

July 22, 2019

Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Dear Secretary DeVos:

We are writing today to express our continuing concerns at news that the Department of Education may issue guidance or a Dear Colleague letter to states and local education agencies regarding their obligations to educate students with disabilities in the least restrictive environment (LRE) under the Individuals with Disabilities Education Act (IDEA). From our understanding of the content of this guidance or Dear Colleague letter, we are concerned it may conflict with existing Department guidance, IDEA's regulations, and even potentially IDEA's statutory mandates. We believe any guidance or Dear Colleague letter that would weaken existing LRE policies would expose the Department to potential legal challenges pursuant to the Administrative Procedures Act (APA). Despite assertions at our meeting yesterday with Department of Education Chief of Staff Nate Bailey, Acting General Counsel Reed Rubenstein and OSERS Assistant Secretary Johnny Collett, there was no disavowal of future plans to release such a document.

As you are aware, the Council of Parent Attorneys and Advocates (COPAA) is the premier advocacy organization for the six million children with disabilities eligible for special education services under IDEA and the 400,000 additional students with disabilities protected by Section 504 of the Rehabilitation Act of 1973. COPAA is a national non-profit organization of more than 2,600 parents of children with disabilities, their attorneys, and their advocates. Its mission is to protect the legal and civil rights of students with disabilities and their families.

Thank you to members of your team who took the time last week to discuss the issuance of proposed guidance or Dear Colleague letter to states and local education agencies regarding their obligations to educate students with disabilities in the LRE under the IDEA. As an entity whose sole mission is protecting the legal and civil rights of students with disabilities and their families, COPAA's interests are plainly germane to this proposed action.

Given that we received no assurance that such a document would not be disseminated at some point in time, we are writing to reiterate and express our extreme alarm and plans to oppose and block any such guidance or Dear Colleague letter should it be issued in the future.

I. The Department Has Not Engaged in The Necessary Steps for Rule Making

As Secretary, the head of a federal Executive Department may adopt rules for the conduct and government of her agency. 5 U.S.C. §301. Adoption of such rules *must comply* with the requirements

of the rule-making procedures as outlined in the federal Administrative Procedure Act (APA). 5 U.S.C. §551, et seq. If the Department’s proposal meets the definition of a “rule” found at 5 U.S.C. Section 551(4), namely, if “ . . . the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency” then the APA requires that the agency follow certain procedures before issuing said rule.

Specifically, the APA requires that rules proposed by any federal agency first be published in the Federal Register, outlining the terms or substance of the proposed rule, the legal authority for the proposed rule, and specific information regarding when a public hearing on the proposed rule will take place. 5 U.S.C. §§ 553(b), (d). The APA mandates that the proposing agency consider, prior to adoption of the rule, all written data, views, or arguments submitted by interested persons regarding the proposed rule. 5 U.S.C. §§ 553(c), (d). This statutorily required publication and consideration of comments is referred to as the “notice-and-comment requirement.”

As you are aware, failure to comply with the “notice-and-comment requirement” would render proposed rules in violation of the APA, or lacking any “force and effect of law,” or both. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-303 (1979). While the Department may consider that the proposed rule might be exempted from the notice and comment requirements, the exceptions to the rulemaking procedures cannot apply to situations such as this “where the agency trenches on substantial private rights and interests.” *Batterton v. Marshall*, 648 F.2d 694, 708 (D.C. Cir. 1980).

The proposed interpretation of LRE changes the legal rights or interests for students with disabilities, and thus the Department was fully required to comply with the notice and comment requirements in the development and publication of the interpretations. See *Doe v. Trump*, 288 F. Supp. 3d 1045, 1074 (W.D. Wash. 2017) (citing *Neighborhood Television, Inc. v. FCC*, 742 F.2d 629, 637 (D.C. Cir. 1984)). To the extent it weakens or conflicts with existing policies relating to LRE it will expose the Department to potential legal challenges pursuant to the Administrative Procedures Act.

We have questions about the Department’s actions vis-a-vis the notice-and-comment requirements, and would ask that you, as is required by 5 U.S.C. 553, make publicly available any information related to the development, publication, comment, and finalization of any proposed rules, guidance or Dear Colleague letter.

II. It Would be Arbitrary and Capricious for the Department to Issue Guidance or Dear Colleague letter that Conflicts with Existing Statutes, Regulations and Caselaw

We also have concerns about the substance of any future guidance or Dear Colleague letter. Per the Individuals with Disabilities Education Act (IDEA) of 2004, implementing federal regulations must maintain at least the same level of protection for children with disabilities as provided by the regulations in effect as of July 20, 1983, unless Congress *clearly and unequivocally* states its intent that the protections be lessened. The same type of statutory guidance regarding implementing federal regulations language was included in IDEA of 1997. Based on the information shared thus far, the proposed guidelines seem to be at odds with this longstanding statutory guidance about implementing federal regulations.

There has been longstanding development about the doctrine of LRE, developed by Congress¹ the Department of Education², and the courts. In fact, courts have, per the statutory mandate found at 5 U.S.C. Section 706(2)(A-B), held as “unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Any attempt to revise the LRE regulations by issuing new guidance or Dear Colleague letter, particularly in a manner that lessens the protections afforded to students with disabilities, is a violation of the APA as discussed above, and the Department’s proposed actions would clearly be found as such.³ We, again, hope that the Department will revisit its plans to issue any guidance or Dear Colleague letter and end all efforts to publish anything that would alter LRE.

A. IDEA Requires that School Districts Provide Both a Free Appropriate Public Education and also the Least Restrictive Environment

Beyond procedural shortcomings in the development of the proposed future guidance or Dear Colleague letter, and our concerns that the substantive nature of the proposed rules are statutorily preempted, we also assert that the guidance or Dear Colleague letter will create broader policy conflicts with the underlying purpose of the IDEA. The most basic premises of the IDEA require that states receiving federal funds provide to all children with disabilities with not only a “Free Appropriate Public Education,” (FAPE), but also that said program be provided in the “Least

¹ Congress’ intended meaning for what the LRE means can be found at 20 U.S.C. Section 1412(5)(B) and 20 U.S.C. Section 1414(a)(1)(C)(iv)), with language supporting what LRE was intended to refer to being found at 20 U.S.C. Section 1412(5)(B).

² LRE was defined by the Department of education at 34 C.F.R. § 300.550: “General. (a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§ 300.550-300.556. (b) Each public agency shall insure: (1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and (2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” Additional guidance about the weight and meaning of LRE is contained in the Continuum of Placement regulations found at 34 C.F.R. § 300.551: “Continuum of alternative placements. (a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services. (b) The continuum required under paragraph (a) of this section must: (1) Include the alternative placements listed in the definition of special education under § 300.13 of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement,” and § 300.552 (“Placements. Each public agency shall insure that: (a) Each handicapped child’s educational placement: (1) Is determined at least annually, (2) Is based on his or her individualized education program, and (3) Is as close as possible to the child’s home; (b) The various alternative placements included under § 300.551 are available to the extent necessary to implement the individualized education program for each handicapped child; (c) Unless a handicapped child’s individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and (d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.”)

³ We understand the Department may take the position that an agency’s interpretation of a regulation should be entitled to deference. We must make clear, however, that in this instance, there is no deference owed to the proposed guidance or Dear Colleague Letter because a new interpretation of the LRE regulation will be “plainly erroneous or inconsistent with the regulation.” *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 129 L. Ed. 2d 405, 114 S. Ct. 2381 (1994); *see also Paralyzed Veterans of America v. D.C. Arena L.P.*, 326 U.S. App. D.C. 25, 117 F.3d 579, 584 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1003, 140 L. Ed. 2d 315, 118 S. Ct. 1184 (1998).

Restrictive Environment” 20 U.S.C. § 1412(a)(1) and (5). The statute explains further that, “[t]o the maximum extent appropriate, children with disabilities... are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. § 1412(a)(5).

In adopting the IDEA,⁴ Congress created a strong presumption for educating students with disabilities in regular education classrooms. Basic to the IDEA and its precursor, the Education for All Handicapped Children Act, is the student’s Fourteenth Amendment right to avoid segregation and seclusion of students with disabilities. These protections emerged as statutory and regulatory obligations:

[T]he Act also contains a specific directive regarding the placement of handicapped children. The Act requires the state to establish procedures to assure that, to the maximum extent appropriate, handicapped children...are educated with children who are not handicapped. With this directive, which is often referred to as “mainstreaming” or placement in the “least restrictive environment,” Congress created a statutory preference for educating handicapped children with nonhandicapped children. (Footnote omitted citing to *Rowley supra* at 181 n.4)

Greer v. Rome City School District, 950 F.2d 688, 695 (11th Cir. 1991). This right to be educated in the LRE with one’s nondisabled peers exists independent of, but equally important to the right to a FAPE. *Id.* at 695-696.

The federal regulations go further and highlight the thrust of the LRE mandate, clarifying that that unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.” 34 C.F.R. §300.116(c). School districts may not unnecessarily segregate a child from his non-disabled peers if that child’s IEP can be implemented using supplementary aids and services in a regular education classroom in the student’s neighborhood school. *Daniel R.R. v. State Bd. of Ed.*, 874 F.2d 1036, 1048 (5th Cir. 1989).

Additionally, the Supreme Court has recently made clear that the Individualized Education Programs (IEP) of children with disabilities must be “appropriately ambitious” to enable them to make progress in the general education curriculum in light of their unique abilities. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017). The Court explained that children with disabilities are to be

⁴ IDEA 1997 *renewed and strengthened* the LRE requirements. The considerations of inclusion and attending class with age appropriate peers and access to the general curriculum were expressly reinforced in IDEA 1997:

The new focus is intended to produce attention to the accommodations and adjustments necessary for disabled children to access the general educational curriculum and the special services, which may be necessary for appropriate participation in the particular areas of the curriculum due to the nature of the disability.

H. Rep. No. 105-95, reprinted in U.S. Cod. Cong. And Admin. News, 105th Congress, First Session, 97-98.

challenged to reach their potential progress to the same degree as their non-disabled peers. For the vast majority of students with disabilities, this progress happens most effectively when children with disabilities are given access to the general education curriculum and included in the general education classrooms with their peers without disabilities. School districts are required to comply both with *Andrew F.*'s requirement that IEPs be "appropriately ambitious" and the statutory requirement that students receive their educational services in the LRE.

In its 2004 Reauthorization of the IDEA, Congress, in its findings, emphasized the importance of educating children with disabilities in the regular classroom:

Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by-

(A) Having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible ...

(C) Coordinating this title with other local, educational service agency State, Federal school improvement efforts, including improvement efforts under the Elementary and Secondary Education Act of 1965, in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where such children are sent;

(D) Providing appropriate special education and related services, and aids and supports in the regular classroom, to such children, whenever appropriate

20 U.S.C. §1400(c)(5) (emphasis added).

Congress recognized that "special education can become a service for such children rather than a place where such children are sent." 20 U.S.C. §1400(c)(5)(C) (emphasis added). Accordingly, Congress has made involvement and progress in the "general curriculum" an overall priority and goal for students with disabilities, bolstering the overall dual premise of the special education to provide an appropriately ambitious program in provided in, to the maximum extent possible, the general education setting. 20 U.S.C. §1400(c)(5)(D).

Several regulations ensure compliance with this LRE mandate. "The IEP must include supplementary aids and services in order to facilitate the provision of services to the student in the general education classroom." 34 C.F.R. §300.320(a)(4). Further, a student cannot be removed from general education classes based solely on a need for curriculum modification. 34 C.F.R. §300.116(e). And if a student will not be participating in general education classes, justification for that exclusion must be provided in the IEP. 34 C.F.R. §300.320(a)(5). Additionally, unless the IEP of a child with a disability requires some other arrangement, the child must be educated in the school that he or she would attend if nondisabled. 34 C.F.R. §300.116(c).

B. The Department's Role Is to Ensure State Compliance with the IDEA, Not Reinterpret the Law

As a foundational issue, though, we worry that there is a misapprehension about the need for any future guidance or Dear Colleague letter. The IDEA is fundamentally a civil rights law, designed to protect the right to education of students with disabilities. It achieves this through creating a contract between the federal government and the States. In exchange for federal dollars, the States voluntarily commit themselves to implementing the provisions of the IDEA. As in any contract, both parties have the right to demand compliance of the other party. For that reason, it is crucial – and in fact the role given to the Department of Education by Congress – that the Department continue to ensure that States comply with the IDEA.

As you know, the Department has been tasked by Congress with the overriding priority to give students with disabilities access to the general education curriculum and education in the regular classroom to the maximum extent possible. This requirement has been strengthened in each subsequent reauthorizations of the IDEA, not for arbitrary reasons, but because the idea of an education in the LRE is based on values but also on outcomes.

In the most recent amending of the IDEA in 2004, Congress found “almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible.” 20 U.S.C. §1400(c)(5). Beyond this, abundant quantitative and qualitative research demonstrates that students with disabilities can achieve considerable educational benefit from access to the general education curriculum and placement in general education classes with supplementary aids and services, such as modified curriculum, resource rooms and itinerant instruction.

Further, the research also supports the finding that when students with and without disabilities spend time together, all students benefit; thus, there is a positive correlation between academic achievement and inclusion.

As we have already stated above, the development of this proposed guidance or Dear Colleague letter fails to adequately take this information into account procedurally, but we also find the proposed guidance or Dear Colleague letter will fall short of acknowledging what the data has always shown: that children with disabilities can achieve considerably more educational benefit from placement in general education classes with access to the general education curriculum through supplementary aids and services than from placement in special education classrooms or schools with limited access, or no access to their age-appropriate non-disabled peers or general education curriculum. As such, the proposed guidance or Dear Colleague letter is, from a policy perspective, flawed.

III. The Department May Not Issue Sub-Regulatory Guidance or Dear Colleague Letter Contradicting Decades of Existing Guidance Recognizing the Strong Presumption of LRE

The Department has a long and consistent history of guidance applying the IDEA's LRE presumption. *See*: OSEP Memorandum 95-9, 21 IDELR 1152 (OSEP 1994). The LRE mandate demands that students be educated in regular classroom settings to the maximum extent appropriate. 34 CFR 300.114 (a).

In making a placement determination, priority must be given to placement in the regular classroom with any necessary supplemental aids and services to make that placement successful. Only after that placement is considered should districts move to more restrictive placement options.

IV. There is No Quota for LRE – The Education Department Has Already Made Clear It is a Presumption

We understand that you and members of the Department are concerned that LRE is somehow inconsistent with making individualized decisions about students and is seen as a quota. The Department has already made clear in guidance, however, that is not the case: OSEP has found that **“(t)he IDEA establishes a presumption** that children with disabilities will be educated in classes and settings with their nondisabled peers unless the education of children with disabilities cannot be achieved satisfactorily in those classes and settings with the use of supplementary aids and services.” *Letter to Wohle*, 50 IDELR 138 (OSEP 2008) at 139 (emphasis added). OSEP has also, at the same time, made clear that the IDEA does not require a set percentage of students to be educated in a general education environment. *Letter to Wohle*, 50 IDELR 138 (OSEP 2008).⁵ This concern is, at best, overclaimed. In practice, the consensus would more likely render an even harsher judgment of these concerns. Administrative convenience has never been a legitimate reason for placing a student in a more segregated setting—indeed the individualized nature of planning for FAPE and LRE under the IDEA have ensured as much. Furthermore, the Department has consistently addressed the concerns of a variety of disability communities since at least 1992. The 1992 policy guidance, *Deaf Policy Guidance*, states: “Meeting the unique communication needs of a student who is deaf is a fundamental part of providing a free and appropriate public education (FAPE) to the child. Any setting, including a regular classroom that prevents a child who is deaf from receiving an appropriate education that meets his or her needs, including communication needs, is not the LRE for that individual child.” *Deaf Students Education Services; Policy Guidance*, Fed Reg. , Vol. 57, No 211, (October 30, 1992) pp. 49274-75. This Department has addressed the “individual LRE needs” for this population of students. Notably, the 1997 amendments to the IDEA codified this guidance and now requires that IEP teams : “consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child’s language and communication needs, opportunities for direct communication with peers and professional personnel in the child’s language and communication mode, academic level, and full range of needs, including opportunities for direct

⁵ *Letter to Wohle* also pointed out that the regular education environment may not be the appropriate placement option for each child with a disability, but districts cannot remove students with disabilities from the general education environment merely because they require modifications of the general education curriculum.

instruction in the child's language and communication mode." 20 U.S.C. §1414 (d)(3)(B). Concerns related to LRE have been amply addressed.

We hope that you will heed our input with regard to any future guidance or Dear Colleague Letter regarding LRE. We must iterate that in the event you do not, and the Department goes ahead with issuing problematic guidance a Dear Colleague letter or otherwise, we are prepared to consider any and all legal action.

Please feel free to contact us to discuss further.

Sincerely,



Denise Marshall
Executive Director



Selene Almazan, Esq.
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