MISSOURI SCHOOL BOARDS' ASSOCIATION
HELPING SCHOOL BOARDS SUCCEED

2100 I-70 Drive Southwest - Columbia, Missouri 65203 Phone: 573-445-9920 Fax: 573-445-9981

www.msbanet.org

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To Whom It May Concern:

The Missouri School Boards' Association is a non-profit organization created by public school board members to provide assistance to and to advocate on behalf of Missouri public schools. Approximately 400 school districts are members of MSBA. On behalf of MSBA's member school districts, MSBA submits the following recommendations regarding U.S. Department of Education guidance or regulations:

1. **Eliminate the FAPE and Special Education Requirements in Section 504 Regulations: 34 CFR 104.33 – 104.37.**

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, ("Act") has been interpreted by the U.S. Department of Education as requiring districts to provide students a "free and appropriate public education," also known as FAPE. *34 CFR 104.33*. This regulation goes far beyond what the enacting statute requires, has created confusion regarding a school district's obligations to students who are disabled but who do not qualify for special education under the Individuals with Disabilities Education Act, and have expanded the legal liability of public school districts.

The Act never uses the term "free and appropriate public education" and it is unclear where this term originated. MSBA is particularly concerned about the definition of an "Appropriate education" in the regulations, which requires districts to provide "regular or *special education* and related aids and services . . ." *34 CFR 104.33(b(emphasis added)*. The requirement to provide special education is not mentioned at all in the Act either. The Act does not require that governmental entities create new, specialized programs for persons with disabilities. Instead, it prohibits governmental entities from excluding persons with disabilities form existing programs or activities.

Yet the U.S. Department of Education has independently created through these regulations a requirement for school districts to identify students with disabilities, formally evaluate the student's disability, create "special education" for the student, reevaluate the student, and provide the student procedural safeguards. *34 CFR 104.33 – 104.37*. These obligations go far beyond what was authorized by the Act, which was to merely provide access to persons with disabilities to existing programs and services.

These regulations are long overdue for review and revision. The regulations were initially enacted in 1980. Aligning the regulations with the enacting statute will provide a more legally sound interpretation and clarify district obligations under the Act, making it easier for districts to comply and for the Office for Civil Rights to monitor compliance. Further, eliminating reference to "special education" and the process for supplying such education in these regulations will not harm students. A student's right to special education is already fully authorized under the Individuals with Disabilities Education Act (IDEA) and regulations interpreting IDEA.

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2. Revise Family Educational Rights and Privacy Act (FERPA) Regulations to Specifically Address Video Recordings: 34 CFR Part 99

Video recording has become ubiquitous in public school districts. Security cameras are installed in buildings and on buses. School events such as graduation, music concerts, and athletic events are frequently recorded. Video is incorporated into lessons and many schools now offer media courses or even host television channels for students. Teachers and administrators include images on district websites and in social media. Professional staff even recorded while teaching in the classroom for professional development and evaluation purposes. Yet the U.S. Department of Education has yet to adopt specific regulations or guidance interpreting FERPA with the unique issues involved with video recording, leaving districts to guess how the Department would apply the regulations.

MSBA encourages the Department to review and revise the FERPA Regulations to provide more specific guidance to school districts on when pictures of students caught on video recordings may be released. Because the U.S. Department of Education enforces FERPA, guidance directly from the Department is necessary. In particular, MSBA encourages the Department to create guidance to address the following scenarios:

Example 1: Two students get into a fight, which is recorded on a bus or building security camera. The recording is used as a disciplinary record for both students and both students are disciplined. The parents of each student demand to see the recordings. The district does not have the technology or expertise to obscure the faces of one student so that the parents of the other student may view the recording. Neither parent consents to the release of the recording to the other parent. Can the district legally allow either parent to view the video of their child's misbehavior if it discloses the misbehavior of the other child they were in a fight with?

Example 2: State statute requires school administrators to report all criminal assaults to law enforcement. Two students get into a fight, which is recorded on a building security camera. District administrators did not witness the fight, so they rely on the recording to discipline the students and then call the police. By calling the police the district discloses information contained in a student's education record. The information is used by law enforcement to prosecute the student, not serve the student. Does this disclosure violate FERPA?

Example 3: The district includes in its annual notice a definition of "Directory Information" that includes video recording and pictures. A parent notifies the district that he wants to his student excluded from Directory Information disclosures. The district routinely records the football games and provides a link to the recording on the website. The student whose parent opted out of Directory Information attends the football game and appears in the recording. The district does not have the technology or expertise to obscure the faces of one student. Does the district violate FERPA if the district posts the recording on the website with the image of the student in the crowd?

3. Modify or Withdraw the Non-Regulatory Guidance: Ensuring Educational Stability for Children in Foster Care

The Non-Regulatory Guidance: "Ensuring Educational Stability for Children in Foster Care" (Guidance) jointly issued by the U.S. Department of Education (DOE) and The U.S. Department of Health and Human Services (DHHS) exceeds the authority of both agencies granted in law. *See Guidance at* https://www2.ed.gov/policy/elsec/leg/essa/edhhsfostercarenonregulatorguide.pdf. This excess is limiting the required collaboration between our Missouri Department of Elementary Education (DESE), the Children's Division of the Missouri Department of Social Services (CD) and local school districts (LEAs) in that the guidance controls various aspects of plan implementation that should instead be left to the impacted state entities.

Placement of a Foster Care Child

The two primary laws governing where a foster care child should be educated are fairly simple and consistent in their expectations. In short, there is a presumption that education in the school of origin is in the best interest of the child, if it is not determined to be in the best interest of the child, the child will be immediately enrolled in the new school and all records will be transferred.

Every Student Succeeds Act (ESSA)

Title I, Part A, section 1111(g) of the Every Student Succeeds Act (ESSA) requires that, as it relates to children in foster care, all state plans outline:

"The steps a [SEA] will take to ensure collaboration with the State agency responsible for administering the state plans under parts B and E of Title IV of the Social Security Act [SSA] (42 U.S.C. 621 et seq. and 670 et seq.) to ensure the educational stability of children in foster care, including assurances that:"

1. Children remain in the school of origin unless it is not in the best interest of the child to do so.
2. The determination of best interest "shall be based on all factors relating to the child's best interest, including consideration of the appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement."
3. If it is not in the best interest of the child to remain in the school of origin, the child must be immediately enrolled in the new school even if the child does not have the records normally required for enrollment and the new school must immediately contact the school of origin.

Social Security Act (SSA)

42 U.S.C. 675 (1)(G) requires "A plan for ensuring the educational stability of the child while in foster care, including assurances that each placement of the child in foster care takes into account the appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement." The State must also provide "an assurance that the State agency has coordinated with appropriate local educational agencies (as defined under section 8101 of the Elementary and Secondary Education Act of 1965 [20 USCS § 7801]) to ensure that the child remains in the school in which the child is enrolled at the time of each placement or "if remaining in such school is not in the best interests of the child, assurances by the State agency and the local educational agencies to provide immediate and appropriate enrollment in a new school, with all of the educational records of the child provided to the school."

However, in addition to articulating the three provisions required by law, (presumption that the school of origin is in the best interest of the child, immediate enrollment in the new school if it is not and immediate transfer of records), the guidance creates a list of ten factors that should be used to determine the best interest of the child. Most of these are reasonable factors that any competent education profession would address. However, the factors listed in the guidance overlap. One factor is "the availability and quality of services in the school to meet the child's educational and socioemotional needs." There are also additional factors for foster children who have special education needs or are English learners – both services designed to meet the child's educational needs and already covered by the previously cited factor. Our concern with this over detailed list is that is has been our experience that, when the DOE includes a list of any kind, those responsible for monitoring compliance tend to use the list as a checklist rather than guidance.

Further, there are two provisions that are not as reasonable and not supported by law. First, the guidance states "Transportation costs should not be considered when determining the child's best interest, which is consistent with the program instruction released by HHS subsequent to the passage of the Fostering Connections Act." (Emphasis in the original) The non-regulatory guidance at issue is basing this strong recommendation on a previously issued guidance, not law. Like it or not, cost is a factor. When the LEA or the child welfare agency (CWA) has to expend funds to transport a child, it reduces the funds available to cover other services for the child. Cost of transportation is a legitimate factor.

Next, the guidance states that determination of the best interest of the child should be a collaborative effort but that "the child welfare agency should be the final decision-maker." Nowhere does the law give more weight to the opinion of the CWA than the state or local education agency. What is most disturbing about this statement is that it effectively removes the LEA from the dispute resolution process. If the LEA determines the educational needs of the child requires one placement but the CWA uses other factors to reach a contrary conclusion, the LEA has no recourse as the child welfare agency has the final say. This is contrary to the need to collaborate.

Further, the guidance states that, if there is a dispute over the placement of the child, the child must remain in the school of origin during the resolution of the dispute. The guidance cites ESSA 1111(g)(1)(E)(i) as the basis for this conclusion. However, that section includes no provision addressing where the child attends if there is a dispute, just a general statement that the school of origin is presumed to be in the best interest of the child prior to an actual determination.

Transportation Costs and Foster Care Children

If it is determined that placement in the school of origin is in the best interest of the child, the child will require transportation back to the school of origin. Pursuant to ESSA (Section 1112(c)(5)) the LEA must coordinate with the state or local CWA to develop a transportation plan to "ensure that children in foster care needing transportation to the school of origin will promptly receive transportation in a cost-effective manner and in accordance with . . . 42 U.S.C. 675(4)(A)." The referenced section of the SSA authorizes maintenance payments for such transportation.

Further the LEA must "ensure that if there are additional costs incurred in providing transportation, to maintain children in foster care in their schools of origin, the local agency will provide transportation to the school of origin if the local [CWA] agrees to reimburse the [LEA] for the cost of such transportation; the [LEA] agrees to pay for the cost of such transportation or the [LEA] and local [CWA] agree to share the cost."

The guidance states that, if a dispute arises over which agency will cover the cost of transportation, "the LEA must provide or arrange for adequate and appropriate transportation to and from the school of origin while any disputes are being resolved."

The law clearly says states that the LEA will provide transportation if the CWA agrees to pay the costs, the LEA agrees to pay the costs or the costs are shared. The structure of the law indicates that the requirement for transportation is based on a clear agreement of how the transportation costs will be paid and by whom. The placement and transportation cost issues are interrelated. If the LEA determines the school of origin is not in the best interest of the child and the CWA, as the "final decision-maker" determines it is, pursuant to the guidance, the LEA has no way to appeal the decision and, even if it did, would be required to transport the child and absorb at the least the initial costs during the dispute resolution process.

Conclusion

We urge the federal agencies involved to modify or remove this guidance and, in general, refrain from using a "non-regulatory guidance" to make law and use the rule-making process instead. Specifically, we recommend:

- The statement that the CWA will be the final decision-maker should be removed.
- The statement that cost cannot be considered during the best interest determination should be removed.

- The guidance should clarify that not every factor in the best interest determination list is required.
- The statement that the district must provide transportation even when there is no agreement as to who will be paying for the transportation should be removed.

4. Revise Requirements for Accommodating Persons with Communications Disabilities: 28 CFR 35.160 and U.S. Department of Education and Department of Justice Guidance, "Frequently Asked Questions on Effective Communication for Students with Hearing, Vision or Speech Disabilities in Public Elementary and Secondary Schools."

In 2010 the regulations interpreting Title II of the Americans with Disabilities Act (ADA) were amended to set a higher standard for accommodating persons with communication disabilities in comparison to other disabilities. Regulation 28 CFR 35.160 ("the regulation") sets requirements for governmental entities to accommodate persons with disabilities impacting their ability to communicate or to receive communication. But the regulation also requires public entities to "give primary consideration to the requests of individuals with disabilities." *28 CFR 35.160(b)(2).*

Title II of the ADA states that persons with disabilities cannot "be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *42 USC §12132*. The statute requires that public entities provide persons with disabilities access to programs and activities. It does not require a public entity to give the preferred accommodation. *See* EEOC v. Agro Distrib. LLC, 555 F.3d 462, 2009 (5th Cir. 2009); Fink v. Richmond, 2010 U.S. App. LEXIS 25801 (4th Cir. 2010); Arce v. La. State, 226 F. Supp. 3d 643 (E.D. La. 2016). The ADA certainly does not mandate that persons with communication disabilities receive accommodation above and beyond what persons with other disabilities receive. Regulation 28 CFR 35.160 goes far beyond the language of the statute.

This regulation becomes particularly onerous in the K-12 education setting, where the Individuals with Disabilities Education Act creates a detailed process to ensure that students with disabilities have access to the accommodations necessary to access the educational program. Yet the U.S. Department of Education and the Department of Justice have issued a joint statement applying the regulation in the school setting as well. See "Frequently Asked Questions on Effective Communication for Students with Hearing, Vision or Speech Disabilities in Public Elementary and Secondary Schools" at https://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf.

In a perfect world governmental entities would have the resources to provide all persons with disabilities their preferred accommodation. However, that is simply not possible. And it is unclear why persons with communication disabilities – as opposed to other types of disabilities – are given

this preference in federal regulation. MSBA encourages the U.S. Department of Education to reconsider the guidance and to work with the U.S. Department of Justice to amend 28 CFR 35.160 to provide a single standard for the accommodation of all disabilities.

5. **Address the Conflict Between the Regulations and Guidance on Service Animals Under Title II and Title III of the Americans with Disabilities Act and School District Obligations for "Child Find" in Section 504 Regulations, 34 CFR Part 104 and the Individuals with Disabilities Education Act**

The U.S. Department of Justice (DOJ) has issued a regulation interpreting Title II and Title III of the Americans with Disabilities Act (ADA) instructing public entities on how to accommodate persons with service animals. This regulation goes far beyond what is required under the ADA. *See 28 CFR 35.136; 42 USC §12132* (Persons with disabilities cannot "be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.")

The DOJ has also issued guidance regarding service animals, including some guidance on the use of these animals in the school environment. "Service Animals," https://www.ada.gov/service_animals_2010.htm; "Frequently Asked Questions About Service Animals and the ADA," https://www.ada.gov/regs2010/service_animal_qa.html.

Both the DOJ regulation and guidance go beyond what is required by the ADA. But what is more concerning for school districts is the fact that the restrictions imposed by the regulations and the guidance conflict with the "child find" obligations school districts have to identify students with disabilities under both IDEA and 504. *34 C.F.R. § 104.32(a)-(b*); P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 738 (3d Cir.2009)("School districts have a continuing obligation under the IDEA and § 504 to identify and evaluate all students who are reasonably suspected of having a disability under the statutes.")

Both the DOJ regulation and guidance specifically state that a public entity "shall not ask about the nature or extent of a person's disability." *28 CFR 35.136(f).* This is in direct conflict with the district's obligations for "child find" under IDEA and 504. As service animals become more common in the United States and these animals are trained to perform more and more diverse tasks, more public school districts have to blindly feel their way through the requirements of this law. Joint guidance or even a regulation would assist school districts in meeting all of their federal obligations with less risk of a lawsuit.

6. **Clearly Label as Non-Binding**

Guidance from the U.S. Department of Education is in general well researched, informative, and helpful. However, one of the concerns with the proliferation of letters, memos, policy statements, and guidance issued by the Department is that the state and federal agencies monitoring compliance often use them as a mandate, rather than a guidance document intended to provide clarity. MSBA

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recommends that any guidance issued include a preamble explaining that the document is for guidance only and does not have the force of law like a regulation or statute. If the Department wants its interpretation to have the force of law, MSBA encourages the Department to use the formal rulemaking process.

Thank you for considering these suggestions. Please feel free to contact me if you have any questions.

Sincerely,

Melissa Randol
Executive Director