

NAMI Comments on the Proposed IDEA Regulations

Subpart A: General

1. **Recommendation:** Change 300.8(c)(4)(ii) – the provision that defines a “child with a disability” -- to eliminate the sentence that reads “The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.”

Rationale: The language in the proposed regulation serves as a significant barrier to appropriately identifying students with mental illnesses that would otherwise qualify for and highly benefit from special education services. Nowhere in the regulations is the term “socially maladjusted” defined, nor is there research to support a definition for this term so it simply serves to cause confusion about the students that it might apply to and will likely serve to unnecessarily limit special education services to students with mental illnesses. Students with mental illnesses often face enormous stigma and barriers to identification and services which leads to poor academic outcomes. The removal of this sentence from the regulations will help to minimize cases in which students that should qualify for IDEA services are denied those services.

2. **Recommendation:** Remove 300.18(b)(2) – the provision defining a “highly qualified special education teacher” -- which allows a teacher to be considered a “highly qualified” special education teacher for three years if that teacher is participating in an alternative route to certification program.

Rationale: This language clearly violates the IDEA 2004 statutory requirements by lowering the standards and qualifications required for a teacher to be deemed “highly qualified” in special education. This seriously threatens to lower student achievement since research shows that a highly qualified teacher has a greater influence on student achievement than any other factor, including class size, student background and class composition. This provision is especially concerning to families with a child with a mental illness, for whom a highly qualified teacher can directly impact their child’s ability to improve their academic achievement.

Only the most experienced and highly trained teachers should be teaching many of the students that are not succeeding in our nation’s schools, namely those with a mental illness and designated in the ED category of IDEA. We believe that there is a connection between students with mental illnesses failing and dropping out of schools at unacceptably high rates and the overuse of unlicensed special education teachers, particularly those teaching students in the ED category of IDEA.

NAMI applauds the Department for focusing on ensuring that every child receives a quality education and that children with disabilities, including those with mental illnesses, are not left behind. NAMI believes that this can only be achieved with teachers that are properly trained and licensed so that they have the skills and knowledge

necessary to improve the academic achievement and functional performance of children with disabilities, especially those with mental illnesses.

Subpart B: State Eligibility

1. **Recommendation:** Change 300.169 – the provision listing the duties of the state advisory panel -- by reinstating the requirement that the state advisory panel advise on the education of eligible students with disabilities who have been convicted as adults and incarcerated in adult prisons, consistent with the current regulations at 300.652(b).

Rationale: NAMI supports the inclusion of representatives from the State juvenile and adult corrections' agencies (currently included in the proposed regulations at 300.168(a)(11)), however believes that it is essential to also include that the duties of the advisory panel shall include advising on eligible students with disabilities in adult prisons to focus on the importance of addressing the academic needs of this often overlooked population (included in the current regulations at 300.652(b)).

There are plenty of research studies that show that our nation's juvenile and adult correctional facilities are crowded with youth and adults living with mental illnesses. In fact, recently published research funded by the National Institute of Mental Health (NIMH) showed that an alarming 65% of boys and 75% of girls in juvenile detention have one or more psychiatric illnesses (Teplin, L., Archives of General Psychiatry, December 2002). Part of the reason that many of these youth, along with those in the adult corrections system, land in these systems is because special education programs have failed to meet their academic and functional needs. Therefore, the current provision that defines the functions of the advisory panel to include advising on eligible students with disabilities in adult prisons, should be retained and added to the proposed regulatory provision in 300.169.

Subpart D: Evaluations, Eligibility Determinations, Individualized Education Programs, and Educational Placements

1. **Recommendation:** Change 300.300(a)(2)(ii)(A) – the provision that sets forth the requirements for parental consent for an evaluation -- by including the provision in the current regulations at 300.345(d)(1-3) that defines the “reasonable measures” that must be taken to find a parent to include detailed records of telephone calls made or attempted and the results of those calls; copies of correspondence sent to the parents and any responses received; and detailed records of visits made to the parent's home or place of employment and the results of those visits.

Rationale: It is vitally important that schools and public agencies take all appropriate and necessary steps to receive parental consent for an initial evaluation for special education services. The regulations should clearly spell out the expectations and steps that schools and public agencies must take to secure parental consent. The proposed regulation simply states “reasonable efforts” to locate the parent must be taken without defining or providing

appropriate guidance on what those efforts are and without holding schools and public agencies accountable in locating a parent.

2. **Recommendation:** Change 300.320(a)(2) – the provision that defines the individualized education program -- 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 and guidance 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 a 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.

3. **Recommendation:** Change 300.320(a)(3)(ii) to clarify that schools must provide parents with progress reports concurrent with the issuance of report cards.

Rationale: The wording in the proposed regulation suggests that periodic reports are optional for schools to provide to parents and are not a requirement. Report cards are meaningless if parents must read them without the benefit of IEP progress reports that provides feedback on progress toward meeting the annual goals. This is particularly true for parents with children with mental illnesses (those most often in the “emotional disturbance” category of IDEA) that unfortunately continue to have the lowest academic achievement and highest dropout and failure rates of any disability group. Parents will also be denied their right to meaningfully participate in their child’s education if they fail to receive appropriate updates on their child’s progress.

4. **Recommendation:** Change 300.320(a)(4) to add a provision that states that the lack of “peer-reviewed research” shall not provide a basis for denying appropriate special education services to students that qualify for special education services. The regulations should also

refer not just to “peer-reviewed research” but also to evidence-based and emerging best practices in addressing the academic and functional needs of students with disabilities.

Rationale: NAMI appreciates the Department’s recognition of the need for broader implementation of services based on peer-reviewed research, however the regulations should make clear that the inclusion of reference to these services and the fact that they may not be available or appropriate shall not serve as a basis for denying services that are otherwise appropriate.

There have been significant advances in the development of evidence-based and emerging best practices in teaching students with disabilities, especially those with mental illnesses. The Department should disseminate information about these practices to schools and should strongly encourage their implementation to help address the unacceptably poor academic achievement and functional performance of students with mental illnesses.

5. **Recommendation:** Change 300.320(a)(5) by removing the phrase “regular education environment” and replacing it with “regular class.”

Rationale: Whenever possible, parents with a child receiving special education services wants that child to be educated in the general education classroom, which is entirely consistent with the dictates of IDEA that require services to be provided in the least restrictive environment. The meaning of the newly introduced phrase “regular education environment” is subject to broad interpretation and could make it more difficult for a child to be educated in the general education classroom. The phrase “regular classroom” is clear and is entirely consistent with current regulations and the IDEA statute. The final regulations should use that phrase to avoid adding to cases in which students with disabilities are inappropriately denied services in a general education classroom.

6. **Recommendation:** NAMI strongly supports 300.320(b) that allows the IEP to determine the appropriateness of transition services for students before age 16.

Rationale: Students with mental illnesses and designated in the emotional disturbance category have real potential to succeed in school and to lead independent and productive lives. Unfortunately, they continue to have the highest drop out and failure rates of any disability group. Students with appropriate transition services that are delivered at the appropriate time stand a much greater chance of completing school and achieving success in their adult lives. It is vitally important that schools provide appropriate transition services to help these students plan for their futures at an appropriate age, which in many cases may well be before age 16.

7. **Recommendation:** Change 300.320(b)(3) to include the following language that is currently in the regulations at 300.344(b)(3)(11) – “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: Clearly, school professionals are in the best position to request that an outside agency provide input for a student’s transition planning, which is the likely reason that this provision was previously included in the regulations. It should not have been removed because transition services are vitally important to the future of students, including connections with outside community agencies that will provide appropriate services when students leave school. That language should be returned to the final regulations.

8. **Recommendation:** Change 300.321(e) – the provision on IEP team attendance – to provide more complete guidance on the requirements related to excusing a member from attendance at the IEP meeting. This provision in the regulations should be expanded to include the following limits and conditions on excusing members of the IEP team:
- The regulations should make clear that IEP team members are not permitted to be excused from the development and review of the initial IEP;
 - IEP members should be provided with sufficient notice of a team member’s request to be excused from the IEP meeting so that parents and other team members have sufficient time to consider whether to consent to excusing that team member (with the exception of the meeting to develop and review the initial IEP);
 - Parents should be informed of their right to not agree to excuse an IEP team member from the meeting, if the parent deems that a team member’s participation is essential;
 - Guidance in the regulations should be provided about the nature of the input that excused IEP team members must provide, including information about a student’s present levels of academic achievement and functional performance, recommendations on changes in services/supports/accommodations to improve academic and functional performance, recommendations on revisions to the current annual goals and other appropriate guidance;
 - Whenever an IEP team member requests to be excused from the IEP team meeting (except when the initial IEP is developed or reviewed), parents should be informed of the purpose of that team member’s participation so they can make an informed decision about whether they wish to agree to excuse that member from the meeting;
 - The regulations should make clear that schools must inform a parent about the procedure and timing for having their questions or concerns answered by the excused IEP team member;
 - The regulations should clarify that IEP team members will only be excused in limited circumstances and not because of any of the following: (i) the cost of providing coverage for the classroom teacher; (ii) disagreement between the administrator and a teacher/related service provider about the appropriate services for a student; and (iii) difficulties in scheduling the attendance of IEP members for the meeting.

Rationale: NAMI remains deeply concerned that IDEA 2004 allows parents and schools to exclude critically important members of the IEP team from meetings where those members’ curriculum areas or related services are being discussed. One of the single most important factors in academic achievement for students with disabilities is the recommendations related to services, supports and accommodations that go into the student’s initial IEP and subsequent revisions.

Excusing members of the IEP team should *only* be done in limited circumstances and *only* when absolutely necessary. IEP team members should be required to participate in the development and review of the initial IEP to ensure that the student's needs are appropriately identified and understood and services are designed to help the student reach the IEP goals.

Moreover, parents must understand that they have the right to not agree to excuse a member of the IEP team that may be essential to the discussions and deliberations that go into developing or revising an appropriate IEP.

9. **Recommendation:** Change 300.322(d) – the provision related to parent participation in the IEP meeting -- to include the language in the current regulation in 300.345(d) as follows “In this case, the public agency must have a record of its attempts to arrange a mutually agreed on time and place, 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.”

Rationale: The language in the proposed regulation simply requires the school to keep a record of attempts made to arrange a mutually agreed on time and place for the IEP meeting without providing any specifics about what needs to be recorded. It is hard to imagine a more important meeting for parents to attend than the IEP meeting. Perhaps the single most important role that parents of students with disabilities play is their meaningful participation in developing the IEP, this is especially true for parents with a child with a mental illness. At a minimum, schools should be required to clearly document attempts to call parents, correspondence sent to the home and visits to the home to ensure appropriate measures were taken for parental participation in the IEP meeting.

10. **Recommendation:** Change 300.324(a)(6) – the provision setting forth the requirements for developing, reviewing and revising the IEP -- to ensure that each member of the IEP team, including the parent, is provided with a revised copy of the IEP with all amendments and changes included. NAMI recommends that the provision now provide 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. 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 critically important that parents and all members of the IEP team receive an updated and revised copy of the IEP. The way the proposed regulation is written, it puts the burden on the parent to request a revised copy of the IEP with the amendment in it, rather than requiring that schools provide parents with an updated copy of the IEP, as currently required in the regulations.

Subpart E: Procedural Safeguards

1. **Recommendation:** Change 300.501(c)(4) – the provision that addresses parent participation in meetings related to their child’s special education services -- in the proposed regulation, that relates to parental involvement in placement decisions so that the language is consistent with the current regulation at 300.501(c)(4) that requires detailed records of attempts to reach parents, including detailed records of telephone calls made or attempted and the results of those calls; copies of correspondence sent to the parents and any responses received; and detailed records of visits made to the parent’s home or place of employment and the results of those visits.

Rationale: Decisions about a child’s placement are vitally important and can make the difference between a child that fails in school and one that succeeds. Clearly, parents need to be involved in placement decisions. Therefore, it is essential that SEAs, LEAs and schools be required to make appropriate attempts to reach parents in multiple and appropriate ways. Under the proposed regulation, it would be enough for a school to make a few phone calls to a residence during working hours to justify moving ahead with a placement with absolutely no parental input. That is simply unacceptable and schools must show that they made appropriate attempts to reach parents about placement decisions.

2. **Recommendation:** Change 300.530(d)(1)(i) – the provision on discipline procedures and the services that must be provided -- to make clear that students that are removed from their current placement, either through suspension or expulsion, continue to receive FAPE as required by IDEA 2004 at 612(a)(1). This provision of the regulation should be rewritten to read as follows: “Continue to receive educational services, as required 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; and ...”

Rationale: Congress made clear in section 612(a)(1)(A) of IDEA 2004 that all children with disabilities, including those with disabilities who have been suspended or expelled from school, are entitled to a free appropriate public education (FAPE) as a condition of schools receiving federal special education funding. The proposed regulation at 300.530(d)(1)(i) should provide clear guidance to schools on the requirement to provide FAPE to suspended or expelled students with disabilities.

Far too many students with mental illnesses continue to have unacceptably high dropout and failure rates and poor academic achievement. Students that are suspended or that spend time away from school for disciplinary reasons are at risk for school failure and dropout and need FAPE to help increase their chances for academic and functional improvement.

3. **Recommendation:** Remove 300.536(b)(2) – a provision that defines a change of placement because of disciplinary removals -- because it adds an additional requirement for a determination to be made that a pattern of removals from a child’s current placement for less than 10 days is not a change of placement. The provision was also not envisioned by

Congress in the discipline provisions of IDEA 2004 because there is no reference to this type of requirement in the law. It will also cause unnecessary confusion because the phrase “substantially similar” behavior in the proposed regulation is highly subjective, ambiguous and may lead to unnecessary litigation.

Rationale: Students with mental illnesses and included under the ED category of IDEA may manifest behaviors or symptoms of their illnesses that are not substantially similar. This can be especially true during times when medications and treatment plans are being adjusted or during periods of instability commonly associated with many of these illnesses. It is not uncommon for some children with mental illnesses to go through different periods of either -- extreme irritability, lack of impulse control, significant withdrawal and other behaviors – any or all of which may lead to incidents in school that are **not** substantially similar, but constitute a pattern of removals from the classroom.

Neither IDEA 2004 nor the legislative history support or allow for the creation of an additional “substantially similar” behavior requirement for determining whether non-consecutive days of removal from school constitute a change of placement. The proposed regulation would allow a student to be removed from their classroom for periods of less than 10 days in a pattern throughout the school year, and denied educational services for behaviors that are a manifestation of their disability, as long as the behaviors that lead to the removal are not substantially similar.

This provision is highly subjective and could be overused by schools to deny educational services to students in the ED category. We request that this provision in 300.536(b)(2), be removed in the final regulations because it may lead to more students in the ED category of IDEA being denied educational services at a time when efforts should be focused on improving their academic achievement.