

Public Comments about streamlining current IDEA regulations

Miriam Kurtzig Freedman, JD, MA

Thank you for the opportunity to provide comment on your efforts to streamline IDEA regulations. At the outset, I believe we can't tweak this 40+-year-old system to work well going forward. In too many ways, it needs a redo, a second generation approach to serve all students, from the neediest to the most advanced.

That said, here are recommendations to fix the current regulatory and "dear colleague" letter system, as that system:

- **Contradicts the law**
- **Overuses and misapplies the law**
- **Overreaches**
- **Overcomplicates procedures (for what purpose?)**

Here are a few examples of each. More can be provided, with citations.

CONTRADICTS the Law

- A. See, e.g., OSEP's Part B "indicators," specifically, Indicator 5—student placement. The law requires that students with disabilities be placed in settings with nondisabled peers "to the maximum extent **appropriate**." Placements should be individualized to meet the "**unique needs**" of the child. Indicator 5 contradicts the above legal basics!
 - a. OSEP developed indicators, based on its monitoring role: 20 USC 1416 (5)(2)(C)(ii)(II) and the LRE (least restrictive environment): 1412(a)(5)(A),(B), (C). Yet neither legal requirement says ANYTHING about percentages of students in general education classrooms and for how much time. OSEP/OSERS requires schools to provide extensive data about the numbers of students who are:
 - 1) Inside the regular class 80% or more of the day
 - 2) Inside the regular class less than 40% of the day, or
 - 3) In separate schools, residential facilities, or homebound/hospital placements.

These **arbitrary benchmarks**, developed by government bureaucrats, drive placements and are enforced to meet that 80% mark, even when schools are

doing a great job for kids! They violate the law's call for appropriate-individualized placements.

Lurking over policies is an uneasy feeling that objective research support is often missing or slim. While the law requires research-based approaches, where is objective, non-partisan research on the benefit of LRE, the effective use of LIN (least intervention necessary) instead, and the benefits (?) of inclusion on all students—general and special education? <https://www.wsj.com/articles/SB10001424127887323309404578613532497541300>.

- B. DOE's "Dear Colleague" letters should be reviewed and withdrawn when they contradict the law. See, e.g., my piece in the AASA.org website. <http://www.aasa.org/aasablog.aspx?id=38814&blogid=286> Even the focus on "closing the gap" is inconsistent with IDEA's individualization approach.

See also the July 26, 2016, OCR "Dear Colleague Letter" for students with ADHD with its 32 page guidance which also contradicts the law.

- C. The current push for accommodations and modifications ignores the law. 20 USC 1412 (a)(16) requires "appropriate accommodations " to **maintain test validity**.

34 CFR 300.160, the current regulation is excellent, as it protects standards. Yet, it is often ignored—in the push for more accommodations, modifications, and Universal Design. OSEP should enforce the basics of good testing, not allow states and others to conflate accommodations and modifications. Much more can be said here and I'm happy to help. E.g., we now have the push for "read- alouds" in some states and federally funded centers. An adult reads the test to a student who then answers questions about the text. How can that possibly test "reading" comprehension? Why don't we call it what it is—"listening comprehension?" Without honesty, we cannot build trust. <https://nceo.umn.edu/docs/OnlinePubs/2017ForumReport.pdf>; <http://www.p12.nysed.gov/specialed/publications/documents/changes-in-allowable-testing-accommodations-grade-3-8-ela.pdf> .

OVERUSE and misapplication of the LAW

- D. Too many children in special education don't need to be there. They are found eligible through a misapplication of the law. **The DOE should clarify and enforce it.**

20 USC 1401 (3)—definition of child with a disability. A child has (a) disability **(b) who, "by reason thereof, needs special education and related services."** Many of today's students have mild/moderate needs need good instruction and interventions. See, "Have we Got Special Education all wrong?"

http://www.huffingtonpost.com/entry/have-we-got-special-education-all-wrong_us_5991daf5e4b0ed1f464c0cde

OVERREACH by OCR, OSEP/OSERS. This is a key issue of concern for schools and parents.

- E. Section 504—Regulations and guidance overreach the law.
 - i. Section 504 has NO FAPE requirement; but the OCR created and expanded it, causing great consternation and costly and painful confusion for schools and parents. What is the IDEA? What is 504? Who knows?
 - ii. The OCR (and others) conflate 504 and IEPs—two very different laws. See, e.g., PARCC Testing Manual, the College Board’s accommodation policies, and so much more. (Citations can be provided, if requested.) The DOE should immediately curtail this overreach.

OVERCOMPLICATES procedures

- F. Exhibit A is student discipline—it must be streamlined. 34 CFR 300.530-536.

Due process litigation regulations at 34 CFR 300.507-509. These cases can take longer than murder trials! They need limits in time and scope.

- G. Data collection—It’s too complex, opaque, burdensome, and subject to error and misinterpretation. Again, it’s hard to know how it helps students or schools.

For example, the push to compare states through RDA (Results-Driven Accountability). One I’m familiar with compares the LRE in CA and other states, such as MA. CA identifies 11% and MA identifies 18% of its students. Apples and oranges. Yet, CA is critiqued because it has a lower LRE percentage. How is that valid, useful, or fair?

Flexibility. The regulations should provide parties—schools and parents—with a voluntary opt out option from some of onerous regulations that may not be needed. These situations are mostly when parties have trust, work well together and the student is doing well. Without explicit flexibility, parties are afraid to veer off the one-size-fits-all path.

I am happy to provide additional information or testimony and to contribute to the effort to improve education opportunities for all students.