

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,

The Chicago Medical-Legal Partnership for Children (CMLPC), a program of the Legal Council for Health Justice, submits these comments 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. The award winning CMLPC has partnered with nationally recognized pediatric medical sites since 2006 providing legal services for low-income families, including assistance with Early Intervention and special education for children with developmental delays, disabilities, behavioral health and special healthcare needs. Beyond our direct representation work, we have utilized the protections for children guaranteed by IDEA and its implementing regulations, to strengthen Illinois statutory protections for children with disabilities through legislative action and systemic policy work. As the long-time Director of CMLPC, Amy Zimmerman is one of two Governor appointed child advocates on Illinois Interagency Council on Early Intervention and is an appointed member of the Illinois Attorney General's Special Education Advisory Committee.

We submit our support of all current regulations and policy guidance that ensure states and school districts support children with disabilities and their families. We believe any steps taken to repeal, replace, or defund any of the laws listed below would be a detriment to these families.

- 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
- The Higher Education Act (HEA)
- The Americans with Disabilities Act (ADA)
- The Workforce Investment and Opportunity Act (WIOA)
- The Carl D. Perkins Vocational and Technical Education Act (PERKINS)
- Freedom of Information Act (FOIA)
- Family Educational Rights and Privacy Act (FERPA)

Additionally, we adopt the comments submitted by The Council of Parent Attorneys and Advocates (COPAA), Division of Early Childhood of the Council for Exceptional Children (DEC) and Loyola University College of Law's Health Justice Project.

CMLPC attorneys and staff are knowledgeable in the laws, regulations, and guidance impacting education and have extensive expertise in IDEA Part B and Part C as well as The Rehabilitation Act of 1973, Section 504. We broadly support IDEA and its implementing regulations and offer recommendations for Part B ([34 C.F.R. § 300](#)) and Part C ([34 C.F.R. § 303](#)) that will further strengthen the intent of the Act.

We suggest the following improvements:

IDEA PART C:

Natural Environment ([§303.126](#))

Natural environment provisions aim to integrate disabled infants and toddlers with their non-disabled peers. The statute and regulations allow, indeed require, flexibility for deviations and demonstrate that natural environment considerations are broader than simple location labeling as natural or non-natural. However, when applying these provisions, states are often too rigid in dictating what is considered a natural environment and defining what serves as justification for providing services in a non-natural environment.¹ By adding direct language to §303.126 that clarifies and emphasizes flexibility in the application of natural environment, children and family outcomes can be better achieved.

Content of an IFSP ([§303.344](#))

The provisions in §303.344 require the Individual Family Service Plan (IFSP) to include statements regarding “the length, duration, frequency, intensity, and method of delivering the early intervention services.” (§303.344(d)(1)(i)). Method is further defined in §303.344(d)(2)(ii) as “means how a service is provided.” We suggest adding provisions to this section to include the use of “telehealth” as an appropriate method of providing early intervention services.

The Health Resources and Services Administration of the Department of Health and Human Services states that telehealth is “especially critical in rural and other remote areas that lack sufficient health care services, including specialty care.”² The benefits of providing telehealth are easily translatable to the critical therapies children receive in Early Intervention; especially considering that these children and families experience similar barriers to access. Whether due to living in rural locations not easily accessible by early interventionists, or living in urban neighborhoods where some early interventionists, who usually work alone can be resistant to go, the benefits of providing telehealth to help insure access to Early Intervention services should be supported through proactive DOE regulatory action.

Due Process Hearing Procedures—Attorney’s Fees (§303.435 - §303.449)

Both IDEA Part B and Part C include provisions for due process hearing procedures (section 615 of the Act and section 639 of the Act, respectively). However, only Part B provides regulations addressing the award of attorney’s fees. ([34 C.F.R. § 300.517](#)). Under Part C, states can choose to adopt the due process hearing procedures within section 639 or section 615 of the Act, but the regulations governing these procedures do not include the award of attorney’s fees. Part B addresses children 3 years of age to 22 years of age, whereas Part C addresses infants and toddlers (ages 0 to 3 years). The legal rights and considerations afforded to children and their families under IDEA should not be dependent on the age of the child. Updating the regulations of Part C to include the award of attorney’s fees as mentioned in Part B would ensure equal consideration and meaningful access to counsel for all children and their families faced with going through due process.

¹ Amy Zimmerman, Catherine Starks, Deborah Marshall, *The Origins and Development of “Natural Environment” In the Individuals with Disabilities Education Act, 2011.*

² Telehealth is defined as the use of electronic information and telecommunication technologies to support and promote long-distance clinical health care, patient and professional health-related education, public health and health administration. Technologies include video conferencing, the internet, store-and-forward imaging, streaming media, and terrestrial and wireless communications. U.S. Department of Health and Human Services, Health Resources and Services Administration, Federal Office of Rural Health Policy <https://www.hrsa.gov/ruralhealth/telehealth/> (accessed September 13, 2017)

We recommend the language from Part B §300.517 be added to Part C, “States That Choose To Adopt the Part C Due Process Hearing Procedures Under Section 639 of the Act” ([§303.435-438](#)) and “States That Choose To Adopt the Part B Due Process Hearing Procedures Under Section 615 of the Act” ([§303.440-449](#)). Adding the language for award of attorney’s fees to both sections of Part C will ensure this issue is addressed regardless of which process the state has adopted.

Finally, regarding IDEA Part C, CMLPC highlights a comment provided by the Division for Early Childhood of the Council for Exceptional Children:

“IDEA early childhood programs also serve as a key mechanism of supports and services for young children with disabilities in community settings such as preschool, Head Start, Home Visiting and child care/early learning. DEC appreciates the valuable policy guidance that has been released in the last several years through collaboration across federal programs in the Departments of Education and Health and Human Services as well as other federal agencies as needed. This federal collaborative work has resulted in the release of a number of powerful policy statements from the respective Secretaries to assist local programs serving young children in understanding best practice giving all young children opportunities to succeed and be ready for school.”³

Elevation of critical aspects of those policy statements into IDEA Part C regulations would benefit young children with disabilities nationwide and in a multitude of early childhood programs.

IDEA PART B:

Child’s Status During Proceedings ([§300.518\(a\)](#)) and State Dispute Resolution Options ([§303.430\(e\)](#))

The benefits of mediation over due process are widely recognized. Mediation is less costly, less adversarial, and improves cooperation and communication. In 1997 Congress formally recognized the benefits of mediation by amending IDEA to require states to offer mediation. In their Senate Report, the Committee on Labor and Human Resources stated their “strong preference that mediation become the norm for resolving disputes under IDEA,” and they believed “the availability of mediation will ensure that far fewer conflicts will proceed to the next procedural steps, formal due process and litigation...”⁴ However, there are no “stay-put” regulations for mediation as there are for due process procedures, which leaves mediation a less attractive option for parents. “Stay-put” regulation requires that the school district cannot unilaterally change the child’s current educational placement during the pendency of a proceeding. We have found that where stay-put protections don’t apply to mediation, families are less willing to pursue mediation.

We recommend that in order to carry out Congress’ intent for adding mediation to IDEA Part B and Part C, the stay-put language offered in Part B §300.518(a) and Part C §303.430(e) should additionally require stay-put application where parents have requested mediation.

SECTION 504, REHABILITATION ACT

We call particular attention to retaining the guidance provided by the “Dear Colleague Letter and Resource Guide on ADHD” that was issued on July 26, 2016. This letter discusses effective implementation of Section 504 of the Rehabilitation Act of 1973 for students with ADHD. Schools may not disqualify a student with ADHD from receiving supports even if the child is performing well academically. Behavioral and executive functioning supports must be

³ [Division for Early Childhood, Comments on IDEA Regulations](#)

⁴ [Sen. Rpt. 105-17, at 26 \(May 9, 1997\)](#).

considered, because deficits in these areas may impact the performance of major life activities as defined in 34 C. F. R. §104.3(j)(2)(ii).

Thank you for the opportunity to provide comments. As stated by COPAA, “the litmus test ED must use should be based on whether the regulation/guidance advances educational equity and serves the interests of all students.”⁵ We highly recommend that the Department of Education hew to this standard and remember that these laws were established to protect the rights of our most vulnerable children.

Sincerely,

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Legal Council for Health Justice
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⁵ [Council of Parent Attorneys and Advocates, Education Regulation Review Letter](#)