



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
Submitted electronically via <https://www.regulations.gov/>

Dear Ms. Malawer:

The Arc submits these comments in response to the above-captioned [request for comment](#) by the Department of Education Task Force for Regulatory Reform pursuant to [Executive Order 13777, "Enforcing the Regulatory Reform Agenda."](#)

The Arc is the largest community-based organization for people with intellectual and developmental disabilities (I/DD). The Arc has a network of nearly 700 chapters across the country promoting and protecting the human rights of people with I/DD and actively supporting their full inclusion and participation in the community throughout their lifetime.

The Department seeks comments identifying regulations that should be "repealed, replaced, or modified, consistent with applicable law" because they: (i) eliminate jobs, or inhibit job creation; (ii) are outdated, unnecessary, or ineffective; (iii) impose costs that exceed benefits; (iv) create a serious inconsistency or otherwise interfere with regulatory reform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 the Information Quality Act; or (vi) derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified. The Department also seeks comments on actions that "the public perceives to be regulatory in nature" which includes Dear Colleague letters, frequently asked questions (FAQ), and general guidance documents.

The applicable laws implemented by the Department that are most critical to people with I/DD are the Civil Rights Act of 1964; the Elementary and Secondary Education Act (ESEA), currently known as the Every Student Succeeds Act (ESSA); the Rehabilitation Act of 1973 (particularly Section 504); the Individuals with Disabilities Education Act (IDEA); the Americans with Disabilities Act (ADA); and the Workforce Investment and Opportunity Act (WIOA). These laws

were enacted and many have been reauthorized numerous times over decades largely to address limited opportunities and discrimination faced by people with disabilities and racial and socio-economic minority groups.

Implementing regulations for each have been developed through careful and considered processes prescribed by the Administrative Procedures Act of 1964. These regulations respond to concrete directions that Congress writes into federal law and must demonstrate through cost-benefit analyses that they serve the public good. For instance, the IDEA and its implementing regulations reflect cost considerations by including numerous “to the extent practicable” clauses.

The Department has allowed for 90 days for stakeholders to review over [150 regulations](#) and [1,700 guidance documents](#). Such an unrealistic timeframe will not result in responsible policy making. Further, this effort appears to be driven by the President’s stated goal of eliminating two regulations for every one issued. This goal is not practicable as regulations vary dramatically in scope. Regulations are not widgets with equal value that can be interchanged. Utilizing rolling reviews of regulations and guidance documents pertaining to individual laws would be a far more effective and established way to make any needed changes.

Though we oppose efforts to repeal, replace, or modify *any* of the regulations and guidance documents listed in the Department’s Regulatory Reform Taskforce report at this point, we highlight below specific ones that are of top priority for people with I/DD, their families, and service providers.

Priority Regulations and Guidance

IDEA. This landmark law that ensures specialized education and related services for children with disabilities throughout the Nation was based on two legal cases involving students with I/DD. Its defining elements are constitutional guarantees of the right to equal treatment, non-biased treatment, least restrictive environment, and procedural due process; parent participation in decision-making; and requirements for state and local education agencies to ensure uniformity across states and within states. The IDEA is consistent with the Nation’s general education policy of assuring effective education for all students and safeguards against biased treatment, especially with regard to discipline.

Early Intervention (Part C). Fortunately, most of the regulations for Part B of the IDEA are protected by a provision in the statute that says that the Department of Education may not issue a regulation which reduces the rights children had as of the 1983 revision of the law:

SEC. 607. ([20 USC 1406](#)) REQUIREMENTS FOR PRESCRIBING REGULATIONS.

(b) Protections Provided to Children.--The Secretary may not implement, or publish in final form, any regulation prescribed pursuant to this title that-

- (1) violates or contradicts any provision of this title; or
- (2) procedurally or substantively lessens the protections provided to children with disabilities under this title, as embodied in regulations in effect on July 20, 1983 (particularly as such protections related to parental consent to initial evaluation or initial placement in special education, least restrictive environment, related services, timelines, attendance of evaluation personnel at individualized education program meetings, or qualifications of personnel), except to the extent that such regulation reflects the clear and unequivocal intent of Congress in legislation.

Since Part C of the IDEA was not added until 1986, regulations pertaining to this part of the law are not similarly protected. The Part C regulations - [Early Intervention Program for Infants and Toddlers with Disabilities \(Part 303\)](#) - provide extremely important direction because this part of the IDEA statute is general in nature. The Part C statute lists the kinds of services that must be available through the early intervention program, but it's the regulations that actually define the services. The statute identifies the basic components of the early intervention system that states must create (e.g. lead agency, Child Find, public awareness program, personnel development, etc.), but the regulations explain what each component includes (such as timelines and required documentation, among many other things). Similarly, the statute lists the procedural safeguards that must be available to families, but the regulations define each of these and more clearly explain how families access each of their rights. Part C regulations should remain intact because they do not go beyond what is required in the statute and are necessary to help states, early intervention service providers, Head Start/Early Start programs, and families understand how to implement the law.

Restraint, Seclusion, Bullying and Harassment

The Importance of regulations and guidance related to these topics will likely only increase with the growing knowledge base on the effects of trauma and the move toward evidence-based policy making. Traumatic experiences, which can include restraint, seclusion, bullying and harassment, have been documented to have long-term effects on students' academic achievement and wellbeing. Unfortunately, students with disabilities, experience these events more frequently than students without disabilities. For instance, students with disabilities served by IDEA represented 12% of students enrolled in public schools nationally, but 67% of the students who were subjected to restraint or seclusion in school.

The Department has issued a number of important guidance documents over the last decade on these topics. Of particular note, the Department issued non-regulatory guidance following the enactment of The Every Student Succeeds Act in 2015 that requires state education

agencies to develop plans on how they support local educational agencies to improve conditions for teaching and learning, including through reducing: incidents of bullying and harassment in schools, overuse of discipline practices (suspensions and expulsions), and use of aversive behavioral interventions (such as restraints and seclusion). These documents support ESSA's goal of helping to reduce these practices by articulating how a school's use of the practices or failure to protect against them may constitute denial of a free and appropriate public education (FAPE) or violations of Title II of the Americans with Disabilities Act and Section 504 of the Rehab Act. The Department has also provided invaluable guidance to states and school districts on model programs and evidence-based alternatives. The Arc urges the Department not to rescind, revise, or modify any of these guidances.

Competitive Integrated Employment

The term "Competitive, Integrated Employment" [[34 CFR § 361.5](#) (c)(9)] was first defined with the enactment of the WIOA in 2014 as:

(i) Is performed on a full-time or part-time basis (including self-employment) and for which an individual is compensated at a rate that-

(A) Is not less than the higher of the rate specified in section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) or the rate required under the applicable State or local minimum wage law for the place of employment;

(B) Is not less than the customary rate paid by the employer for the same or similar work performed by other employees who are not individuals with disabilities and who are similarly situated in similar occupations by the same employer and who have similar training, experience, and skills; and

(C) In the case of an individual who is self-employed, yields an income that is comparable to the income received by other individuals who are not individuals with disabilities and who are self-employed in similar occupations or on similar tasks and who have similar training, experience, and skills; and

(D) Is eligible for the level of benefits provided to other employees; and

(ii) Is at a location—

(A) Typically found in the community; and

(B) Where the employee with a disability interacts for the purpose of performing the duties of the position with other employees within the particular work unit and the entire work site, and, as appropriate to the work performed, other persons (e.g., customers and

vendors), who are not individuals with disabilities (not including supervisory personnel or individuals who are providing services to such employee) to the same extent that employees who are not individuals with disabilities and who are in comparable positions interact with these persons; and

(iii) Presents, as appropriate, opportunities for advancement that are similar to those for other employees who are not individuals with disabilities and who have similar positions.

This definition is consistent with the statutory language and will help to limit “enclave” employment models which segregate individuals with disabilities *within* integrated settings and are used almost exclusively for people with I/DD. We urge that this regulatory definition not be rescinded, modified, nor replaced as it adheres to WIOA’s goal for people with disabilities to more fully participate in integrated community employment opportunities.

Again, we urge the Department not to repeal or modify its regulations, guidance, or other positions pursuant to Executive Order 13777. Thank you for the opportunity to share our views comment on this request for comment.

Sincerely,

Annie Acosta

Director of Fiscal and Family Support Policy