

February 28, 2005

Office of Special Education and Rehabilitative Services  
U.S. Department of Education  
400 Maryland Avenue, SW  
Potomac Center Plaza  
Room 5126  
Washington, DC 20202-2641

Dear Assistant Secretary Hager:

The American Occupational Therapy Association (AOTA) submits the following comments in response to the December 29, 2004 Federal Register notice of request for comments and recommendations on regulatory issues under Parts B and C of the recently amended Individuals with Disabilities Education Act (IDEA), P.L. 108-446. AOTA looks forward to providing comments to the Department on Part D at some point in the future. Professional development will be a crucial component for assuring high quality early intervention, educational and related services personnel who have the necessary knowledge and skills to “improve the academic achievement and functional performance of children with disabilities.” In addition, the law’s emphasis on using scientifically-based instructional practices will require ongoing leadership by the Department in identifying effective related services practice and interventions (as required in Title II, Sec. 177(a)(4)) and disseminating that information broadly. The Department is urged to develop regulatory guidance in these areas as soon as possible.

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. These everyday activities include getting dressed and eating, getting along with peers, completing school assignments, and caring for family members. More than one-third of AOTA’s members provide important services to children and youth in early intervention, preschool and school programs across the country.

AOTA agrees the 2004 amendments provide an opportunity to consider what guidance is needed from the Department to appropriately implement the new law in its own right and in conjunction with No Child Left Behind (NCLB). The resulting 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. Ongoing technical assistance will also be needed as states move forward with aligning their state policies with the new federal requirements.

AOTA supports the purpose and intent of the 2004 amendments to IDEA (IDEA 2004), especially the recognition that the law intends students with disabilities be prepared for “further education, employment and independent living.” Related services personnel, such as occupational therapists and occupational

therapy assistants, play an important role in this effort, as reaffirmed by the new law. IDEA 2004 recognizes the importance of qualified related services personnel in accordance with state law. It also recognizes the need for related services personnel to receive quality professional development aimed at helping children succeed in school, at home and in the community. Finally, the law recognizes the need for research into appropriate related services interventions and strategies.

### **QUALIFIED PERSONNEL**

Section 602(10) provides an extensive definition of highly qualified special education teachers. The regulations should clarify that these requirements do not apply to related services personnel unless they are responsible for teaching a core academic subject as defined in Sec. 602(4). Related services personnel are addressed separately under Sec. 612(a)(14), and AOTA is concerned about efforts by some states to apply the NCLB highly qualified requirement to occupational therapists. State and local education agencies should be clear about when Sec. 602(10) does or does not apply to related services personnel.

612(a)(14)(B) Related Services and Paraprofessionals: AOTA supports statutory language maintaining the requirement for states to utilize related services personnel in accordance with state law or regulation, as well as new language that prohibits waivers of certification or licensure requirements on “an emergency, temporary, or provisional basis.” Although AOTA believes this language will help ensure that states and school districts will only utilize appropriately trained individuals to provide occupational therapy services, the regulations must be clear and strong in this regard. Conference report (H. Rept. 18-779) language directing States to establish “rigorous qualifications for related services providers to ensure that students with disabilities receive the appropriate quality and quantity of care,” should be incorporated into the regulations. In addition, the regulations should clarify that states are not to create new categories of personnel in an effort to bypass these requirements.

This section also maintains the allowance for paraprofessionals and assistants, who are properly trained and supervised, to assist in the provision of special education and related services in accordance with state law, regulation or other written policy. The Department failed to provide guidance on the appropriate use of this level of support personnel in the 1999 regulations. This lack of guidance has led to inappropriate use of this level of personnel, including the use of paraprofessionals “instead of” the professional and without appropriate training and supervision (the same problem has occurred in early intervention programs under a similar provision in Part C). While the use of paraprofessionals and assistants is one means to achieve broader service utilization and contain costs, issues of quality, accountability, supervision, reimbursement, and legal and ethical considerations must be addressed. The Department is urged to provide clear guidance on the meaning of “trained and supervised,” and to clarify that this level of support staff are not the sole providers of services and require a reasonable amount of weekly on-site supervision by the professional.

612(a)(14)(D) directs States to require local districts to “take measurable steps to recruit, hire, train, and retain highly qualified personnel” to provide special education and related services. AOTA continues to hear from its members and school administrators about continued shortages of occupational therapists.

The regulations should outline the types of measurable steps that local education agencies (LEAs) could take to recruit, hire, and retain qualified related services personnel, such as the establishment of reasonable working conditions and workload requirements that allow related services personnel to engage in the full range of professional roles and responsibilities necessary to meet students' educational needs.

635(a)(9) retains language on adherence to state law or regulation for personnel qualifications; and Sec. 635(b) continues the allowance for states to make "ongoing good faith efforts" to recruit and hire appropriately and adequately trained early intervention personnel. The regulations for these areas should be consistent with Sec. 612(a)(14).

### **EARLY INTERVENING SERVICES**

613(f) Coordinated early intervening services: AOTA believes this is an important expansion of the law and supports the legislative language. The regulations should specify that an array of services, including related services, be available to address students' needs, and clarify that LEAs may utilize related services personnel to assist in designing and implementing "educational and behavioral evaluations, services and supports," including consulting with teachers and other school staff. In addition, LEAs should include related services personnel in any professional development supported under this part to ensure they also have the necessary knowledge and skills to appropriately identify children's learning and behavioral needs and provide effective interventions under this provision.

The Department will also need to address process issues, such as how to determine whether a student should receive supports under this provision or when they should be referred for a special education evaluation, and how this information will be communicated to staff. When does the need for a "behavioral evaluation" constitute a referral to special education, and when can it be for early intervening services? For instance, if a teacher asks an occupational therapist to observe a student in order to provide suggestions for classroom modifications, does this constitute a "screening" for IDEA eligibility, for early intervening services, or for "screening" to determine appropriate interventions? These are among the issues requiring the Department's attention.

### **EVALUATIONS, ELIGIBILITY DETERMINATIONS**

614(a)(1)(E) AOTA supports new language clarifying that screening of a student by a teacher or specialist to determine appropriate instructional strategies in order to implement the curriculum "shall not be considered to be an evaluation for eligibility for special education and related services." Some therapists have reported difficulty doing this due to state or local interpretations that such informal screenings constitute a formal evaluation and must therefore follow IDEA's procedures. The Department will need to clarify when a screening should be considered part of the formal evaluation process for special education and clarify as well the way to identify early intervening needs.

Sec. 614(b)(4) clarifies that determination of eligibility "and educational need" for IDEA services occurs after the administration of "assessments" and other evaluation "measures." The regulations should

incorporate Conference Report language so that decisions about a student's eligibility and subsequent need for special education and related services will be based on the results of the evaluation process and that information gathered during the evaluation should appropriately and fully "inform the development of the IEP for the child."

### **INDIVIDUALIZED EDUCATION PROGRAMS (IEPs)**

Sec. 614(d)(1)(A)(i)(I)/(II) While AOTA supports legislative language on "academic achievement and functional performance" in the present levels of performance section of the IEP and "academic and functional goals" as types of measurable annual goals, we urge the Department to clarify the meaning of functional performance and provide examples of appropriate functional goals. The Department should also clarify whether IDEA requires discipline-specific goals, such as "OT goals" or "therapy goals." Not only have IEP Teams long struggled with how to write appropriate IEP goals, they also have difficulty determining which goals will be supported by various members of the team. For instance, if a student is struggling with written literacy, and the underlying issue is difficulty with handwriting – which is a typical "OT issue" – should the goal be written with regard to his ability to successfully complete written assignments or to improve the mechanics of writing? And, if occupational therapy addresses this goal, is it an "OT" goal only or is it the student's goal that may require multiple providers to address it? This confusion has been partly fueled by SEA and LEA interpretations that each special education and related service provider should have its own set of goals on the IEP (which is likely one reason for the volume of paperwork often cited).

Furthermore, the Department should also provide guidance about other ways of tracking student progress in light of the elimination of short-term objectives (STOs) and benchmarks for all students except those who take alternate assessments which are aligned to alternate achievement standards.

614(d)(1)(A)(i)(IV) requires the IEP team to determine the need for special education and related services based on "peer-reviewed research to the extent practicable" (a comparable provision is included in Part C at Sec. 636(d)(4)). AOTA urges the Department to proceed cautiously in developing guidance in this area. The regulations must be clear that IEP (and IFSP) teams cannot use this provision to inappropriately limit access to necessary services. Professionals should not be restricted in using their judgment in determining the most appropriate methodology or intervention strategy, in conjunction with the best available evidence, for a given child. The new Title II/IES requirement to identify effective related services practices will be critical in reducing the burden on districts, parents, and service providers to defend every approach or decision on an overly rigorous standard.

614(d)(1)(B) and (C) IEP Team Attendance: Although AOTA supports efforts to make the IEP processes more efficient and effective, we are concerned that vital steps of the process not be eliminated or minimized solely in the name of flexibility or efficiency without regard to consequences. The regulations should clarify that any change to the IEP by the parent and LEA be immediately conveyed to the full team who is still responsible for developing, revising, reviewing, and in most instances, also implementing the IEP. This will assure appropriate communication between and among members of the team.

### **PART C**

Sec. 635(a)(16) AOTA supports the statutory language that modifies the natural environment requirement to clarify the role of the parent and IFSP team in making that determination. In addition, the regulations should clarify that early intervention services can be provided in a variety of settings if they are appropriate to achieving the purpose of Part C. A clinic, hospital, or medical office may be entirely appropriate for the provision of some services in some instances for some families. The Department should clarify that such settings are not de facto “un”-natural environments, and prevent such extreme and absolute implementation policies of what is to be an individualized process.

In addition, AOTA is concerned about how efforts by some Part C lead agencies to implement a “preferred provider” transdisciplinary service delivery model for providing early intervention services. While we support collaborative methods for providing services, AOTA is troubled by reports that occupational therapists may be expected to “train” other service providers, usually a “developmental specialist” or “early interventionist,” to provide occupational therapy services, thereby leading to potential quality and ethical problems which could also violate state laws. AOTA believes this can lead to scope of practice issues and may result in inadequate provision of services for the family under IDEA. Use of aides in appropriate situations is of course allowed, but with appropriate supervision and training and consistent with state law. The Department is urged to clarify that decisions about needed services and service provision remain the responsibility of the IFSP team and are not implemented solely by agency policy. State or agency efforts to adopt any transdisciplinary or preferred provider model must not limit access to authentic mandated services, and that must assure those services be provided by qualified personnel in accordance with state law or regulation as required at Sec. 635(a)(9).

### **PAPERWORK REDUCTION**

Sec. 617(e) directs the Secretary to develop and disseminate model IEP/IFSP and other forms to a variety of audiences. Sec. 609 authorizes the Department of Education to grant waivers of certain statutory and regulatory requirements so that states can identify ways to reduce paperwork burdens in order to increase time and resources available for instruction and other relevant activities. AOTA welcomes the development and dissemination of model forms that can be used to facilitate implementation. However, while we support efforts to increase time and resources available for instruction and other relevant activities, we are concerned that essential elements of tracking, monitoring, and documenting student progress not be eliminated in the name of flexibility. The Department should clarify what those elements are and how frequently they should be documented.

Thank you, again, for this opportunity to provide comments and recommendations to the development of regulations for IDEA 2004. AOTA is ready and prepared to work with you to provide any additional assistance as you move forward in implementing the law.

Sincerely,  
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