**CCD EDUCATION TASK FORCE**
**RECOMMENDATIONS FOR IDEA REGULATIONS**

## SUBPART A

1. Recommendation: Modify 300.8(c)(2) as follows

~~((2) Deaf-blindness means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational needs that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.~~

(2) Deaf-blindness means concomitant hearing and visual impairments, the combination of which causes severe communication and other developmental and educational needs that adversely affect a child's educational performance. The term includes children who are deaf-blind and have additional disabilities.

Rationale**:** The current definition of deaf-blindness is based on the educational program the child can or cannot attend, and has confused both educators and family members since its adoption. The other disability categories—with the exception of "multiple disabilities" which has also caused confusion because of its relationship with deaf-blindness—have definitions which are based on features of the disabilities.

While most of the children who are deaf-blind are served in programs for children with significant disabilities where they receive specialized support services related to their dual sensory loss, deaf-blind children are being educated in a continuum of education placements. The regular classroom, programs for children who are deaf and programs for children who are blind are all appropriate settings if the needed specialized support services are provided.

2. Modify 300.8(c)(4)(i)(E)by eliminating the reference to "socially maladjusted" in the current definition of emotional disturbance

Rationale: Children with neurological, behavioral and mood disorders often face stigma and barriers to identification; this leads to poor educational outcomes. Services designed and offered under IDEA can greatly assist in addressing these students' mental health needs, improving their academic achievement, and strengthening their chances for success in life. We urge the Department of Education to reexamine the definition of "emotional disturbance." Specifically, we urge the Department to eliminate the reference to "socially maladjusted" in the current definition of emotional disturbance [34 C.F.R. Sec. 300.7(c)(4)(ii)]. The exclusion of children from eligibility on the basis of "social maladjustment" poses

a significant barrier to identifying correctly children with mental/emotional disorders. Research finds no justification for a distinction between mental/emotional disorder and social maladjustment and even if it did exist, no valid instruments exist to make such a distinction. Ten states have dropped the exclusion of social maladjustment. Eliminating this exclusion from the federal definition will assist State and local educational agencies in reducing misidentification that leads to inappropriate placements in other categories and the provision of inappropriate special education services.

3. Recommendation: The draft regulations use the term “agreement” throughout the documents. The regulation should clarify that the term “agreement” has the same meaning as the term “consent” as defined in 300.9.

Rationale: The instances in which the term agreement is used must require that parents to be fully informed and to provide their approval in writing.

4. Recommendation: Modify 300.17 by relettering (d) to become (e) and adding a new (d) to the definition of a Free Appropriate Public Education (FAPE) clarifying that the IEP team may decide to provide services in a post-secondary or community-based setting to students who have not yet received a regular high school diploma or “aged out” of receiving services.

Rationale: The final regulations need to clarify that it is permissible for these students to participate in dual enrollment programs and/or receive special education and related services in postsecondary and community based settings. The President’s Committee on Persons with Intellectual Disabilities (PCPID) in their 2004 report stated, “IDEA serves students through 21 years of age, depending on state law, and provides students with intellectual disabilities, ages 18-21 years, with limited options. Many of these students have had to stay in high school or participate in a “center” type program, which usually has consisted of segregated employment and earnings at below the standard minimum wage. The President’s Committee supports new emerging opportunities for students with intellectual disabilities to become involved in various transitional programs located at two year colleges or four year universities, or to participate in vocational education and training programs in integrated community-based settings….Dual enrollment, a relatively new development for students with intellectual and other disabilities, allows them to complete high school while attending a two or four year college with same-age peers, pursue an academic or vocational curriculum, or a combination of both, in an inclusive setting. Such opportunity permits students with disabilities to remain eligible for services under IDEA, if deemed appropriate by the IEP.”

Over one hundred such programs at two and four year colleges and universities are listed on the US Department of Education-funded website:

www.thinkcollege.net These transitional opportunities lead to greater employment, independence, and community living. The final regulation needs to be clear that it is permissible (although not required) for school districts to support dual enrollment programs and services for these students in age-appropriate postsecondary and community-based environments.

5. Recommendation: Insert new 300.18 (b (1) (ii)
(ii) when a teacher is certified as a "fully certified special education teacher", the state is assuring that that teacher is knowledgeable and skilled in the special education area in which the certification is received.

Rationale: States have a range of requirements for determining special education certification. Whatever the state chooses for those requirements, they should send the message to parents that if the teacher is labeled as having obtained "full state certification as a special education teacher," then the parent can assume that such a teacher is knowledgeable and skilled so that they can meet the unique needs of the student with a disability. In eliminating the option for an "emergency, temporary or provisional" licensure, the law clearly sends the message that special education teachers should be fully skilled and knowledgeable in special education. If an individual cannot demonstrate special education skill and knowledge, the individual should not be eligible for "full state certification as a special education teacher."

6. Recommendation: Insert new 300.18 (b)(1) (iii) and renumber accordingly.
(iii) States are prohibited from creating new categories to replace emergency, temporary or provisional licenses, which provide for any lowering of the standard for full certification in special education

Rationale: The creation of new categories for instant certification in order to avoid the statutory prohibition against temporary, emergency, provisional or waived certification, would undermine the law's requirements and water down the "highly qualified" standard.

7. Recommendation: Strike 300.18(b)(2)

Rationale: The draft regulation allows an individual who is participating in an alternative route to certification program to be considered a highly qualified special education teacher for three years. This language creates a lower standard than the statute for special education teachers, and should not be included in the regulation. It clearly violates statutory requirements in 607(b)(1). A provision that allows individuals to be called highly qualified teacher for up to

three years as they complete an alternative certification program creates a major loophole in the highly qualified mandate, and will result in lower student achievement for hundreds of thousands of students with disabilities.

> 8. Recommendation: Modify 300.18(c)(2) as follows:
> (2) Meet the requirements of subparagraph (B) or (C) of section 9101(23) of the ESEA as applied to an elementary school teacher, or, in the case of a secondary school teacher, meet the requirements of subparagraph (B) or (C) of section 9101(23) of the ESEA as applied to an elementary school teacher, be able to teach to the State's alternate achievement standards for grade(s) in which the students are enrolled, and have sufficient subject matter knowledge to be able to provide instruction aligned to the academic content standards for the grade level in which the students are enrolled, as determined by the State. States rules must be consistent with guidance published by the U.S. Department of Education August 2005, "Alternate Achievement Standards for Students with the Most Significant Cognitive Disabilities Non-Regulatory Guidance."

Rationale: NCLB Regulation §200.1(d) provides that a State may, through a documented and validated standards-setting process, define alternate academic achievement standards, provided those standards are aligned to the State's academic content standards, promote access to the general curriculum and reflect professional judgment of the highest achievement standards possible. On page 21 of the U.S. Department of Education's August 2005 "Alternate Achievement Standards for Students with the Most Significant Cognitive Disabilities Non-Regulatory Guidance" clarifies that state alternate achievement standards must be aligned with the state's academic content standard for the grade in which the student is enrolled. Page 26 of the guidance contains a description of how to align alternate achievement standards with the State's academic content standards, states that the content must be clearly related to grade-level content and the State must adapt or extend the grade-level content standards to reflect instructional activities appropriate for this group of students. The final IDEA regulation for §300.18(c)(2) must be consistent with this NCLB regulation and the guidance. A special educator teaching students who will be assessed against alternate achievement standards will need to understand and be able to teach to the alternate achievement standards for which the students are enrolled, as well as have sufficient grade level subject matter knowledge to be able to provide instruction that is aligned to the State's grade-level academic content standards, promote access to the general curriculum and encourage the highest achievement possible. The only way to move these students along the continuum towards grade-level achievement standards is to align the instruction to grade-level academic content standards. In addition the language "in the case of instruction above the elementary level" is confusing and should state clearly that this requirement relates to secondary school teachers.

9. Recommendation: Insert new 300.18(d)(4)

(4)States may not develop HOUSSE standards for special education teachers that allow for a lesser standard of content knowledge for special education teachers than for general education teachers.

Rationale: This intent is clearly reflected in report language accompanying the statute. There is evidence that some states have created HOUSSE standards for special education teacher whose content standards are significantly lower than they are for general education teachers. Teachers who are responsible for instructing students, be they special education students or general education students, must be knowledgeable in the content area of instruction.

10. Recommendation: Insert new 300.18 (d)(5)

(5) HOUSSE may not be used to determine full certification in special education.

Rationale: It is clear from the statute that the full certification of a special education teacher must be in special education. The HOUSSE is intended to ensure that a special education teacher who is teaching in specific core content areas is knowledgeable in those content areas.

11. Recommendation: Strike 300.18(g)

Rationale: Students who are publicly placed in private schools must be guaranteed teachers who meet the same highly qualified standards that apply to public school teachers. Moreover, the proposed regulation is in conflict with the requirement in the proposed 300.138 and the current 300.455 that services to children parentally-placed in private schools must be provided by personnel meeting the same standards as personnel providing services to children in the public schools.

12. Recommendation: Add the full definition of homeless children from the McKinney-Vento Homeless Assistance Act to 300.19.

Rationale: All definitions from other statutes should be presented fully in the IDEA regulations to make them more user friendly to all stakeholders.

13. Recommendation: Add the full definition of Limited English Proficient from the Elementary and Secondary Education Act to 300.27.

Rationale: All definitions from other statutes should be presented fully in the IDEA regulations to make them more user friendly to all stakeholders.

14. Recommendation: Modify 300.34 (b) as follows:

Exception. Related services do not include a medical device that is surgically implanted, ~~the optimization of device functioning, maintenance of the device~~, or the replacement of that device.

Rationale: The statute only excludes "a medical device that is surgically implanted, or the replacement of such device" (sec 602 (26) (B)) from the definition of related services. The proposed regulation adds two phrases that exceed Congressional intent. If Congress wished to exclude supportive services for such devices from related services, language to that effect would have been included in the law. The law excludes only a surgically implanted medical device or the replacement of such a device, not supportive services for the device.

The inclusion of the above two phrases in regulation may restrict the ability of an IEP team from recommending related services that are necessary to assist a child with a disability to benefit from special education. For example, a cochlear implant is a medically implanted device for processing sound, including oral language. However, the cochlear implant recipient still needs instruction in listening and language skills to process oral language, just as other children do who have less severe hearing loss and wear hearing aids. However, according to the proposed regulation, children with cochlear implants may not receive these necessary related services from audiologists and speech-language pathologists because these services could be viewed as “optimizing the functioning” of a medically implanted device. The proposed language in this regulation is overly prohibitive, contradicts IDEA’s guarantee of a free and appropriate public education to children with disabilities, and needs to be modified as recommended above.

15. Recommendation: Modify 300.34 by adding a new subsection (b) and re-lettering current subsections (b) and (c):
(b) An LEA shall provide other recognized related services, including art, music, and dance therapy, as determined necessary by the IEP team to assist the child to benefit from special education.

Add new subparagraph (6) under proposed subsection (b) and re-number proposed subparagraphs (6) – (16):

(6) Music therapy –
(i) Means services provided by a qualified music therapist; and
(ii) Includes –
(A) Using music interventions to address academic, cognitive, behavioral, social, and physical needs;

(B) Facilitating development in communication and sensory-motor skills;
(C) Developing adaptive strategies to encourage a child's participation in the school environment;
(D) Planning school programs that set behavioral expectations and maintain structure for children; and
(E) Consulting and collaborating with teachers and other school staff to meet the needs of the individual child

Rationale: Prior to 1997, the IDEA regulations contained a note indicating that the list of related services was not exhaustive and could include "other developmental, corrective, or supportive services (such as...art, music, and dance therapy)" (Note 1, 34 CFR, § 300.16). All notes were eliminated in the 1999 regulations. However, the discussion accompanying the regulations reiterated the exact language of this deleted note. In addition, the Department of Education issued a letter of clarification in June 2000 specifically stating that music therapy is an appropriate and useful related service that should be provided if the IEP team determines it necessary for the child to receive FAPE (*Letter to Farbman*, June 9, 2000). CCD believes this letter confirmed the Department's continuing interpretation that the list of related services is not exhaustive. CCD supports including the proposed language to ensure that children receive the related services that are necessary for them to receive educational benefit and to progress in the general education curriculum.

16. Recommendation: Support 300.38(a)(2)(ii) and 300.38(a)(4)

Rationale: CCD recommends maintaining the references to travel training in the definition of special education in the proposed regulation.

17. Recommendation: Modify 300.43 to include the full definition from the Assistive Technology Act and to clarify that Universal Design means designing curriculum, instructional materials and assessments so that they are accessible to students with as wide a range of abilities as possible.

Rationale: This provision refers to the definition of universal design from the Assistive Technology Act of 1998. It is a general definition and may not be interpreted to apply to curriculum and instructional materials which are essential to educational improvement. Universal design of assessments is mentioned elsewhere in IDEA, but it makes sense to also reference it here.

**SUBPART B**

1. Recommendation: Modify 300.114 (b)(2) as follows:

(2) Assurance. If the State does not have policies and procedures to ensure compliance with paragraph (b)(1) of this section, the State must provide the Secretary with an assurance that the State will revise the funding mechanism as soon as feasible, but no later than the start of the 2006-2007 school year, to ensure that the mechanism does not result in placements that violate that paragraph.

Rationale: The regulations follow the statute by requiring states to revise its funding formula so that it is no longer weighted on the basis of service setting "as soon as feasible." CCD recommends that the regulations establish a specific deadline of "no later than the start of the 2006-2007 school year." The funding formula policy was first adopted in the 1997 IDEA amendments and reinforced in the 2004 amendments. States should not have difficulty in meeting a specific deadline.

2. Recommendation: Retain the word "preschool" in 300.116. Also, the final regulation should contain a clause which states that if an inclusive preschool is the appropriate placement for a child, and there is no inclusive public preschool that can provide all the appropriate services and supports, the public agency must pay all costs associated with providing a free, appropriate public education for the child in a private preschool; including paying for tuition, transportation and such special education, related services and supplementary aids and services as the child needs.

Rationale: The use of the word "preschool" from the current regulation is critically important to clarify that a preschool child with a disability, who is served under IDEA, has the same rights regarding placement decisions as older students with disabilities. This includes the rights in the LRE provisions. Many parents are told that their preschool-age child does not have the right to be educated with non-disabled children and that the public agency will not provide a placement in a private preschool, even if it is the only available appropriate placement. This situation undermines the "individualized" decision- making that is the hallmark of IDEA. The decision about whether an inclusive preschool placement should be provided must be based on whether it is the appropriate least restrictive environment for the child, not on the availability of inclusive public preschools. Preschool has clearly been identified as a critical educational period for all children. This is especially true for children with disabilities. An early placement with non-disabled peers is the foundation for later inclusive educational opportunities and ultimately for competitive employment in the community.

3. Recommendation: Modify 300.156(a) by adding the following:
SEAs shall consult with LEAs, other State agencies, including professional licensing boards, the disability community, and professional organizations to determine the appropriate qualifications for related services providers,

including the use of consultative, supervisory, and collaborative models to ensure that students with disabilities receive the services described in their IEPs.

Rationale: Qualifications that are needed to provide the appropriate quality and quantity of services to students with disabilities have been well established by professional organizations, as well as other State agencies and profession-specific licensing agencies. Such standards are critical to State Education Agencies as they consider appropriate qualifications for school-based related service providers. These qualifications should ensure that students with disabilities receive the quality and quantity of services and supports necessary for involvement and progress in the general curriculum, especially the Adequate Yearly Progress criteria under No Child Left Behind.

Congress recognized the need for high standards, as stated in the preamble to the proposed regulations: "Conferees intended for SEAs to establish rigorous qualifications for related services providers to ensure that students with disabilities receive the appropriate quality and quantity of care. SEAs are encouraged to consult with LEAs, other State agencies, the disability community, and professional organizations to determine the appropriate qualifications for related services providers."

4. Recommendation: Modify 156(c)(1) by retaining the regulation currently in 300.661(c)(1).

Rationale: Under the draft regulations when a party files a State Complaint and then subsequently files a due process complaint, the State Complaint process stops. Under the current regulations the State Complaint process stops only as to the areas at issue in the due process complaint. If a parent knows the State complaint process will stop once they file for due process they may be more likely to forego the State Complaint process, (the process that is cheaper for States) and seek due process resolution on all issues. IDEA 2004 seeks to help parents and schools resolve disputes as quickly as possible and without the need for a due process hearing when possible. This draft regulation defeats this underlying intent.

5. Recommendation: Modify 300.156(d) as follows

(d)(1) *Policy.* In implementing this section, a State must adopt a policy that includes a requirement that LEAs in the State take measurable steps to recruit, hire, train, and retain highly qualified personnel to provide special education and related services under this part to children with disabilities.

(2) State policies must include

(i) How States will ensure that LEAs meet this requirement; and

(ii) Suggested steps to be taken by LEAs to accomplish this requirement,

including establishing and providing caseload or classroom size standards, access to loan forgiveness programs or other financial incentives, professional development growth opportunities, and clerical and technology supports.

Rationale: We believe that children with disabilities deserve to receive services from well-trained and qualified related services providers who have met an established set of standards. Therefore, we support the proposed language which states that qualifications for related services personnel must be "consistent with State-approved or State-recognized certification, licensing, or other comparable requirements that apply to the professional discipline" and that those professionals have not had certification or licensure waived on an emergency, temporary, or provisional basis.

We suggest the proposed language to strengthen this section. It directs local school districts to actively and continually seek and maintain an appropriate complement of well-trained and qualified related services personnel to meet the individual needs of all children with disabilities who require their services.

6. Recommendation: Reinstate public participation requirements to 300.165 from the current regulations of 300.280-300.284.

Rationale: IDEA touches more than 6 million children and their families. The public must be given ample opportunity to provide input when the state considers a change. The draft regulations do not ensure that parents can fully participate in their child's education. The current regulations must be reinstated. Proposed § 300.165 "procedurally or substantively weakens the protection provided to children with disabilities under this title as embodied in the regulations in effect on July 20, 1983" without a "clear and unequivocal intent of Congress" and is therefore in violation of § 607(b)(1) of the IDEA, 20 U.S.C. § 1406(b)(1).

7. Recommendation**:** 300.167 should retain the provisions in current 300.653 regarding advisory panel procedures.

Rationale**:** Many of these procedures including early meeting/agenda notification, reimbursement of reasonable and necessary expenses and interpreter and other necessary services are essential to ensure diverse parent participation. Without these required procedures, parents with busy work schedules, parents who are economically disadvantaged and parents who need foreign language or sign language interpreters may not be able to serve on State advisory panels. Proposed § 300.167 "procedurally or substantively weakens the protection provided to children with disabilities under this title as embodied in the regulations in effect on July 20, 1983" without a "clear and unequivocal intent of

Congress" and is therefore in violation of § 607(b)(1) of the IDEA, 20 U.S.C. § 1406(b)(1).

8. Recommendation: Modify 300.169 by reinstating requirement of the state advisory panel from the current regulations 300.652(b) regarding students with disabilities in adult prisons.

Rationale: The Department removes from mandatory duties of the State Advisory Panel a representative advising on eligible children with disabilities in adult correction agencies on grounds that it requires too much micromanaging. See current 300.652(b). Specifically, the Department has provided that a representative for this population may sit on the advisory panel, but the person does not have advisory power. The population of children with disabilities in adult correction agencies is one of the most vulnerable populations. The Department should not only permit, but encourage advice and information from someone with knowledge in this area. Therefore, the Department should retain the language in current regulations §300.652(b).

9. Recommendation: Modify proposed 300.172 and 300.210 to incorporate the following—

- Adoption of Accessibility Standards: SEAs and LEAs are required to "adopt" the National Instructional Materials Accessibility Standard (NIMAS) in a "timely manner." However, the proposed regulations neither clarify what adoption might mean (especially in the case of LEAs which may not have sufficiently-defined mechanisms in place to establish such standards within their respective jurisdictions) nor set boundaries for the timeliness of SEAs' and LEAs' adoption of the standards. With respect to the issue of timing, the regulations should provide that NIMAS should be adopted by all SEAs and LEAs no later than December 3, 2006.

- Coordination with the NIMAC: The proposed regulations parrot the provisions of the 2004 amendments allowing SEAs and LEAs to elect whether they will coordinate with the National Instructional Materials Access Center (NIMAC) established by those amendments to serve as a repository and distribution mechanism for textbook publisher-provided standardized electronic files. The regulations fail to specify precisely how SEAs and LEAs make this election and communicate their decision to 'opt in or opt out' of this coordinated national system either to the Department or to other entities within the SEAs' and LEAs' jurisdiction that are responsible for the production of materials in specialized formats. We strongly urge the Department to require SEAs and LEAs to *certify in writing* to the Secretary their decision whether to participate in this national system. Moreover, either a roster of jurisdictions that have elected to

participate should be published by the Department, or some other mechanism should be required to ensure SEA and LEA public accountability for their obligation to affirmatively act to coordinate with, or not to coordinate with, the NIMAC.

- Assurances to Provide Access: Again, the proposed regulations merely echo the statute's sketchy requirement that, if the SEA or LEA elects not to coordinate with the NIMAC, such SEA or LEA must provide an "assurance" to the Secretary that the jurisdiction "will provide instructional materials … in a timely manner." The proposed regulations do not specify when and how such an "assurance" is to be tendered and what particulars it must contain to be deemed satisfactory by the Secretary. Surely the Department does not intend for SEAs and LEAs to simply declare in correspondence that they intend to provide access without any additional detail regarding how the agency will comply with the clear requirement of the regulations to provide access for all students with disabilities. In addition, the proposed regulations do not assist SEAs and LEAs in crafting such assurances by setting parameters for their provision of accessible materials in a "timely manner." We believe that the manifest intent and legislative history of the 2004 amendments provides ample justification for requiring that, if SEAs and LEAs elect not to coordinate with the NIMAC, they must provide a written "assurance" to the Secretary detailing the precise policies and procedures that will be in place to provide students with disabilities access to instructional materials *at the same time* as such materials are made available to their non-disabled classmates.

- Scope of NIMAS: The Department has published a separate notice pertaining to the establishment of the National Instructional Materials Accessibility Standards (NIMAS). Although that notice is not the subject of these comments per se, CCD urges the Department to formally build into the establishment of the NIMAS a federally-recognized process allowing such standards to be regularly updated and modernized. We feel strongly that the 2004 amendments were intended to benefit all students who may need specialized access to instructional materials, and as technology evolves, the NIMAS will be extensible to enable even greater access beyond the production of Braille, large print and digital audio texts currently available, meaning that an even wider population of students with disabilities would be served.

Rationale: CCD commends the Department for both recognizing the clear need to affirmatively address the persistent overall national lack of access to required instructional materials and for unequivocally articulating, for the first time in regulations implementing America's special education law, the unambiguous obligation of SEAs (Sec. 300.172) and LEAs (Sec. 300.210) to ensure such access for all students with disabilities. The provisions of the 2004 amendments

regarding access to instructional materials were intended to be construed broadly and with a view toward meeting the needs of all students who may require specialized access to required textbooks and other core academic materials. However, without additional direction from the Department, SEAs and LEAs will neither be assured of their compliance with current law nor be able to assure the Department, with integrity, that the students they serve are indeed receiving meaningful access to classroom materials.

10. Recommendation: Modify 300.174 in the following two ways. 300.174 (b) should be renamed "Statutory rule of construction".

Add the following language:
300.174(c) Additional clarification. In implementing this section, school staff should neither promote nor discourage any specific treatment options that parents and treating professionals may consider and implement. In addition, when medication has been included in a treatment program to address a specific condition, nothing in this section shall be deemed as a bar to school staff reporting to parents or their representatives, classroom observations on the impact and/or efficacy of specific treatments. Best practices in medication management include the consideration of classroom behavior, academic performance and functional performance in the treating professional's determining the most appropriate, or required changes in medication and/or dosages."

Rationale: The provision of the regulation is a restatement of the wording in the Act with no additional clarification or commentary. The Act and the regulation prohibit both state and local education personnel from requiring a child to have a prescription for a controlled substance as a condition of attending school. CCD supports the underlying premise of this provision that no parent or child should be forced to adopt a treatment for a disorder in order to attend a public school.

Teachers and related services personnel are frequently the first to recognize learning, functioning and behavioral problems in the school setting and therefore should be able to advise parents of such observations. CCD believes that professionals should act within their professional scope of practice; thus, school personnel should not recommend the use of medication. They should also not interfere with the administration of a medically supervised treatment. Medication assessment and prescription is the role of a physician. However, school personnel should be able to recommend a comprehensive and complete medical assessment by persons licensed to perform such evaluations. Because students spend a significant portion of their day in the classroom, the vital role school personnel play in providing observations to the diagnosing professionals cannot be underestimated. Effective communication between school personnel and parents is essential and strongly encouraged.

**SUBPART C**

1. Recommendation: Modify 300.208 (a)(4) to clarify that an LEA may use funds to provide services and supports in post-secondary and community-based settings for students with disabilities who have not yet received a high school diploma or "aged out" of receiving special education services. Such services and supports could include, but should not be limited to, participation in dual enrollment programs and other partnerships with postsecondary institutions, employers and/or community-based organizations; other services and supports provided through the IEP team process, and services and supports for parentally-placed students with disabilities.

Rationale: It is important to clarify in the final regulation that LEAs *may* (but are not required to) provide this support with IDEA funds. The President's Committee on Persons with Intellectual Disabilities (PCPID) in their 2004 report stated, "IDEA serves students through 21 years of age, depending on state law, and provides students with intellectual disabilities, ages 18-21 years, with limited options. Many of these students have had to stay in high school or participate in a "center" type program, which usually has consisted of segregated employment and earnings at below the standard minimum wage. The President's Committee supports new emerging opportunities for students with intellectual disabilities to become involved in various transitional programs located at two year colleges or four year universities, or to participate in vocational education and training programs in integrated community-based settings….Dual enrollment, a relatively new development for students with intellectual and other disabilities, allows them to complete high school while attending a two or four year college with same-age peers, pursue an academic or vocational curriculum, or a combination of both, in an inclusive setting. Such opportunity permits students with disabilities to remain eligible for services under IDEA, if deemed appropriate by the IEP."

Over one hundred such programs at two and four year colleges and universities are listed on the US Department of Education-funded website: www.thinkcollege.net These transitional opportunities lead to greater employment, independence, and community living. The final regulation needs to be clear that it is permissible (although not required) for school districts to support dual enrollment programs and services for these students in age-appropriate postsecondary and community-based environments.

2. Recommendation: Modify 300.226(a) as follows:
(2) Except under circumstances related to disproportionality in 300.646(a)(2), the LEA shall carry out activities under this section.

Rationale: The proposed regulations should reference the obligation of the LEA to use early intervening funds to address particularly, but not exclusively, the

issues related to the disproportionate representation of children from one or more ethnic group.

3. Recommendation: Modify 300.226(b) as follows:
(b) Activities. In implementing coordinated, early intervening services under this section, an LEA may carry out activities that include—
(1) Professional development (which may be provided by entities other than LEAs) for teachers, related services providers**,** and other school staff.

Rationale: Related services providers are the staff members referred to as “pupil services personnel” in the No Child Left Behind Act and are frequently called upon to work with at-risk students. They also provide consultation to teachers and other school staff on instructional and behavioral strategies to better serve students in need. Specifying related services personnel as providers of early intervening services clarifies that students in need of academic and behavioral services shall receive them from the expertise available in the school building, and further encourages collaboration between special and general education staff.

In addition, CCD is pleased that the new statutory provision on early intervening includes services for students who need "behavioral support" to be successful in the general education environment. We support the proposed regulatory language in § 300.226(b)(1) that would provide professional development in delivering these interventions not only to teachers, but also to "other school staff."

We recommend that the Department of Education provide specific guidance to LEAs on the utilization of related services personnel in the provision of early intervening services. Related services personnel have specialized training, knowledge, and skills in the development and provision of behavioral and academic interventions linked to improved academic achievement. Using these staff members, who are included in the No Child Left Behind Act (NCLB) as "pupil services personnel," should also enhance collaboration between general and special education staff and further align NCLB and the IDEA.

4. Recommendation: Modify 300.226(b)(2) as follows:
Providing educational and behavioral evaluations, services, and support, including scientifically-based literacy instruction and the use of appropriate supplemental instructional materials.

Rationale: The explicit acknowledgement that supplemental instructional materials may be used in early intervening programs is intended to clear up confusion in school districts regarding whether or not they may be used. Some

school districts believe that they cannot use supplemental instructional materials because they were not developed using randomized clinical trials.

5. Recommendation: Modify 300.226(b) as follows:
(b)(3) providing information about early intervening services to parents of children who receive early intervening services

Rationale: The LEA should provide parents with information about early intervening services and the goals for such services.

6. Recommendation: Retain 300.226(c)

Rationale: The content of section (c) addresses the concern that early intervening services must not be used as a means of avoiding special education requirements and/or procedural safeguards, and re-enforces early intervening services as a short-term approach to making necessary instructional modifications and/or building requisite skills for children who are not identified as having a disability. Early intervening services can be discontinued for those students who close the gap in performance level with their non-struggling peers while students who continue to display low rates of progress can be moved to higher levels of intervention.

7. Recommendation: Modify 300.226(d) as follows

(d) Reporting. Each LEA that develops and maintains coordinated, early intervening services under this section must annually report to the SEA and make available to the general public in language that is accessible and understandable to all stakeholders on
(1) The number of children served under this section; ~~and~~
(2) The number of children served under this section who subsequently receive special education and related services under Part B of the Act during the preceding two year period, and
(3) the length of time a child receives early intervention services
(4) the impact of the early intervening services
(5) the amount of Part B funds used for early intervening services

Rationale: Schools should be able to account for the amount of time a student receives early intervening service and their impact. In addition schools should report the amount of Part B funds used to support early intervening services and the actually services provided.

**SUBPART D**

1. Recommendation: Modify 300.300(a)(2)(ii)(A) by restoring current regulation in 300.345(d) on what constitutes “reasonable measures.”

Rationale: Public agencies must document their efforts to obtain parental consent for an initial evaluation. Given the importance of appropriately identifying children as eligible for special education and related services, public agencies must be very clear as to their responsibilities. In addition, the current regulations 300.345(d) are part of the 1983 regulations.

2. Recommendation: Modify 300.305(e)(3) by adding the following language:

A member of the student's IEP team shall provide the student and the parent with a written Summary of Academic Achievement and Functional Performance based on academic achievement with a description of the effectiveness of accommodations and supports as well as a review of functional assessment and evaluation data.

The performance summary shall (1) give information and data to document the student's disability based on evaluations that have been conducted within the previous 36 months; (2) provide information on the nature and extent of academic and functional limitations caused by the disability and the academic and functional strengths of the student; (3) provide information on the effectiveness of accommodations, supports, and assistive technology previously used to reduce the functional impact of the disability

The performance summary should include, whenever possible (1) the most recent evaluations or data that support the summary (2) student input regarding the academic and functional limitations of her/his disability, and the student’s academic and functional strengths, (3) use and effectiveness of accommodations and supports.

Rationale: Solid data are needed to show the students strengths as well as to support requests for accommodations. This should not impose a paperwork burden because most of the data requested should be part of the student's record.

3. Recommendation: Modify 300.309(a)(2)(ii) by defining “intellectual disability.”

Rationale: The regulation introduces a new term “intellectual disability” that must be defined.

4. Recommendation: Modify 300.309(a)(3) by adding
(vi) Limited English Proficiency

Rationale: As stated in the NPRM discussion, exclusions listed in 300.309 are in addition to the special rule for eligibility determination. Limited English Proficiency should be added to this list.

5. Recommendation: Modify 300.309(a) by adding the following new language:

"(4) Construction Clause. Nothing in 300.309 shall be construed to mean that a child who has a disability, or any other condition listed in (a)(3), cannot also be identified as having a concomitant specific learning disability.

Rationale: Many children who fall into the categories listed in 300.8(c)(10)(ii) or 300.309(a) (3) have concomitant specific learning disabilities that go unidentified. These students end up with lower academic and functional achievement than they should, because an important contributing factor to their learning problems has not been addressed.

6. Recommendation: Support 300.309(d)

Rationale: This proposed regulation will ensure that the evaluation process moves forward in a timely fashion, but also allows the parties to agree to an extension should it be necessary. CCD supports the informed participation of all parties in this process, so that a determination of eligibility for services may be made as expeditiously as possible.

7. Recommendation: Modify 300.311 (a) by adding the following language:
(8) The determination of the team concerning the effects of cultural factors, limited English Proficiency, environmental or economic disadvantage.

Rationale: This language ensures that the written report includes all elements of 300.309.

8. Recommendation: Modify 300.320(a)(2) to add the following subsection:
(iii) Nothing in this section shall prohibit SEAs and LEAs from including benchmarks or short-term objectives for children with disabilities who are

not taking alternate assessments as an appropriate way to measure progress toward annual goals. Also, the regulations should provide alternative methods for monitoring student progress for cases in which the IEP team decides not to use benchmarks or short-term objectives.

Rationale: Benchmarks and short-term objectives are an appropriate way to measure progress toward annual goals, especially functional goals for many students who take an assessment aligned to grade level achievement standards. The decision about whether to use benchmarks and short-term objectives should be made by members of the IEP team, including the parents. The regulations should make clear that the use of these measurement tools should not be prohibited or discouraged by an SEA, LEA or school, rather should be left to the IEP team. This is entirely consistent with the proposed regulations that allow the IEP team to decide whether to begin transition planning before age 16. The statute does not require transition planning before age 16, however the Department of Education recognized the vital importance of including the IEP team in this decision. The IEP team should be given the same deference when it comes to benchmarks and short-term objectives and there is nothing in the statute that is inconsistent with this recommendation.

Also, the regulations should clearly state alternative methods for monitoring student progress, if the IEP team decides not to use benchmarks or short-term objectives. This may include incorporating instructional objectives from the general education curriculum or linking the annual goals to the appropriate grade level, alternate or modified learning/achievement standards.

9. Recommendation: Modify 300.320(a)(3)(ii) by clarifying that parents must be sent progress reports concurrent with the issuance of report cards.

Rationale: The proposed regulation language which says "such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards" may be misinterpreted as an option, not part of the requirement. The report cards are meaningless if the parents have to read them without concurrent IEP progress reports. In addition parents whose children have disabilities should be informed of their child's progress at least as often as parents are informed of their nondisabled children's progress.

10. Recommendation: Add new 300.320(a)(4)(iv) to read as follows: "A lack of available peer-reviewed research on special education and related services or supplemental aids and services shall not be construed as a basis for denying special education and related services or supplemental aids and services."

Rationale: This language clarifies that IEP teams cannot use 300.320(a)(4) to inappropriately limit access to necessary services. Professionals should be able to use their professional judgment, in conjunction with the best available evidence, to determine the most appropriate methodology or intervention strategy for a given child.

11. Recommendation: Modify 300.320 (a)(5) by using the phrase "regular class" instead of using "regular education environment."

Rationale: IDEA 2004 requires that IEPs contain an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class. The proposed regulations change the statutory words "regular class" to "regular education environment." This new term could make it more difficult for parents who want their child to be educated in the general education classroom since "regular environment" can be interpreted to mean almost any involvement with nondisabled children in a regular education school. The term "regular class" needs no clarification; it is in the current regulations, in IDEA 2004 and in the preamble to this proposed regulation. The Department is not upholding the intent of Congress with this change.

12. Recommendation: Support 300.320(b)

Rationale: CCD strongly supports the availability of transition services to students with disabilities younger than age 16. The proposed regulation wisely defers to the judgment of the IEP team and involves the parents in this critical decision.

13. Recommendation: Modify 300.320(b) by requiring the IEP for a student with transition services to include a statement of inter-agency responsibilities and any needed linkages, as required by current regulations.

Rationale: The proposed regulation requires transition services to be listed in the IEP but does not explicitly refer to a statement of inter-agency responsibilities and any needed linkages. Transition is an exceedingly complex and difficult time for parents and they rely on the statement of inter-agency responsibilities and linkages to help them navigate the transition maze.

14. Recommendation: Modify 300.320(b) to require transition services to include vocational/career training through work study and provision of documentation to ensure accommodations in the workplace and post-secondary education including accommodations in the administration of college entrance exams.

Rationale: These services are necessary for a smooth transition to employment or post-secondary education.

15. Recommendation: Modify 300.321(a)(3) as follows:
(a)(3) Not less than one special education teacher of the child, or where appropriate, ~~not less that one special education provider of the child~~, or in circumstances where there is no special education teacher, one special education provider.

Rationale: The proposed regulation is the same as the current regulation in this respect, but it causes confusion about whether a special education provider can be substituted for the special education teacher. Special education providers are valuable members of the IEP team but they should not replace a child's special education teacher.

16. Recommendation: Support 300.321(b)(2)

Rationale: CCD strongly supports the participation of the child with a disability in the transition IEP. Students with disabilities have the right and the need to help make decisions which affect their lives after school.

17. Recommendation: Modify 300.321(e)(2):
(e) *IEP Team attendance.*
(iii) the LEA shall ensure that written input provided by excused members of the IEP Team is sufficient to allow the IEP team to make informed decisions about the excused member's area of the curriculum or related services.

Rationale: The statute gives parents and school districts the option to excuse a member of the IEP team when that member's services are being discussed *if written input is provided before the meeting*. Regulations should clarify that, before agreeing to excuse a member, serious consideration must be given to determining if written input will be sufficient to thoroughly examine what services are needed or whether changes to the current IEP are necessary.

18. Recommendation: Support 300.322(b)(2)

Recommendation: The parents and the student must be involved in the transition planning for that student and need to know what other agencies may provide services after leaving school.

19. Recommendation: Modify 300.321 (a)(4)(iii) as follows:
(iii) is knowledgeable about the availability of resources of the public agency and has the authority to commit these resources.

Rationale: A large percentage of the due process complaints and litigation start when the IEP team states that a child needs certain supports or service, but they are not written in the IEP because no one is present who is authorized to commit the resources. This change would reduce litigation.

20. Recommendation: Modify 300.321 (b)(3) by adding the following new language:
"If an agency invited to send a representative to a meeting does not do so, the public agency shall take other steps to obtain participation of the other agency in the planning of any transition services."

Rationale: The modification language comes from the current regulation in 300.344(b)(3)(ii). The involvement of an agency that is likely to be responsible for providing or paying for transition services is essential to ensure that parents are fully informed and that the transition will proceed as smoothly as possible. The public agency should be required to involve such an agency in the planning of transition services even if the agency did not send a representative to the IEP meeting. This is not an unnecessary burden as it is described in the preamble to the proposed regulations.

21. Recommendation: Modify 300.321 (e) by adding the following language
"(3) The public agency must ensure that each IEP meeting, when appropriate, maintains a multidisciplinary scope and that this factor must be considered in determining whether an IEP Team member's area of curriculum or related services is being discussed at the meeting or whether written input is sufficient."

Rationale: Two essential elements of the IEP meeting are the depth and scope of the decision making process when parents, teachers and service providers from all the disciplines share their ideas and expertise. Therefore, it is nearly impossible to predict that any member's area of curriculum or related services will not be discussed. It also makes it difficult to provide written input that can substitute for the member's presence. If it turns out the member's attendance should have been required, the meeting will have to be stopped and rescheduled to have that member in attendance. If IEP team members are regularly excused under this provision there will be an increase in the number of IEP meetings, which is not consistent with the intent of Congress.

22. Recommendation: Modify 300.322 (d) to retain current regulatory language in 300.345(d) and the 1983 regulations in 300.345(d).

Rationale: These regulations are essential and describe the types of documentation that are required with respect to the public agency's attempts to arrange a mutually agreed upon time and place for the IEP meeting such as (1) detailed records of telephone calls made or attempted and the results of those calls; (2) copies of correspondence sent to the parents and any responses received; and (3) detailed records of visits made to the parent's home or place of employment and the results of those visits. Congress has placed great emphasis on parent participation in educational decisions. The regulations should be clear about the lengths to which the public agency is expected to go to find a mutually agreed upon time and place for the IEP meeting before the meeting can be conducted without the parents in attendance.

23. Recommendation: Modify 300.322 by adding 300.345(e) from the current regulation.
"The public agency shall take whatever action is necessary to ensure that the parent understands the proceedings at the IEP meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English."

Rationale: According to the preamble, the proposed regulations did not retain this language from the current regulations because agencies are required by other Federal statutes to take appropriate actions to ensure that parents who have disabilities or limited English proficiency understand the proceedings at an IEP meeting. It is very difficult for parents to track their rights under IDEA, let alone cross reference rights in other documents. The Department combined the statutory and regulatory language under IDEA in recognition of this difficulty. It is inconsistent to assert that parents should be aware of provisions in other statutes that also apply to IDEA.

24. Recommendation: Modify 300.323 (b)(2)(i) by requiring parental consent before a preschool aged child receives IFSP services in states that have developed a state policy under section 635(c).

Rationale: While the proposed regulations maintain the current regulations in 300.323(b), states now have the option of providing services in accordance with an IFSP to preschool aged children. Some states may choose to continue their sliding fee scale to these children and some parents may choose to continue to receive Part C services rather than transition to 619 services that are at no cost. It is essential that these parents give consent and have the differences between the two systems fully explained to them, including the financial implications to

their family. The decision to forgo an IEP and retain an IFSP is a decision that significantly impacts the rights of children and parents. Therefore, it is essential that parents have the necessary information to make informed decisions and that their consent or agreement is required to be documented.

25. Recommendation: Modify 300.323(d) by restoring language in current 300.342(b)(3)
"Each of these professionals is informed of her or her specific responsibilities related to implementing the child's IEP and the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP."

Rationale: In addition to ensuring that the IEP is accessible to teachers and service providers, the final regulation should retain current regulatory language that ensures that each teacher and provider is informed of his or her specific responsibilities related to implementing the child's IEP and the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP. This language from the current regulations was removed from the proposed regulations as unnecessary because public agencies are required to share this information in order to meet their obligations under the Act. The unfortunate reality is that many teachers and service providers tell parents they have never seen their child's IEP. Therefore, it is necessary to explicitly require that the teachers and service providers be informed of all their specific responsibilities related to the IEP.

26. Recommendation: Modify 300.323 (e)(2)(i) and 300.323(e)(2)(ii) by requiring that transmittal of records should occur within 15 business days after receiving the request.

Rationale: The transmittal is required to be done promptly, but without a stated time period, parents have no clear recourse when the LEA has not transmitted the records in a timely fashion.

27. Recommendation: Modify 300.324 (a)(2)(i) as follows
(i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies <u>based on functional behavioral assessments</u>, to address that behavior."

Rationale: Numerous studies have demonstrated that functional behavioral assessments lead to the development of successful behavioral interventions for children in school settings.

28. Recommendation**:** Modify 200.324(a)(2)(iv) with the following language:

> " (A) When considering the communication needs of a deaf or hard of hearing child the IEP Team shall ensure that:
> (I) the child's language and communication skills are assessed;
> (II) the public agency provides educational programming and services designed to develop the child's language (expressive and receptive) and other academic skills; and
> (III) the public agency provides language and communication access to educational information and interactions with peers and professional personnel, including direct communication.

Rationale**:** Language assessment, development, and access are among the most important components of an educational program for a deaf or hard of hearing child. (National Deaf Education Project, The Educational & Communication Needs of Deaf and Hard of Hearing Children: A Statement of Principle Regarding Fundamental Systemic Educational Changes, Gallaudet University, 2000.) Case law requires LEAs to provide communication in the child's communication mode. This regulation will help guide IEP teams as to how best meet the educational needs of deaf and hard of hearing children.

29. Recommendation: The final regulation should retain current regulatory language in 300.346(b) that requires the consideration of special factors in a meeting to review, and, if appropriate, revise an IEP.

Rationale: The preamble to the proposed regulations states that this language was removed because IDEA 2004 no longer requires the consideration of special factors in IEP review and revision. However, it is not possible to thoroughly review and revise an IEP so that it addresses all the issues listed in Section 614 (d)(4), without considering special factors. It is difficult to imagine that Congress intended to permit an IEP team to ignore critical special factors when reviewing and revising an IEP. This requirement must be clearly stated in the proposed regulation to avoid any confusion on this point.

30. Recommendation: Retain 300.346(c) that requires the IEP team to include a statement in the child's IEP detailing the particular device or service related to the special factors (including an intervention, accommodation, or other program modification) that the child needs in order to receive FAPE.

Rationale: The preamble to the proposed regulations indicates that this requirement was removed because it is covered in proposed regulation §300.320 (a)(4). The statement of services and supports required in that proposed

regulation would cover special factors in a very general way but would not serve as a reminder to state the particular device or services related to the special considerations. The reality is that parents and educators generally review the specific provision related to the task at hand and may miss a more general requirement elsewhere in the regulations. To ensure informed parent involvement and proper implementation of IDEA, certain general requirements are important enough to repeat in the specific situations to which they apply.

31. Recommendation: Modify 300.324(a)(1)(iii) by creating a new (iv) that restores the current 300.346(a)(iii).

Rationale: In NCLB and IDEA 2004, Congress made it clear that students with disabilities must be part of the accountability system that applies to all students. Aligning IDEA 2004 with NCLB was one of Congress' major objectives. Statewide testing of students with disabilities is an important factor and can provide valuable information to use in a program. The testing should inform the team of the child's success in the general education curriculum. The information obtained is meaningless to the student unless those results are reviewed by the IEP team.

32. Recommendation: Modify 300.324 (a)(6) as follows:
"(6) Amendments. Changes to the IEP may be made either by the entire IEP Team or, as provided in paragraph (a)(4) of this section by amending the IEP rather than by redrafting the entire IEP. ~~Upon request, a parent must be provided with a revised copy of the IEP with the amendments incorporated~~. Each member of the IEP Team, including the parent, must be provided with a revised copy of the IEP with the amendments incorporated.

Rationale: It is essential to the implementation of an IEP that everyone on the IEP team, including the parents, has the most updated version of the document.

33. Recommendation: Support 300.324(c).

Rationale: The school system has the final responsibility for ensuring a successful transition, so it must identify alternative strategies for meeting the student's objectives.

34. Recommendation: Restore current 300.350.

Rationale: This language explicitly requires the provision of special education and related services to a child with a disability in accordance with the child's IEP and a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP. The Department justifies the elimination of this language by asserting that these requirements are implicit in IDEA and NCLB. In this age of accountability it is more important than ever to explicitly state the level of commitment that parents should expect from the school district, the administrators and educators. This is too important a message to eliminate in favor of implicit requirements.

**SUBPART E**

1. Recommendation: Retain 300.501(c)(4), including the referenced examples in § 300.345(d), from the current regulations.

Rationale: Parents are very important members of the placement team. Congress added §614(e) to IDEA '97 to ensure parental involvement in placement decisions. Therefore, if a school district asserts that it cannot secure a parent's involvement, it should keep detailed records of its attempts to obtain parental participation. This includes responses from the parent asking to reschedule the meeting if the parent is unable to attend (ill, unable to get excused from work, etc.). Because current section §300.345(d) provides examples of the kinds of efforts and records that should be kept, not mandates, it does not infringe on state flexibility. However, deleting the rule will suggest to states that something less than procedures similar to those in the examples will now be acceptable, and will lead to less parental participation and inevitably to unnecessary litigation over what is needed to ensure participation.

2. Recommendation: Retain 501(c)(5) from the current regulations.

Rationale: One of the core requirements of IDEA is to ensure meaningful participation of parents. Parents cannot participate in the process in a meaningful way if they do not have the means to understand the proceedings (*i.e.* not in their language). Regulatory silence now, coming as it would as a deletion of the old rule, will only increase the possibility that many parents, especially those with limited education or financial means and parents with vision and hearing disabilities, are not properly afforded their right to meaningfully participate in IEP and other meetings regarding their children.

IDEA 2004 (§607 (b)(2)) specifically states that all the rights provided in the July 20, 1983 regulations shall remain. Among those rights are the rights to an interpreter for deaf and non-native English speaking parents. 34 C.F.R. § 300.345(e) (1983). Since one purpose of the reauthorization was to avoid undue litigation, the Department could help avoid this problem by simply clarifying "reasonable" and keeping consistent with prior regulations.

3. Recommendation: Support 300.504(c).

Rationale: Section 300.504(c) requires an explanation of the State complaint procedure and the due process complaint procedure. Both are important procedures and parents need to have both explained, as the Department recognizes. This is also recognized by IDEA 2004, which recognizes the existence of a complaint under § 615(b)(6) and a due process complaint notice under §615(b)(7).

4. Recommendation: Add a new §300.504(e) Notice regarding Resolution Session"

Rationale: This amendment would simply require notices to mention and explain the resolution session to parents. The resolution session imposes new requirements with new consequences. It will, if properly designed and implemented by states, have state (possibly LEA) specific procedures that must be explained to parents if they are expected to comply. Most parents are not knowledgeable about the law and the procedural safeguards notice is intended to educate them about all important features of the IDEA. Since this is a new requirement it is especially important for the notice to describe how it works and what parents' responsibilities are.

5. Recommendation: Modify 300.506(b)(6)(i) and (b)(8) by deleting the phrase "arising from that dispute".

Rationale: The statute at §615(e)(2)(F) and (e)(2)(G) requires that mediation discussions remain confidential during any subsequent due process hearing or civil proceeding. The draft regulations state that the discussions must remain confidential during any subsequent due process hearing or civil proceeding *arising from that dispute.*

The Department is permitted to issue regulations only to ensure the specific requirements of the Act are properly implemented. §607(a). The change made by the proposed regulation goes beyond the statute in an impermissible way, and therefore, also appears impermissible under §607(b), too. Further, the plain meaning and intent of this section is to encourage the use of mediation as a forum to resolve disputes. One method Congress has chosen to do so is by ensuring information exchanged during mediation are kept confidential. The regulation seeks to make the confidentiality conditional, only permitting it to apply to the current issue in dispute, but allowing the information to be used in other actions. The lack of required confidentiality will quell the desire to engage in mediation for both schools and parents, and will result in more and possibly avoidable litigation.

6. Recommendation: Replace proposed regulation §300.506(c)(1)(i) with the current regulation 300.506(c)(1)(i)(A) and (B).

Rationale: The draft regulations permit mediators to be employees of LEAs and SEAs. As the Department recognized in 1999 because it is important to encourage mediation the process must be attractive to both parties. Parents will not be attracted to a process in which an LEA employee will act as mediator. That the employee is from a neighboring, or even distant LEA, will tend to deter parents from using mediation. Knowing this the Department forbade LEA employees from being mediators. Federal Register, March 12, 1999, p. 12611. The same reasoning holds true today. Mediation is much less expensive than litigation of any kind. Congress' goal in adding the mediation provision was, among things, to reduce costs. This goal is more likely to be realized if parents trust the process. The fact that a particular LEA employee may make an excellent mediator is not enough to instill that trust.

7. Recommendation: Proposed Section 300.507(a)(2) and 300.511(e) should be amended to read as follows: The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint, or, if the State has <u>established, after notice, hearing and opportunity for comment under § 612(a)(19) of the Act a reasonable</u> explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law.

Rationale: Two of the primary purposes of the IDEA are "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living" and "to ensure that the rights of children with disabilities and parents of such children are protected." In enacting the IDEA amendments of 2004 Congress stated on more than one occasion that it was attempting to strengthen parents' rights, to make their participation in the process meaningful. Therefore, the regulations should clarify that any state laws or regulations setting timelines different from those in IDEA 2004 must be reasonable in order to further the purpose of the Act.

8. Recommendation. Delete the phrase "or engage in a resolution session" from 300.508(c) from the proposed regulation.

<u>Rationale</u>: This section states that a party may not have a hearing on a due process complaint or "engage in a resolution session" until the party files a due

process complaint that complies with the requirements of §300.508(b)(Content of Complaint). The statute at §615(b)(7)(A) states that a party may not go forward with a due process hearing if they have not fulfilled the requirements of 300.508 (content of complaint). The statute does not forbid parties from moving forward with the resolution process; however the draft regulation does limit the party's ability to go forward with the resolution session.

The Senate Report clearly states Congress' intent that a school district's belief that a parent has failed to provide a sufficient notice should not delay the resolution sessions. Senate Report 108-185, p. 38-39. IDEA 2004 explicitly states that the timelines for the resolution session begin when the complaint is received. §615(f)(1)(B)(i)(I). The proposed regulation contradicts IDEA 2004 and therefore violates § 607(b)(1). It is also potentially harmful to the child's education to delay resolution sessions while the hearing officer decides whether the notice is sufficient. The Act encourages parties to settle issues short of proceeding to hearing. The requirement to begin the process to resolve issues should not be stalled while a hearing officer rules on sufficiency.

9. Recommendation: Create a §300.508 (d)(3)(iii) to state that a hearing officer should permit a party to amend the complaint unless doing so would prejudice the other side. In the alternative, the regulations should at least state that hearing officers should follow the standard that permits them to freely grant amendments when justice so requires.

Rationale: Most parents will not know in detail the procedural rules required by the new IDEA. Parents should be able to amend complaints when necessary, rather than being forced to start the entire process again. The purpose of the complaint is to notify the opposing party of the claims alleged. Unless the party would be prejudiced by permitting an amendment, it should be permitted. Alternatively, the regulations should follow the Federal Rules of Civil Procedure, Rule 15(a) which states that the ability to amend a complaint in federal court is to be "freely given when justice so requires." This has been the law in federal civil cases since 1937.

10. Recommendation: Include a section under §300.508(d)(3) that states that parties are required to amend their complaints only when seeking to significantly change the subject matter of the complaint, but not when the complaint is insufficient for minor reasons.

Rationale: Most parents caught in the web of procedural rules will not be able to use the hearing process effectively. If every minor error results in parents being required to amend the complaint or start the hearing process from the beginning, the child's ability to obtain a hearing and relief will be inordinately delayed. They will have to proceed through the 30-day resolution procedure each time. It makes little sense to force parents to do this because they simply left out the

child's address or school name, for example, or other information that the LEA has readily available in its records.

11. Recommendation: Add a new section 300.508 that states if parents file a new due process complaint, because the original complaint was deemed by a hearing officer to be insufficient, the statute of limitations is tolled (temporarily suspended) by the original filing.

Rationale: The purpose of a statute of limitations is to prevent the assertion of stale claims and guarantee that parties are notified when they are being sued. Since the original complaint puts the LEA on notice, there can be no claim that the LEA was surprised by the re-filing of a complaint found to be insufficient. Therefore, the statute of limitations should be tolled by the original filing (the dates calculated to determine if a party is within the Statute of Limitations shall stop at the date of the original filing).

12. Recommendation: Add a new 300.510(b)(4) that states that if a school district fails to convene the resolution session by the 15th day, or does not give the parent sufficient advance notice to allow the session to occur by the 15th day or does not bring the required representatives to the meeting, including an official with authority to make decisions for the school district, the scheduling of the due process hearing occurs at that point and the 45 day period for receiving a hearing decision is counted from the day the complaint notice (hearing request) was received.

Rationale: Many school districts will comply with the resolution session requirement (§ 615(f)(1)(B)) of IDEA 2004 and convene the meetings on time with the required representatives. LEAs that act in bad faith and do not convene the meeting or do not bring an official with authority to make decisions for the school district, as the law requires, should not be rewarded with a 30-day halt in the proceedings. The 30 days was intended by Congress to be used to resolve complaints, not as a break for school districts that were not complying with the law.

13. Recommendation: Create a §300.510(b)(3) as follows: A parent has a right to seek a determination from a Hearing Officer that he or she has acted in good faith and seek an order that requires the hearing to proceed without delay.

Rationale: Schools must work in good faith with parents, and parents must be provided with notice and an opportunity to meet at a time and place when they are able to do so. Parents may have to ask to be excused from work or make

childcare arrangements. This may be a particular problem for low-income parents. Further, a parent must have the opportunity to dispute the schools' claim that parents did not participate, or the ability to move forward to a due process hearing will be entirely within the control of the party that is being sued.

14. Recommendation: Create a new section under 300.510(a) that states that if the parties waive the resolution session, they proceed immediately to due process and the 45-day period for receiving a hearing decision begins.

Rationale: The 30 days was intended to give the school district time to resolve the dispute. If the parties waive the resolution session, they should not get a 30-day delay because it serves no purpose. Otherwise, the child's education suffers because the hearing decision is delayed for 75 days, instead of 45 days, even though no one is working on resolving the dispute.

15. Recommendation: Create a new section under 300.510(a) that states that if the parties agree to use the mediation process in lieu of the resolution session, the 45-day period for conducting and receiving a hearing decision begins.

Rationale: If the parties choose to go to mediation rather than through the resolution process, the parties must follow the mediation requirements under §300.506. Those requirements as well as IDEA 2004 prohibit the use of mediation "to deny or delay a parent's right to a hearing on the parent's due process complaint." Therefore the timeline to conduct a due process hearing should commence from the date that due process request was received.

16. Recommendation: Add a §300.510(c)(3) that requires LEAs to inform parents at the time a resolution agreement is signed that each party has three days to void the agreement. The information provided to parents must be done so in their native language to the extent feasible (*i.e.* through an appropriate interpreter if their native language is not English and ASL or other appropriate interpreter if the parent is deaf and the Braille equivalent for written documentation).

Rationale: Most parents do not know particulars of the law and many parents are not represented by counsel or advocates. Parents need to know they have the right to void the agreement. Informing them of this right is consistent with the Act and requires little effort on the part of schools.

17. Recommendation: Modify 300.510(c)(2) by adding "or through the state Complaint process."

Rationale: The State Complaint process is relatively easy for parents to use and less costly for both parents and schools than due process hearings. Parents should have the option of using the process to enforce resolution agreements.

18. Recommendation: Modify 300.512(b) by adding the underlined section: "At least five business days prior to a hearing conducted pursuant to Sec. 300.511(a) and 300.532, each party must disclose to all other parties all evaluations completed by that date and recommendations. . ."

Rationale: As written the draft regulations apply the right to disclosure of documents in a due process case only to complaints regarding "any matter relating to the identification, evaluation or educational placement of the child, or the provision of a Free Appropriate Public Education …" §615(b)(6) and does not include due process claims brought under the discipline provisions. IDEA 2004 requires parties to disclosure documents 5 days prior to a hearing. The Department has reduced this to 2 days. The statute does not permit reducing the days and therefore this regulation must be stricken. (See # 26 below)

19. Recommendation: Modify section 300.516(b) as follows:

"The party bringing the action shall have 90 days from the date of the decision of the hearing officer or 90 days from the date the reviewing officer or panel decision (if the state has a two-tier system) to file a civil action, or, if the State has an explicit time limitation for bringing civil actions under Part B of the Act, in the time allowed by that State law.

Rationale: The IDEA permits states to have a one-tier system (hearing officer only), or a two-tier system (hearing officer's decision is subject to an impartial review). Section 615(g)(2). However, parties cannot appeal to a court until the entire administrative process has been exhausted. The regulations must clarify that the 90-day timeline or the State's alternate timeline begins to run from the date of the final administrative decision by either the hearing officer or the reviewing officer or panel in order to prevent the inappropriate dismissal of cases.

20. Recommendation: Modify 300.519(c) by including §300.519(d)(ii) and (iii) (requiring court-appointed surrogates for wards of the state to have no conflict of interest and adequate knowledge and skills to be a surrogate.)

Rationale: Wards of the state are particularly in need of careing and qualified surrogate parents. There is no reason to distinguish between court-appointed surrogates and school-district appointed surrogates on these requirements. No child should have a surrogate parent who has a conflict of interest or lacks adequate knowledge and skill to be a surrogate.

21. Recommendation: Modify 300.530(d)(1)(i) to conform to the statute, providing that the children must "continue to receive educational services, as provided in section 612(a)(1), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP."

Rationale: As worded, § 300.530(d)(1)(i) does not include the phrase, "as provided in section 612(a)(1)." This section of the IDEA requires states to provide FAPE to children, including those suspended or expelled. Thus, the regulation appears to contradict IDEA 2004 by removing this phrase and allowing these children to be provided with something less than FAPE. To avoid violating. §607 (b)(1), the phrase should be restored. Not only does it violate §607(b)(1), but it violates § 607(a), because it is not necessary to ensure compliance with the IDEA.

22. Recommendation: Delete draft regulation §300.532(c)(5): The hearing rights established in §300.511-513 should remain intact for expedited hearings brought under §300.532

Rationale: This section permits States to establish a different set of procedural rules for expedited hearings. However, the regulations do not clarify that the purpose of permitting States to establish a different set of procedural rules is to assist in the expeditious nature of the process, not to strip parents of rights. The draft regulations as written could permit states to re-write rules regarding basic rights of parents such the right to a free transcript of the proceedings, and hearing officers that meet the qualification standards of §300.511.

The Act provides that these rights apply to any hearing conducted, including a hearing conducted as part of the discipline proceedings. Therefore, the Department contradicts the statute (in violation of §607(b)(1)) if it does not apply these basic rights to students involved in discipline hearings under §300.532. Further, the July 20, 1983 regulations provide for these hearing rights, and the regulations issued to implement IDEA 2004, must not lessen the rights provided in July 20, 1983, under §607(b)(2). The Department should clarify that these basic rights are part of all IDEA due process hearings.

23. Recommendation: Delete 300.532(c)(4).

Rationale: IDEA 2004 provides for due process hearings when a parent has a complaint about "any matter relating to the identification, evaluation or educational placement of the child, or the provision of a Free Appropriate Public Education . . ." and for instances when a parent who disagrees with placement decisions or manifestation determinations regarding discipline proceedings. IDEA 2004 also states that parties that file for due process in these situations must provide the opposing party all the evaluations and recommendations they intend to use at the hearing 5 business day before the hearing. The Department changes this statutory rule by reducing this period to 2 business days. The Department may not contradict the statute when it issues regulations; therefore, this regulation must be stricken. Further, the right to disclosure of documents 5 days before a hearing was provided in the July 20, 1983 regulations at §300.508(a)(3), and the Department may not lessen the protections that were in the July 20, 1983 regulations. §607(b).

24. Recommendation: Support 300.530(d)(1)(ii).

Rationale: IDEA 2004 § 615(k)(1)(D)(ii) mandates that the Functional Behavioral Assessment must result in services designed to address a behavioral violation "so it does not recur." It is appropriate and required that the regulation use the same standard as in the statute.

25. Recommendation: Modify 300.534(c)(2) to state: <u>"that if the LEA otherwise has a basis to be deemed to have knowledge of a child's disability, an evaluation and eligibility determination that is more than 3 years old should not prevent deeming an LEA to have knowledge of a child's disability when the requirements in 300.534(b) are otherwise met.</u>

Rationale: An LEA should not be able to avoid being deemed to have knowledge of a child's disability because the child was evaluated in the distant past and a determination was made that the child was not eligible for services under IDEA. A preschool evaluation that looked at limited factors may not be appropriate for determining whether a second or third-grade child has a disability. Emotional and other disabilities can show up for the first time, or are evaluated, when a child is older or a traumatic event or accident has occurred.

26. Recommendation: Delete 300.536(b)(2).

Rationale: The existing regulation, §300.519, should be retained. Neither IDEA 2004 nor the legislative history allow or support creating an extra "substantially similar" behavior requirement for determining whether non-consecutive days of

removal are a change in placement. Therefore, the new standard violates § 607(a) of IDEA 2004 because it is not necessary to ensure compliance with IDEA's specific requirements. Moreover, just what constitutes "substantially similar" behavior is highly subjective, prone to overuse, and likely to lead to litigation. The proposed regulation also appears to permit a student to be removed and denied educational services for manifestations of their disabilities, if the periods of removal are for non-consecutive periods that each are shorter than 10 school days, but cumulate to more than 10 school days, so long as the behaviors are not substantially similar. Disabilities may manifest in behaviors that are not substantially similar. For example a child with mental retardation may take school property that does not belong to him, may lie to a teacher because nondisabled peers told him to, and may have difficulty following staff instructions. Therefore, the NPRM contradicts IDEA 2004 § 615(k)(1)(E) and violates §607(b)(2). Under the proposed regulation, if the child is excluded for non-consecutive periods, he or she may be denied educational services and therefore FAPE.

Finally, proposed § 300.536(b)(2) is also vague and unclear. It say that "the child's behavior is substantially similar to the child's behavior in the incidents that resulted in the series of removals, taken cumulatively, is determined, under § 300.530(f), to have been a manifestation of the child's disability." The final clause referring to a manifestation of the child's disability is wholly unclear and ambiguous.

**SUBPARTS F, G and H**

1. Recommendation: Modify 300.600(b)(2) as follows:
   (2) Ensuring that public agencies meet the program requirements under Part B and Part C of the Act, with a particular emphasis on those requirements that are most closely related to improving educational results for children with disabilities.

Rationale: The regulations should reinforce that state monitoring and enforcement activities also apply to the Part C program.

2. Recommendation: Modify 300.601(a) as follows:
   (a) General. Not later than December 3, 2005, each State must have in place a performance plan that evaluates the State's efforts to implement the requirements and purposes of Part B and Part C of the Act, and describes how the State will improve such implementation.

Rationale: Again, the regulations should reinforce the monitoring and implementation of the Part C program.

3. Recommendation: Modify 300.641(d)(1) as follows
(d) If a child with a disability has more than one disability, the SEA must report that child in accordance with the following procedure:
~~(1) If a child has only two disabilities and those disabilities are deafness and blindness, and the child is not reported as having a developmental delay, that child must be reported under the category "deaf-blindness."~~
~~(2) A child who has more than one disability and is not reported as having deaf-blindness or as having a developmental delay must be reported under the category "multiple disabilities."~~
(1) If a child has both significant hearing and vision loss, whether or not other disabilities are present, that child must be reported under the category "deaf-blindness."
(2) A child who has more than one disability but does not have both significant hearing and vision loss must be reported under the category "multiple disabilities."

Rationale**:** Approximately 85% of the more than 10,000 children served by the federally funded State and Multi-state Deaf-Blind Projects have, in addition to their hearing and vision loss, additional disabilities including cognitive disabilities and physical/health impairments.

The proposed language is identical to the current language in the regulations that has resulted in a startling under-reporting of children who are deaf-blind. By following the current instructions, which require that children with other disabling conditions in addition to their combined hearing and vision loss be reported under the category multiple disabilities, the SEAs annually report approximately 1,500 children under the category Deaf-Blind. This under-reporting, by as much as 85%, impedes appropriate planning at the federal and state levels.

4. Recommendation: Retain 300.704 (c) (2)

Rationale: CCD supports the clarification of this regulation on the source of revenue for the administration of the high cost fund.

5. Recommendation: Modify 300.704 (c) (3)(i)(A) as follows:
"Establish, in consultation and coordination with representatives of LEAs, parents of students with disabilities enrolled in the LEAs, representatives of the State Advisory Panel and other stakeholders, a definition of a high need child with a disability that, at a minimum___"

Rationale: Parents of children enrolled in the LEAs and other stakeholders should be involved in the development of the definition of a high need child for purposes of the high cost fund.

6. Recommendation: Retain 300.800

Rationale: CCD supports the incorporation of the 619 preschool regulations in the Part B regulations.