K-12 schools, the standard is free appropriate public education.
- The definition of FAPE under Section 504 is ill-defined, vague and different from that under the IDEA, a statute which creates an individual entitlement. This confusion makes it difficult to implement, especially with respect to students who are covered by both statutes. This increases the risk of litigation and has resulted in confusing court decisions and inconsistency in the state of the law.
- While no federal funds are provided under Section 504 to ensure FAPE, the regulation requires that school districts provide non-IDEA eligible students with disabilities (e.g., those who have diabetes, food allergies, and other physical disabilities) with potentially costly services and procedural safeguards that may even exceed those required under the IDEA;
- Removing the FAPE requirement will not relieve school districts of the duty to provide covered students with reasonable accommodations to ensure non-discriminatory participation in programs and activities.

If the Department decides to retain the FAPE requirement under section 504, NSBA urges it to make the following clarifications:

- With respect to children eligible for services under the IDEA, a district's compliance with that statute satisfies FAPE obligations under Section 504; and
- Parental revocation or withholding of consent for services under the IDEA (34 CFR 300.9) effectively withholds or revokes consent for applicable services under Section 504.

Definition of "Day" under IDEA regulations —34 CFR 300.11

Change default definition of "day" in IDEA regulations to "school day." When a request for due process is filed immediately preceding an extended break in the school calendar, school districts experience substantial burden and expense in meeting the requirement to respond in 10 calendar days and to hold a resolution meeting in 15 calendar days. School staff must be called in to gather records and to assist with drafting the response. School buildings may be closed, making it difficult to find needed records. Staff and service providers may be off contract during the break, requiring the district to pay these

personnel for the time they are needed to assist with a response or resolution meeting or to prepare for the actual hearing. Necessary staff may be completely unavailable due to prior commitments such as summer jobs or travel.

"Calendar day" should be specifically stated as the appropriate measure where that is the Department's intention.

Local Educational Agency Maintenance of Effort (MOE) Requirement – 34 CFR 300.203(a)-(c), 300.204; Non-regulatory Guidance, July 27, 2015,
https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osepmemo1510leamoeqa.pdf

Current regulations set out four methods by which school districts can meet the eligibility and compliance standards with respect to MOE under the IDEA. In addition, a reduction in expenditures is permitted for 1) the voluntary departure of staff (for example, by retirement); (2) the costs of a special education student who has left the district, graduated, or aged out of the program; (3) the costs of a specific special education student who no longer requires the specific services; and (4) the cost of capital equipment purchased in prior years. The regulations also require that when a school district fails to meet the MOE standard, its compliance in subsequent years must be measured against the most recent preceding year in which the district met MOE, not against the deficient amount from the immediately preceding year.

NSBA urges the Department to provide more flexibility to school districts in meeting MOE requirements by withdrawing the subsequent year rule set out in 300.203(c). NSBA continues to believe this rule is without statutory support. Additional flexibility could also be achieved in one of several ways: 1) expand exceptions to allow for expenditure reductions when school districts find ways to operate more efficiently and can demonstrate no reduction in services to students; 2) provide waivers in the event of uncontrollable or exceptional circumstances, such as a natural disaster or unforeseen decline in a school district's financial resources; and/or 3) allow districts to apply the same MOE percentage under IDEA as permitted under ESSA.

Independent Education Evaluation (IEE) under IDEA regulations—34 CFR 300.502(b)

The IDEA statute requires states and school districts, as a condition of receiving federal funding for special education programs, to adopt procedures that afford students and parents "procedural safeguards" with respect to FAPE. 20 U.S.C. §1415(a). These procedures must include " (1) An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, *and to obtain an independent educational evaluation of the child*." 20 U.S.C. §1415(b)(1) (emphasis added).

The Department regulation on independent educational evaluations (IEEs) goes beyond the statute's requirement that parents be allowed to obtain an IEE, and affirmatively requires school districts to pay for such evaluations upon a parent request, or initiate a due process complaint. 34 CFR 300.502(a) and (b).

IEEs requested by parents can result in substantial expense to a school district, even after it has conducted its own appropriate evaluation. In light of these potential costs, the regulation should be amended to:

- place on parents the burden of showing that the challenged evaluation does not comply with specific provisions of the IDEA;
- require parents to make any request for an IEE within 30 days after the challenged evaluation is considered by the IEP team;
- where a school district refuses the IEE request, require parents to bring any due process hearing seeking the IEE at public expense within 30 days of the school district's refusal;
- clarify the meaning of "an" IEE does not include a separate evaluation of each area of need considered by the school district's evaluation nor does it cover an annual IEE; and
- clarify that the purpose and content of any IEE are limited to determining the child's eligibility under the IDEA and the type and extent of special education and related services needed to address the child's disability(ies); specific placement recommendations and determinations of district liability are beyond the scope of an evaluation and should be excluded.

Specificity of Due Process Complaints under IDEA—34 CFR 300.508(5), (6)

Because due process proceedings may become unduly protracted and expensive, the regulation should be amended to require that the problems identified in the due process complaint match specific requests made at an IEP meeting and that parents demonstrate that the school district refused to meet the requests so that a genuine impasse exists and require that a "case conference" be held on an open record basis before the due process hearing may begin; during the case conference, or shortly thereafter, allow the district to make on the record offers to resolve the dispute.

Stay-put Placement under IDEA Regulations—34 C.F.R. 300.518(d)

IDEA requires a child to remain in his or her "then current educational placement" during the pendency of due process proceedings, except in limited circumstances involving discipline or the parties agree otherwise. 20 U.S.C. §1415(j). This concept is referred to as "stay put."

The Department's regulation at 300.518(d) requires that a hearing officer's decision in favor of the parents transforms the parents' desired placement into the child's stay-put placement in the event of subsequent appeals by treating the decision as an agreement between the state and the parent as to placement. This legal contrivance obligates school districts in some circuits to pay the cost of the parents' unilaterally selected placement until appeals are completed even when the school district is ultimately found to have provided FAPE. This result conflicts with the IDEA provision that clearly states school districts are not obligated to pay for private unilateral placements except where they have denied FAPE. NSBA recommends that this regulatory provision be removed.

GUIDANCE AND OTHER DEPARTMENT DOCUMENTS

Alignment of IEPs with State Academic Content Standards – OSEP Dear Colleague Letter November 16, 2015
https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf

This Dear Colleague Letter "clarifies that individualized education programs (IEP) for children with disabilities must be aligned with state academic content standards for the grade in which a child is enrolled." As this letter was issued before the Supreme Court's decision in *Endrew F. v. Douglas Cnty. Dist. Re-1*, 137 S. Ct. 988 (2017), NSBA urges the Department to rescind this letter and consider, after input from stakeholders, whether to issue guidance regarding alignment of IEPs with state standards consistent with the Supreme Court's directive that IEPs be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."

Effective Communication under the American with Disabilities Act (ADA)—2014 Dear Colleague Letter and FAQ on Effective Communication, November 12, 2014
https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/memosdcltrs/doe-doj-eff-comm-ltr.pdf
https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/memosdcltrs/doe-doj-eff-comm-fct-sht.pdf
https://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf

Serving Children under IDEA

NSBA urges the Department to clarify its interpretation of the Department of Justice regulation at 28 CFR 35.160 in a manner that makes clear that with respect to a student with disabilities receiving services under the Individuals with Disabilities Education Act (IDEA):

- the ADA's effective communication requirement is satisfied if the school district is providing the child with a free appropriate public education (FAPE) as specified in the IDEA, negating any need for the district to engage in a separate ADA analysis; and

- the IDEA's process for developing an Individualized Education Plan supersedes any ADA requirement that the district give primary consideration to the parent's preferred communication method.

NSBA believes the Department should make changes to the 2014 DCL on Effective Communications it issued jointly with the U.S. Department of Justice, in keeping with these recommendations and as otherwise set forth in its letter sent to the Department on March 5, 2015 (See Appendix A.). NSBA urges the Department to withdraw statements that suggest the holding in *K.M. v. Tustin Unified Sch. Dist.*[2] applies beyond the jurisdiction of the U.S. Court of Appeals for the Ninth Circuit, and to provide additional guidance on the standards (1) to determine a fundamental alteration in the nature of a program or activity and (2) to assess undue financial and administrative burden on schools.

[2] 725 F.3d 1088 (9th Cir. 2013).

Website Accessibility

Recognizing that enforcement positions are beyond the scope of the Department's request to identify burdensome and costly regulations, NSBA nonetheless urges the Department to retreat from enforcing the effective communications regulation under the ADA and general non-discrimination regulations under Section 504 to assign to school districts burdensome and costly requirements related to the accessibility of district websites. While achieving web site accessibility is a laudable goal, there is no clear statutory or regulatory support for some of the requirements and timelines that OCR has imposed in the agreements to resolve accessibility issues, including requiring school district websites to meet the WCAG 2.0 standards, compelling districts to close caption all web accessible videos, and burdening districts with responsibility for the accessibility of third party vendor sites.

Fiscal Equity under Title VI –OCR Dear Colleague Letter, October 1, 2014

https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf

In this DCL, the Department significantly expands OCR's jurisdiction over school districts' day-to-day operations to ensure that students are provided with equal educational opportunity and access to district resources. OCR indicates it will apply both intentional discrimination and disparate impact rubrics under Title VI to evaluate school district matters traditionally within the control of local school boards: 1) the quality, adequacy, and appropriateness of courses, academic programs and extracurricular activities will be examined to ferret out disparities in the allocation of resources; 2) access to strong teaching and instruction will be measured by looking at factors such as teacher effectiveness data, workforce stability, teacher qualifications, school leadership, support staff, teacher absenteeism, turnover rates and evaluations systems; 3) school facilities will be inspected to assess their actual physical condition, lighting, cleanliness, HVAC systems, and paint; and 4) technology and instructional materials will be reviewed for availability and currency. NSBA urges the Department to refrain from engaging in the expansive reviews this DCL appears to envision. Because the educational decision-making of local and state leaders should not be usurped by detailed federal demands that overstep the agency's authority to enforce civil rights laws, NSBA recommends that the Department withdraw this DCL.

OCR Dear Colleague Letter on Students with Disabilities In Extracurricular Athletics – January 25, 2013,

https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf

This guidance appears to expand OCR's authority under Section 504 to regulate school district decision-making concerning the participation of students with disabilities in sports and other extracurricular programs. The guidance is unclear as to whether school districts must undertake assessments for these activities separate from the required annual 504 educational meeting whenever a request for participation is made. It also fails to provide any details as to who should compose the assessment team or to clarify whether OCR's review will focus on the process used to arrive at the decision as opposed to the team's decision itself. Additional clarification is also needed concerning the "opportunity to benefit" and "fully and effectively" standards. This DCL also erroneously suggests that a FAPE standard applies to participation in elective extracurricular programs. For these reasons (as more fully discussed in NSBA's Letter Response to the DCL, May 21, 2013, Appendix B here), NSBA recommends that the Department revise the DCL to provide much-needed clarification.

Bullying and Harassment under Title IX—OCR Dear Colleague Letter, October 26, 2010, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html

In its guidance document on bullying and harassment, the Department articulates an enforcement standard to be applied by OCR that veers significantly from the standard for school district liability under Title IX established by the U.S. Supreme Court in *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999). The DCL changes key aspects of *Davis*' "actual knowledge" component and expands the types of harassment for which districts are may be found responsible. The DCL also erroneously suggests that Title IX requires districts to eliminate harassment and ensure it does not recur by taking multiple remedial steps and responding to remedial requests of parents. The DCL also does not adequately consider school district obligations under the Family Educational Rights and Privacy Act, the First Amendment free speech clause, and the multiple bullying and harassment standards under which schools must operate. For these reasons (as more fully explained in NSBA's Letter to Charlie Rose, December 7, 2010—Appendix C here) NSBA urges the Department to issue a clarification that provides an accurate legal standard regarding school official's responsibilities with respect to harassment and presents examples as one view of best practices rather than Title IX requirements. In addition, OCR should apply a standard consistent with the *Davis* decision and Title IX in investigation and enforcement activities related to bullying and harassment.

OCR Procedures-Revised Case Processing Manual (CPM),
www2.ed.gov/about/offices/list/ocr/docs/ocrcprm.pdf

NSBA urges the Department to modify the CPM and OCR practices to align with the Secretary's stated goal of OCR acting as a neutral factfinder in a manner consistent with its regulatory and statutory authority to enforce civil rights laws and that respects due process protections for school districts. This would include eliminating past practices including: using an individual complaint to initiate a class- or school-wide inquiry; unreasonable data requests beyond the scope of the complaint; wide-ranging and/or one-sided interviews; refusing to allow districts to challenge inaccurate evidence; exceeding timelines for completing investigations; proposing voluntary resolution agreements without review of information; issuing letters of findings after voluntary resolution; directing educational policies without legal basis; failing to respond to written requests; and confidentiality restrictions on public communication by school districts

Civil Rights Data Collection
81 Fed. Reg. 96,466 (Dec. 30, 2016); 82 Fed. Reg. 33880 (July 21, 2017)

Consistent with the concerns NSBA raised with respect to the 2015 Civil Rights Data Collection (CRDC) (see Appendix D), NSBA continues to believe there is questionable statutory and regulatory authority that allows OCR to require in its biennial survey of school districts the submission of data for items and categories that are not connected to civil rights enforcement, have any civil rights implications for students, or impact the provision of equal educational opportunities to students under the five specific statutes (Title VI, Title IX, Section 504, Title II/ADA, and the Age Discrimination Act) for which OCR has investigative authority and are the bases of OCR's mission. NSBA remains concerned about the authority of OCR to require school districts to collect and report non-civil rights-related data on behalf of other offices in ED which do not have such authority of their own, and may involve conduct or information that is not relevant to the programs operated by such other ED offices.

NSBA appreciates the opportunity to submit its concerns about burdensome and costly regulations and guidance documents issued by the Department. We reiterate our strong support of our common purposes to ensure that public schools understand and comply with their responsibilities under federal laws affecting the education of children. We look forward to working with the Department to develop regulations and resources to help school districts in their efforts to provide the nation's public school children with educational opportunities that prepare them for the future.

Sincerely,

Thomas J. Gentzel
Executive Director & CEO

Enclosures (4): Appendix A—NSBA Letter in Response to Effective Communications DCL
Appendix B—NSBA Letter in Response to Students with Disabilities in Extracurricular Activities DCL
Appendix C—NSBA Letter in Response to Bullying and Harassment DCL
Appendix D—NSBA Letter in Response to Proposed 2015 Civil Rights Data Collection