

September 6, 2005

Troy R. Justesen
U.S. Department of Education
400 Maryland Avenue, SW
Potomac Center Plaza
Room 5126
Washington, D.C. 20202-2641

Dear Dr. Justesen:

The American Occupational Therapy Association (AOTA) submits the following comments in response to the June 21, 2005 *Federal Register* Notice of Proposed Rulemaking for Part B of the recently amended Individuals with Disabilities Education Act (IDEA). AOTA looks forward to providing comments to Parts C and D, and the remainder of Part B not covered by this NPRM.

AOTA represents nearly 35,000 occupational therapy practitioners, educators, researchers, scientists and students of occupational therapy. Occupational therapy is concerned with helping individuals engage in everyday activities, or “occupations”, in order to participate in school, work, and play. More than one-third of AOTA’s members provide services to children and youth in early intervention, preschool, and school programs across the country.

AOTA believes the regulations should clearly guide parents, service providers, and administrators in applying the law so they can ensure that eligible children actually receive high quality early intervention services or a free appropriate public education. Some areas of the proposed regulations accomplish this need very well, while additional guidance is needed to clarify other areas. In addition, ongoing technical assistance will also be needed as states move forward with aligning their state policies with the new federal requirements.

AOTA’s comments are provided in sequential order as presented in the NPRM. New language is AOTA is suggesting for inclusion in the regulations is underlined.

AOTA is ready and prepared to work with you to provide any additional assistance as you move forward in implementing IDEA.

Sincerely,

Leslie L. Jackson, MEd, OT
Federal Affairs Representative
AOTA Public Affairs Division

Subpart A**§ 300.18. Highly qualified special education teacher.**

Add new paragraph (a)(3):

“(a)(3) With respect to related services personnel, the term *highly qualified* applies only when such personnel provide special education in accordance with §300.38(a)(2)(i) and are responsible for teaching a core academic subject as that term is defined in §300.10.

Rationale: Despite clear statutory language at §612(a)(14)(B) regarding qualifications for related services personnel, some states are attempting to apply the NCLB highly qualified requirement to occupational therapists and other related services personnel. This additional language should clarify for State and local agencies when the highly qualified requirement does and does not apply to related services personnel.

Subpart B**§ 300.156. Personnel Qualifications.**

Insert new paragraph (a)(2) and re-number current (a) as (a)(1); add new language in paragraph (d):

"(a) (1) *General.* The SEA must establish and maintain qualifications to ensure that personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities.

(2) The SEA shall consult with LEAs, other State agencies, including professional licensing boards, advocates for children with disabilities, and professional organizations to determine appropriate rigorous qualifications for related services personnel, consistent with state law or regulation, including the use of consultative, supervisory, and collaborative models to ensure that students with disabilities receive the services described in their IEPs.

(d) (1) *Policy.* In implementing this section, a State must adopt a policy that includes a requirement that LEAs in a 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 caseload or classroom size standards and providing access to loan forgiveness programs or other financial incentives, professional development opportunities, and clerical and technology supports."

Rationale: Regulations should clarify, according to the congressional intent expressed in the Conference Report, that State education agencies (SEA) must establish "rigorous qualifications" for related services personnel. These qualifications must be consistent with state law or regulation as required by the statute at

§612(a)(14)(B)(i) and (ii). For occupational therapy, these qualifications are specified in each state's Occupational Therapy Practice Act, and may be supplemented by other State agencies' policies to provide the appropriate quality and type of services to students with disabilities. These standards should be given full weight as SEAs determine appropriate qualifications for related services personnel. These qualifications should ensure that professionals are able to provide students with disabilities the services and supports necessary to be involved and progress in the general education curriculum and to be included in the accountability system under the No Child Left Behind Act. IDEA requires states to establish qualifications for related services personnel consistent with state law or regulation; therefore, SEAs should not be allowed to ignore or bypass those laws when determining qualifications for school-based occupational therapy personnel.

While AOTA supports the proposed regulations requiring LEAs to take measurable steps to recruit, hire, train, and retain highly qualified personnel, including related services personnel, we recommend that this regulation also include guidance regarding ways this requirement can be met. Higher caseloads, additional paperwork, and lack of time for planning and collaboration are major causes of job dissatisfaction among school staff, including related services personnel, and ultimately lead to staff leaving the school system. Issues that affect the availability and provision of high quality related services should receive the same level of consideration as strategies to improve the recruitment and retention of teachers.

Subpart C

§ 300.226. Early intervening services.

Add language in paragraph (b)(1); add new paragraph (c) and re-letter current paragraphs (c) – (e):

"(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 personnel, and other school staff....

"(c) *Personnel.* In implementing early intervening services, an LEA may utilize related services personnel, also defined in § 9101(36) of the ESEA as pupil services personnel, to—

(1) assist in determining which students should receive coordinated, early intervening services;

(2) assist in the design, implementation, and evaluation of such services, including educational and behavioral evaluations, services, and supports;

(3) consult with teachers and other school personnel on the provision of such services in the general education environment; and

(4) provide such services."

Rationale: AOTA 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."

AOTA recommends 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," would also enhance collaboration between general and special education staff and further align NCLB and the IDEA.

Retain § 300.226(c)

Rationale: The content of section (c) appropriately 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. However, as discussed in our February comments, AOTA believes the Department needs to provide additional guidance to help schools determine when a student should receive supports under this provision and when they should be referred for a special education evaluation. For example, when should the need for a "behavioral evaluation" constitute a referral to special education and when should it be an early intervening service? This is one of the process issues requiring the Department's attention.

Subpart D

§ 300.300. Screening for instructional purposes is not evaluation.

Rationale: AOTA strongly supports this clarification that screening a student by a teacher or related service provider to determine appropriate instructional strategies in order to implement the curriculum does not constitute a formal evaluation for purposes of determining IDEA eligibility. However, the Department should provide additional guidance to clarify when a screening should be considered part of the formal evaluation process for special education.

§ 300.304. Evaluation procedures.

Modify 300.304(b)(2) as follows:

"(b)(2) Not use any single procedure or single test score as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and..."

Rationale: This language will clarify that IEP teams should use information from a variety of sources that yield relevant data about a child's academic, developmental, and functional performance to base their

decisions about a student's eligibility and the determination of an appropriate educational program rather than on single test scores or procedures *alone*.

§ 300.320. Definition of individualized education program.

Modify § 300.320(a)(2) to read as follows:

“(a)(2)(ii) A statement of measurable annual goals, including academic and functional goals, and instructional objectives or benchmarks aligned to grade level achievement standards, designed to ...”

Rationale: Benchmarks and objectives are common components of state and local learning standards and are used to track student progress in the general education curriculum. The regulations should clearly state alternative methods for monitoring student progress, such as incorporating instructional objectives from the general education curriculum or linking the annual goals to the appropriate grade level, alternate or modified learning/achievement standards.

In addition, AOTA also recommends the Department provide additional guidance for IEP teams on how to develop appropriate IEPs, including how to identify appropriate annual goals that are linked to the general curriculum or learning standards. AOTA frequently hears from its members on this issue of IEPs, especially writing appropriate goals. Inclusion of this topic in the Department’s technical assistance efforts would ensure teams, including parents, are prepared to develop effective IEPs that accurately reflect student needs and achievable outcomes.

Add new § 300.320(a)(4)(iv) as follows:

" (a)(4)(iv) A lack of available peer-reviewed research on special education and related services or supplemental aids and services shall not be construed as the sole 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.

Support § 300.320(b)

Rationale: AOTA 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.

Modify § 300.320(b)(2) as follows:

“(b)(2) The transition services (including courses of study; related services; vocational/career training, including through work study; and provision of documentation of accommodations needed in the workplace or post-secondary education, including accommodations in the administration of college entrance exams) needed to assist the child in reaching those goals.”

Rationale: These services are necessary for a smooth transition to employment or post-secondary education. Many students are denied accommodations in post-secondary environments due to the lack of documentation of their use during high school.

§ 300.321. IEP Team

Modify § 300.321(a)(3) as follows:

“(a)(3) Not less than one special education teacher of the child, or where appropriate, ~~not less than 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 but it has caused confusion about whether a special education provider can be substituted for the special education teacher. The regulation should clarify this. Special education providers are valuable members of the IEP team but they should not replace a child's special education teacher.

Support 300.321(b)(2).

Rationale: AOTA strongly supports the participation of the child with a disability in the development of his or her transition IEP. Students with disabilities have the right to and should help make decisions which affect their lives after school.

§ 300.321(e). IEP team attendance.

Add new language in paragraph (e)(2); add new paragraph (e)(3):

“(2) A member of the IEP Team may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related service, if—

(i) The parent, in writing, ~~and the public agency,~~ and the member proposed to be excused consent to the excusal, with reasonable and appropriate notice sufficient for the excused member to provide input; and

(ii) The member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting; and

(iii) Excused members are provided a copy of the new IEP after the meeting or after amendment of the IEP.

(3) Before determining that a member may be excused, the parent and the public agency must agree that written input from the member is sufficient to ensure the multidisciplinary scope

and depth necessary for the development of an appropriate IEP.”

Rationale: In order to ensure the integrity of the IEP process, the team must engage in a discussion of a scope and depth to determine what the child's unique needs and services necessary to meet those needs. The team is obliged to discuss not only current services, but other services that might be necessary to help the child be successful in school. The richness of this discussion may be diminished if members are excused too often and, instead, the team must rely on written input. In addition, written input may require further clarification and/or additional discussion requiring the excused member's immediate response in order for the team to complete its task.

Written input may also dictate the need for an additional meeting if the discussion cannot be completed

without the excused member and that member is not currently available. In that instance, the staff member will have spent instructional time to create the written input but will still have to attend a meeting. In fact, if members are routinely excused, this could lead to an increase in the number of IEP meetings, which would be inconsistent with congressional intent to streamline and focus the IEP process. It is in the child's best interest, and the wisest use of staff time, to ensure that appropriate staff members are involved in IEP discussions and deliberations when their professional expertise is needed.

Add new (iii) to 300.321(e)(2) as follows:

“(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 serious consideration is given to determining if, and what, written input will be sufficient to thoroughly examine what services are needed or whether changes to the current IEP are necessary.

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.

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 and related services personnel, must be provided with a revised copy of the IEP with the amendments incorporated.”*

Rationale: It is essential to the implementation of a student's education program (e.g., IEP) that everyone on the IEP team, including the parents and related services personnel, has the most updated version of the document.

Restore current 300.350.

Rationale: This language explicitly requires a good faith effort to provide special education and related services to a child with a disability in accordance with the child's IEP and to assist that child to achieve the goals and objectives or benchmarks identified 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.

Retain § 300.346(b) from current regulations:

"(b) *Review and Revision of IEP.* In conducting a meeting to review, and, if appropriate, revise a child's IEP, the IEP team shall consider the factors described in paragraph (a) of this section." [referring to "Consideration of Special Factors"]

Rationale: AOTA recommends conducting a functional behavioral assessment (FBA) before developing a behavioral intervention plan. An FBA provides information about how the child functions across settings which is critical to understanding the origin of the behavior and the best approaches to address that behavior.

AOTA also recommends retaining the language from current regulations that requires the IEP team to consider the special factors when reviewing and revising an IEP. This paragraph has been removed from the proposed regulations. AOTA believes that revisiting the special factors during the review and revision of the IEP is as necessary as during the development of the document and will provide a better picture of how students are meeting their IEP goals.

Subpart E

§300.345. Opportunity to examine records; parent participation in meetings.

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.

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.

Modify 300.534(c)(2) to state:

“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.”

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.

§ 300.530. Discipline Procedures - Manifestation Determination.

Insert new language in paragraph (e)(1):

"(e) *Manifestation determination.* (1) Except for removals that will be for not more than 10 consecutive school days and will not constitute a change of placement under § 300.536, within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant member of the child's

IEP Team (as determined by the parent and LEA) must review all relevant information in the student's file, including the child's IEP, ~~any teacher~~ observations by any teacher or related services personnel, and any relevant information provided by the parents...."

Rationale: Related services personnel are trained to conduct evidence-based classroom observations. These professionals can provide vital information, based on those observations, about how the child functions in other contexts, e.g., on the playground, in the community, and at home. Those observations are critical to the IEP Team in making an appropriate evaluation of the behavior in question.