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A LEGAL ANALYSIS REGARDING SOME OF THE PROPOSED CHANGES TO ALABAMA'S ADMINISTRATIVE CODE IMPLEMENTING THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA), 20 U.S.C. 1400, *et. seq*

Drafted by

Deborah Mattison, Esq.

and

Rachel McGinley, Esq.

Wiggins, Childs, Pantazis, Fisher and Goldfarb

The Kress Building
301 19th Street North
Birmingham, AL 35203
(205) 314-0500

The following constitutes a preliminary analysis[1] regarding some of the draft proposed rule changes to the Alabama Administrative Code implementing the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et. seq.*

I. PRELIMINARY LEGAL ISSUES RELEVANT TO ALL CHANGES.

These comments represent our preliminary thinking regarding the proposed changes to Alabama's Administrative Code regarding the provision of special education pursuant to IDEA. Our comments arise from consideration of the proposed rules in light of IDEA's statutory purpose and protections, as well as the practical effects the proposed changes will likely have when implemented. As will be discussed further below, especially important to our consideration were

[1]This document is intended to provide general information concerning recent developments in and/or the draft proposed changes to Alabama's special education administrative code provisions. It is not intended as a solicitation; it is distributed with the understanding that it does not constitute the rendering of legal advice. This document should not be used as a substitute for professional service in specific situations. If legal assistance or other expert assistance is required, the service of a qualified professional should be sought and no representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.

Congress's decision to enact IDEA to "ensure that the rights of children with disabilities and parents of such children are protected" 20 U.S.C. 1400(d)(1)(B) and case law explaining that, in return for federal funds, Alabama must implement IDEA's substantive and procedural standards, which set a floor of protections for parents and children that Alabama, through its administrative rules, may rise above, but cannot fall below. Because of the nature of the Alabama Department of Education's draft proposed changes and our position as lawyers practicing in the area of special education, the main focus of our comments will be the proposed changes to the procedural safeguards. In order to give more context to our comments, we begin with a brief overview of IDEA's history and basic provisions.

A. IDEA's Substantive Requirements.

IDEA is a comprehensive Federal statute which entitles each student with a disability to a free appropriate public education (FAPE) to meet his or her unique needs. 20 U.S.C. 1400 *et. seq.* Originally titled Education for All Handicapped Children Act of 1975, IDEA was based on Congress' finding that the millions of children with disabilities had educational needs which were not being met due to, *inter alia*, a lack of services and inappropriate public school placements.[2] 20 U.S.C. 1400(c) and (d); *Arlington Central School Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291 (2006); *Burlington School Comm. v. Mass. Dept. of Ed.*, 471 U.S. 359 (1995). Enacted under both the 14th Amendment to the United States Constitution and the Spending Clause, IDEA provides federal financial assistance to state and local educational agencies who implement its substantive and procedural requirements. IDEA's primary purpose is to assure that students with disabilities receive sufficient services to enable them to lead productive adult lives. *M.M. v. School Bd. of Miami -Dade County*, 437 F.3d 1085 (11th Cir. 2006); 20 U.S.C. 1401(d)(1)(B); *Bd. of Educ. of the Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176 (1982). See also, Alabama Exceptional Child Education Act, Ala. Code 16-39-1, *et. seq*. IDEA's implementing federal regulations were promulgated in 1977 and they further IDEA's purposes.

B. IDEA's Focus on Assuring Extensive Parental Participation As A Means to Providing a FAPE.

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[2] IDEA was enacted subsequent to *Mills v. Board of Education of the District of Columbia*, 348 F.Supp. 866 (D.D.C. 1972), wherein the court determined that the D.C. Board systematically denied children with disabilities a publicly-supported education, in violation of the Constitution and its own code. Consequently, D.C. was Ordered to provide a number of special education programs and related services, as well as parental procedural protections. Many of theses requirements were included in IDEA. See also *Pennsylvania Association for Retarded Children v. Commonwealth*, 334 F.Supp. 1257 (E.D.Pa. 1971) and 343 F.Supp. 279 (1972) (collectively referred to as *PARC*). The House and Senate Reports identify *Mills* and *PARC* as the primary force behind IDEA. *See, for example*, Senate Report No. 94-168, pp. 5-6 (1975); H.R.Rep. 94-322, pp. 2-3; U.S.Code Cong. & Admin.News 1975, pp. 1429-1430.

Understanding that parents have a stake in their children's education, IDEA includes a wide array of procedural safeguards designed to provide parents with meaningful tools to make sure that IDEA's promises do not amount to empty rhetoric. IDEA's procedural provisions highlight Congress' desire to afford parents a full and equal partnership in the design and implementation of their child's educational program. The procedures include the opportunity for parental input at essentially every stage of the development of a student's program, including during the evaluation stage. 20 U.S.C. 1414(a)(1)(D); 1414(d)(1)(B)(I) (addresses a parent's entitlement to play an active role in the development of their child's IEP); 1414(e); 1415(b)(1); 1415(c)(3) (requiring informed consent). See also 34 C.F.R. 300.500; 300.503, *et seq*.; 300.571. Parental involvement during the evaluation process is important because evaluation results are major factors in determining the content of the child's IEP.[3] IDEA also entitles a parent to an independent educational evaluation at public expense if the parent disagrees with the district's evaluation.

IDEA affords parents the right to an impartial due process hearing "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child". 20 U.S.C. 1415(b)(6)(A); *Manecke v. School Board of Pinellas Co. Fla*., 762 F.2d 912 (11th Cir. 1985). Any party who is aggrieved by the decision of the hearing officer is entitled to judicial review by a state or federal court. 20 U.S.C. 1415(i)(2). Finally, recognizing that a parent may need legal assistance to effectuate IDEA's entitlements, IDEA allows a prevailing parent to recover their reasonable attorney fees. 20 U.S.C. 1415(i)(3)(B).

One of IDEA's hallmarks has always been the elaborate procedural mechanisms which Congress created to ensure full and meaningful parental *participation* in *all decisions* regarding the identification, *evaluation* and design of a student's educational program. 20 U.S.C. 1400(c)(5)(B). The Eleventh Circuit has stated that "it is beyond dispute that full parental involvement in a handicap child's education is the purpose of many of [IDEA's] procedural requirements." *Doe* at 661. In Doe, the Eleventh Circuit goes on to say that

> . . .we think that the importance Congress attached to these procedural safeguards cannot be gain said. *It seems to us no exaggeration that Congress placed every bit as much emphasis upon compliance with the procedures giving parents and guardians a large measure of participation at every stage of the administrative process as it did upon the measurement of the resulting IEP against a substantive standard.*

Id. (citations omitted)(emphasis added).

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[3]These are just a few of IDEA's provisions requiring full parental participation.

This sentiment has been echoed by the Supreme Court. See *Burlington, supra; Rowley*, 458 U.S. at 205-206. In *Schaffer v. Weast*, 546 U.S. 49 (2005), the Supreme Court highlighted some of IDEA's procedural rights and the important role they play in helping parents meet schools on a level playing field when determining their children's educational future.

> School districts have a "natural advantage" in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them. See School Comm. of Burlington v. Department of Ed. of Mass., 471 U.S. 359, 368 (1985). As noted above, parents have the right to review all records that the school possesses in relation to their child. § 1415(b)(1). They also have the right to an "independent educational evaluation of the[ir] child." Ibid. The regulations clarify this entitlement by providing that a "parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency." 34 CFR § 300.502(b)(1) (2005). IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.
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> Additionally, in 2004, Congress added provisions requiring school districts to answer the subject matter of a complaint in writing, and to provide parents with the reasoning behind the disputed action, details about the other options considered and rejected by the IEP team, and a description of all evaluations, reports, and other factors that the school used in coming to its decision. § 615(c)(2)(B)(i)(I) of IDEA, as added by § 101 of Pub. L. 108-446, 118 Stat. 2718, 20 U.S.C. § 1415(c)(2)(B)(i)(I) (2000 ed., Supp. V). Prior to a hearing, the parties must disclose evaluations and recommendations that they intend to rely upon. 20 U.S.C. § 1415(f)(2). IDEA hearings are deliberately informal and intended to give ALJs the flexibility that they need to ensure that each side can fairly present its evidence. IDEA, in fact, requires state authorities to organize hearings in a way that guarantees parents and children the procedural protections of the Act. See § 1415(a). Finally, and perhaps most importantly, parents may recover attorney's fees if they prevail. § 1415(i)(3)(B). These protections ensure that the school bears no unique informational advantage.

Schaffer at 60-61. The Supreme Court's discussion is particularly relevant here, as many of the procedural rights mentioned are affected by ALSDE's proposed changes. As will be discussed further below, we feel many of the changes proposed negatively impact parents' ability to match school districts' natural advantages in information and expertise.

C. States Must Assure that Parents Receive At Least the Due Process Safeguards Required by IDEA.

As explained above, one of IDEA's hallmarks is its focus on protecting *parents'* rights to the

due process safeguards required by the federal law. Thus, while a state department of education can afford a parent *more* procedural safeguards than is required by IDEA, it can not afford a parent *fewer* procedural rights. "While state procedures which more stringently protect the rights of the handicapped and their parents are consistent with the EHA and thus enforceable, see [*Diamond v. McKenzie*, 602 F.Supp. 632 (D.D.C.1985)], those that merely add additional steps not contemplated in the scheme of the Act are not enforceable". *Antkowiak v. Ambach,* 838 F.2d 635, 641 (2d Cir. 1988) (state statute permitting state review of unappealed decision of hearing officer violates finality provision of Education for All Handicapped Children Act's (EHA, IDEA's predecessor)).

Because we believe that some of the draft proposed rules serve to offer fewer safeguards to parents than does IDEA, we believe that those changes run afoul of IDEA. "Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" *Felder v. Casey,* 487 U.S. 131, 138 (1988) (citing *Free v. Bland,* 369 U.S. 663, 666 (1962)). The critical question is whether the state requirement "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941).

Finally, the Federal Office of Special Education has found that a state may not offer less protection to parents via state rules, than is required by IDEA. See, *Letter to Wilson,* 16 IDELR 83 (OSEP 1989) (prohibiting the promulgation of any regulations "which would procedurally and substantively lessen the protections guaranteed to handicapped children," absent clear and unequivocal congressional intent to the contrary, based on 20 U.S.C. 1406).

II. THE RIGHT TO AN INDEPENDENT EDUCATION EVALUATION AT PUBLIC EXPENSE.

Both the United States Supreme Court and the Eleventh Circuit have affirmed that the right to a publicly funded IEE is one of IDEA's most important procedural safeguards. *Phillip C. v. Jefferson County Bd. of Educ*., 701 F. 3d 691, 698 (11th Cir. 2012), citing *Schaffer v. Weast*, 546 U.S. 49, 53-54 (2005) and *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988) ("Congress repeatedly emphasized ... the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness."). The federal regulation setting out a parent's right to an IEE at public expense, 34 C.F.R. 300.502, is valid and enforceable. See *Phillip C. v. Jefferson County Bd. of Educ*., 701 F. 3d 691 (11th Cir. 2012), cert. denied 134 S.Ct. 64 (2013).

IDEA, as per the federal regulations, states, in part, the following regarding a parent's entitlement to an IEE.

> The parents of a child with a disability have the right under this part to obtain an

> independent education of the child . . .

34 C.F.R. 300.502(a). Regarding a parent's right to an IEE *at public expense*, IDEA states as follows,

> A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

34 C.F.R. 300.502(b)(1). Paragraphs (b)(2) though (4) explain the steps a district must take when a request for an IEE at public expense is made. The federal language explaining these important steps states that upon receiving such a request, the district must, without unnecessary delay, either file a due process complaint to request a hearing to show that its evaluation is appropriate, or pay for the IEE. 34 C.F.R. 300.502(b)(2). Moreover,

> If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. (However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.)

34 C.F.R. 300.502(b)(4).

Upon request for an IEE, a district must also provide certain information, to include any applicable agency criteria, which must be consistent with the criteria used by public agency uses when it initiates an evaluation. 34 C.F.R. 300.502(a)(2) and (c)(2).

A parent's right to an IEE at public expense is hardly a new concept. Rather, it has existed in substantially the same form since *Mills, supra* and *PARC, supra*. This persistence is due not to some sort of regulatory inertia or a colossal thirty year failure to recognize the existence of the provision. Rather it is due to a policy choice on the part of Congress and the U.S. Department of Education based on a common understanding about the fundamental importance of the right as a means for ensuring a FAPE. As explained by the Supreme Court in its first interpretation of IDEA,

> The fact that both *PARC* and *Mills* are discussed at length in the legislative Reports suggests that the principles which they established are the principles which, to a significant extent, guided the drafters of the Act. Indeed, immediately after discussing these cases the Senate Report describes the 1974 statute as having 'incorporated the major principles of the right to education cases.' S.Rep., at 8, U.S.Code Cong. & Admin.News 1975, p. 1432. Those principles in turn became the basis of the Act, which itself was designed to effectuate the purposes of the 1974 statute. H.R.Rep.,

at 5.

Rowley at 194. The federal regulation as it was drafted initially, and as it exists today, effectuates the will of Congress as expressed in the statute and it simply synthesizes the plain meaning of the statutory language with the IDEA's legislative history and purpose.

Alabama's current Administrative Code provision essentially mirrors the federal language. 290-8-9.02(4). However, ALSDE now proposes to change the language regarding a parents right to a publicly funded IEE by limiting the circumstances under which a parent may request an IEE. According to the proposed rule, any IEE request must,

> "*relate to a district evaluation for procedures used determine whether a child has a disability and the nature and extent of the special education and related services that the child needs as defined herein"*.

We believe this proposed change can be interpreted to substantively limit a parent's right to an IEE to district evaluations that were used to *"determine whether a child has a disability and the nature and extent of the special education and related services that the child needs as defined herein"* and, thus, runs afoul of IDEA. Again, the current rule simply requires that a parent disagree with an "individual evaluation(s)". The federal language states that "a parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation by the public agency". So while the federal rule contains no limitation on the type of evaluation with which the parent must disagree, Alabama's proposed rule expressly limits when IEEs at public expense are available. For example, one obvious problem could arise when a parent agrees that the child has a disability but disagrees as to the identity of the disability. A district could assert that an IEE is limited to *whether* the child has a disability. We simply see no need for this artificial limitation, especially given that the United States Supreme Court has reaffirmed the importance of assuring parents the right to an IEE.

Another problem could occur when a parent wants an evaluation of a particular aspect of the child's program, such as the child's participation in extra-curricular activities or the child's regular education program. Since, the terms "special education" and "related services" are legal terms, the proposed language could be used to claim that the IEE sought by the parent is not within the express language of the rule. "The right to a publicly financed IEE guarantees meaningful participation throughout the development of the IEP." *Phillip C. v. Jefferson County Bd. of Educ*., 701 F. 3d 691, 698 (11th Cir. 2012). As another example, there is no reference to IEEs in response to functional behavior assessments[4] or evaluations used for placement purposes. While these two types of

[4]*Harris v. District of Columbia*, 561 F. Supp. 2d 63 (D.D.C. 2008) (court finds that functional behavior assessments are included in the definition of an independent educational evaluation and, as a result, district should have acted on the parent's request for an independent FBA).

evaluations can be viewed as part of a determination of the "nature and extent of a child's special education and related services needs", the additional language proposed could be interpreted to exclude such evaluations from those with which a parent may disagree for purposes of an IEE request.

Furthermore, the proposed phrase uses the word "and" to connect the conditions *("used determine whether a child has a disability* ***and*** *the nature and extent of the special education and related services that the child needs").* This could make it possible to deny a parent's request for an IEE at public expense for an evaluation which is used solely to determine a child's need for a particular related service, for example. Even replacing "and" with "and/or" would likely fail to solve the above fundamental problems with the proposed language for the reasons mentioned herein.

In short, the limitation suggested by the draft proposed rule is not contained in 34 C.F.R. 300.502, as the federal regulation refers only to "an evaluation obtained by the public agency". 34 C.F.R. 300.502(b)(1). See also 34 C.F.R. 300.502(b)(5) ("A parent is entitled to only one independent education evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees").

ALSDE's proposed language for IEEs also requires a parent to "*identify the agency evaluation with which he or she disagrees*". This proposed language both imposes an additional burden upon parents not required by IDEA. Additionally, as a matter of practice, most parents lack the ability to interpret evaluation tools typically administered by a district, which could make it extremely difficult to identify the actual evaluation with which they disagree. There is a further problem in that the actual evaluations administered by district are not routinely given to a parent.

Probably more importantly, however, IDEA's federal language does not place upon a parent the obligation to identify the evaluation with which with the parent disagrees. Therefore, we believe ALSDE's proposed language directly contradicts 34 C.F.R. 502(e)(2), which states that "*except for the criteria described in paragraph (e)(1) of this section, a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense*." See also *Letter to Thorne*, 16 IDELR 606 (OSEP 1990) (there is no requirement that a parent must provide specific areas of disagreement with the public agency's evaluation; any attempt to narrow the circumstances upon which a parent can secure reimbursement for an IEE is a direct violation of IDEA).

Further, the federal Office of Special Education Programs (OSEP) has repeatedly upheld the broad nature of a parent's right to an IEE, to include the right to an IEE if a parent disagrees with an evaluation because a specific area of the child's needs wasn't assessed. In such a case, the parent has a right to request an IEE at public expense to fill the gap in the district's evaluation. See *Letter to Baus*, 65 IDELR 81 (OSEP February 23, 2015). For a "fill in the gaps" type of IEE request, a parent would not be able to point to a specific agency evaluation which had been completed or obtained by the district. It is thus possible to read ALSDE's proposed language as foreclosing the right to an IEE

in an area which the agency did not evaluate, which would contradict OSEP's interpretation of the federal regulatory guarantees for IEEs.

ALSDE has proposed including a statement that the "*public agency may inquire and a parent can provide the basis of his or her objection to the agency evaluation*." While we have no objection to the first clause of the sentence, we believe the second clause may be misleading and suggest that the language from the federal regulation be used instead. The relevant part of the federal regulation states that "the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, *the public agency may not require the parent to provide an explanation* and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation." 34 C.F.R. 300.502(b)(4)(emphasis added). We believe the word choice and structure of the federal regulation better explains the rights of parents in this situation.

The problems with the proposed language regarding publicly funded IEEs are complicated, in our opinion, even for lawyers who practice in this area. We believe that they pose substantial burdens for parents who are not represented and that they may effectively deny such parents one of IDEA's most important procedural safeguards.

It is our recommendation that the state language remain the same, or that it mirror the federal language.

III. CHANGING THE STATUTE OF LIMITATIONS FROM TWO YEARS TO ONE YEAR.

Congress has adopted a two year statute of limitations applicable to claims brought under IDEA. See 1415(b)(6). Additionally, in recognition that clams for past harms may be brought, case law and Congress have upheld a parent's/student's right to reimbursement and compensatory education.

In our experience, there are sound policy reasons for retaining the two year limitations period.

First, we believe that reducing the statute of limitations time period fails to further IDEA's guarantee that children with disabilities will receive a FAPE. Nor does it further Congress's intent to afford parents meaningful due process protections. Under the draft proposed rule, if a child's rights were violated more than one year- but less than two years prior to the due process hearing request, a parent could be without recourse to address the violation. This scenario is a clear limitation on a parent's current rights under IDEA. Congress found that a two year limitation period was appropriate for IDEA claims; and we believe that Congress' actions in this respect set a reasonable balance–allowing time for working through issues, while preserving children's and their parents' procedural rights. We also believe that the inclusion of a two year statute of limitations in

the federal statute gives that time period a presumption of reasonableness.[5] Congress contemplated that the period might include things which happened in the past. If a past issue has no merit, hearing officers are empowered to address this problem. To the extent that the change is proposed to limit the burden on a school district of having to prepare for and defend against two years of alleged IDEA violations, we note that at least one court in Alabama has already determined that such burden is not too onerous for a district to handle.

> The Board cannot credibly assert that, confronted with an allegation that the IEPs were defective, it was unduly burdensome for the Board to compare the contents of those two IEPs with the finite, specific statutory requirements for same in preparation for the hearing. This is particularly true given the Board's ready access to a phalanx of IDEA specialists, including Dr. Simpson, special education coordinators and teachers, and the Board's retained counsel.

Escambia County Bd. of Educ. v. Benton, 406 F.Supp. 2d 1248, 1262 (S.D. Ala. 2005). Given that the proposed change offers no benefit children with disabilities or their parents, but rather reduces the due process rights afforded currently afforded them, we do not support the proposal to limit the statute of limitations to one year.

Second, we feel strongly that reducing the limitations period would likely mean additional hearing requests so as not to lose any claims in the short one year window. In our experience, parents understandably want to trust their children's school and they typically avoid, for as long as possible, taking action which could be construed as "challenging" school districts' decisions. However, if parents believe that they have only a relatively short time period to file a claim to protect their children, we believe that they will be more inclined to either file a hearing complaint or seek legal counsel. Further, it is often the case that districts ask that parents "give the program a chance" or "work with" the district. We believe that parents will be less likely to do this if it means running the risk of losing an opportunity to secure relief for their child.

Currently, in our practice we are able to resolve a number of issues without requesting a hearing because of the two year limitations period. While filing a hearing request is prudent in some instances, a longer limitations period gives us a "cushion" of time–in some cases– to try to work out a resolution. We are very concerned about the viability of this practice if it means jeopardizing the viability of claims due to the statute of limitations. This problem is compounded by the fact that when a client seeks legal representation, an attorney's ethical duties require a rigorous investigation of the claims and facts which make up the potential claims. A review of the documentation is

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[5]The corresponding federal regulation, 34 C.F.R. 300.507(a), went through the notice and comment requirements before being adopted. Any state choosing to adopt a time limit for requesting a hearing, other than the two year time limit in the Act, must comply with the public participation requirements in 34 C.F.R. 300.165 and 20 U.S.C. 1412(a)(19).

essential if the attorney is to have an accurate and complete picture of the child so as to properly advise a parent of his or her legal rights. Historical information is particularly important for establishing the knowledge of a school district about a child's abilities as well as the efficacy of the educational services provided to the child over time. However, we typically have a difficult time securing all relevant information quickly. It often takes weeks and sometimes months to secure records from the district. Without all relevant information, it is sometimes hard to resolve matters quickly. We will address this records issue further in our comments about resolution meetings below.

Third, it is also important to understand that even if the limitation period is shortened, case law clearly establishes that evidence prior to the limitations period is admissible for a variety of purposes, including demonstrating knowledge or a pattern of actions. See *J.Y. v Dothan City Bd. of Educ*., 2014 U.S. Dist. LEXIS 43687, *26-*27, and fn. 11 (M.D. Ala. March 31, 2014) (approving hearing officer's use of evidence of events occurring outside IDEA's two year statute of limitations as evidence supporting district's failure to evaluate and identify a child, noting that "Statutes of limitations operate only to bar claims that accrue outside the applicable limitations period; evidence that is relevant to establish claims that accrued within the limitations period is generally admissible.").

Fourth, this proposed change will cause significant confusion in light of the Eleventh Circuit's case law on exhaustion under IDEA and the statute of limitations for cases brought pursuant to Section 504 of the Rehabilitation Act. 29 U.S.C. 794. 20 U.S.C. 1415(l) of IDEA affirms the right of children with disabilities to bring claims under other federal laws protecting their rights. But it also requires that a party go through IDEA's due process procedures before filing a civil action under another law (such as Section 504) which seeks relief available under IDEA. The Eleventh Circuit has strictly enforced 20 U.S.C. 1415(l) by requiring parents to exhaust even when it appears that the relief they are requesting (such as compensatory damages under the Rehabilitation Act) is not available under IDEA. *N.B. v. Alachua County*, 84 F.3d 1376 (11th Cir. 1996); *Babicz v. Sch. Bd. of Broward County*, 135 F.3d 1420 (11th Cir. 1998). Typically, such exhaustion is through an administrative hearing under IDEA, seeking IDEA relief for conduct that the parent believes may also violate Section 504, which has a two year statute of limitations in Alabama.[6]

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[6]Where a federal statute does not contain a limitations period courts should look to the most analogous state statute of limitations. *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985). Most civil rights actions are essentially claims to vindicate injuries to personal rights. See *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661 (1987) (action for discrimination is one for "fundamental injury to the individual rights of a person"); *Wilson*, 471 U.S. at 276 (claims which allege discrimination are best characterized as personal injury actions). The Eleventh Circuit has looked to the personal injury statute for the state to determine the applicable statute of limitations for cases brought under Section 504 of the Rehabilitation Act. See *Everett v. Cobb County School Dist*.,138 F.3d 1407, 1409 (11th Cir. 1998). In Alabama, the time period is two years. *Powell v. Thomas*, 643 F.3d 1300, 1303 (11th

Thus, parents who believe their child's education has been discriminatory under Section 504 must proceed with an IDEA hearing. It is questionable if Section 504's two year limitation would be frustrated by a one year limitation under IDEA. To give an example of how the ALSDE proposed one year statute of limitations could cause difficulties for parents and courts, consider a parent who seeks to challenge an alleged Section 504 violation that took place more than one year, but less then two years ago. The parent requests a due process hearing under IDEA in order to satisfy IDEA's exhaustion requirement, as interpreted by the Eleventh Circuit. Would the hearing officer be able to deny the parent the right to an IDEA hearing since the alleged violation occurred more than one year ago? If the hearing officer denies the parent an IDEA hearing, how would the parent exhaust in keeping with precedent from this Circuit? Denying a parent the right to a ruling on the Section 504 claim would likely cause problems at the district court level. See *Ms. B. v. Chilton County Board of Education*, 891 F.Supp. 2d 1313 (M.D. Ala. 2012); *Laura A. v. Limestone Cnty. Bd. of Educ.*, 610 Fed. Appx. 835 (11th Cir. 2015).

Finally, we believe that any change would have to be phased in over time. It would be unfair to deny parents who have reasonably relied on the long-standing two year limitation period the right to bring claims within that time period.

It is our recommendation that the limitations period remain the same.

IV. INCLUSION OF ADDITIONAL PLEADING REQUIREMENTS.

IDEA states that a parent has the right to a hearing to "**with respect to any matter relating to the identification, evaluation or educational placement of the child, or the provision of a free appropriate public education to such child. . . .**" 20 U.S.C. 1415(b)(6)(A); 34 C.F.R. 300.507; Ala. Admin. Code 290-8-9.08(9)(c). (Emphasis added) See also *Manecke v. School Board of Pinellas Co. Fla.*, 762 F.2d 912, 917 (11th Cir. 1985) (IDEA affords parents the "opportunity to contest virtually any matter concerning the educational placement of the handicapped child, or the provision of a "free appropriate public education" to such child.").

IDEA identifies what must be included in a due process complaint. It states that a complaint must contain,

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Cir. 2011) (noting Alabama's two-year period for personal injury actions, found in Ala. Code 6-2-38(l)). Courts in Alabama have already used the two year statute of limitations for claims brought under the Rehabilitation Act for children in factual circumstances to which IDEA's statute of limitations would also be applicable. See, e.g., *Andalusia City Bd. of Educ. v. Andress*, 916 F. Supp. 1179, 1185 (M.D. Ala. 1996) (court expressly adopts a two year statute of limitations for claims under the Rehabilitation Act brought by parents of a child with a disability to challenge provision of inappropriate special education services).

> (I) the name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending;
> (II) in the case of a homeless child or youth (within the meaning of section 11434a (2) of title 42), available contact information for the child and the name of the school the child is attending;
> (III) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and
> (IV) a proposed resolution of the problem to the extent known and available to the party at the time.

20 U.S.C. 1415(b)(7)(A)(ii).

A. Narrowing the Scope of the Hearing

The draft proposed rules include several changes which, we believe, will likely have the effect of narrowing a parent's right to a due process procedure.

First, Alabama's administrative rules have historically included language similar to 20 U.S.C. 1415(b)(6)(A). See Ala. Admin. 290-8-9.08(9)(c) (first sentence - "any matter relating to the a proposal or refusal to initiate or change the identification, evaluation, educational placement of a child or the provision of FAPE to a child."). While not quite as broad as IDEA's language regarding the general scope of hearings, Alabama's current language does give parents an initial grasp of the substantive scope of impartial due process hearings before getting into more specific procedural aspects of the hearing. ALSDE's proposed changes omit the current first sentence of the rule regarding impartial due process hearing procedures. The proposed rule starts instead with the statute of limitations, saying generally that a hearing may be requested if the unspecified "disagreement" on which the request arises occurs not more than one year before. The subject matter of the hearings is buried in the second half of the sentence, which notes that one year timeline runs from the date a "parent or public agency knew or should have known about the alleged action or omission pertaining to identification, evaluation, educational placement or the provision of FAPE that forms the basis of the request for a due process hearing." This is unnecessarily confusing, particularly for parents not represented by attorneys. There is no connection between the "disagreement" and the "alleged action or omission". ALSDE's proposed deletion of the "any matter" language may also be interpreted to narrow the scope of due process hearings.

Second, the proposed language proposed language in 290-8-9.08(9)(c)1.(ii) seeks to change the current requirement that the complaint include "a description of the nature of the problem of the child relating to such proposed of refused initiation or change, including facts relating to the problem" to a much more burdensome, legalistic requirement. Specifically, persons requesting due process hearings must, under the proposed rule,

> *(1) allege a specific violation of the child's entitlement to a free appropriate public education that occurred within the applicable timeline as prescribed in Section 13 (c), above; (2) [describe] the nature of the disability and how the public agency's proposal or refusal to initiate a change with respect to the child's identification, evaluation, educational placement or provision of FAPE; [and] (3) include a statement of facts supporting each and every allegation that the child was deprived or denied a FAPE.*

We believe this new language can effectively narrow the types of issues a parent may raise at a hearing. Again, IDEA clearly entitles a parent the right to a due process hearing regarding

> *"any matter relating to the identification, evaluation or educational placement of the child, or the provision of a free appropriate public education to such child. . . ."*

And, this is consistent with the current requirement that a parent include in a complaint

> "a description of the ***nature of the problem*** of the child relating to such proposed initiation or change, including ***facts relating to such problem***".

However, by changing the rules to require that the complaint include a statement of facts supporting each and every allegation that the child was deprived or denied a FAPE, the proposed rule makes it appear that a parent may only file a complaint which challenges the district's alleged failure to provide the child with a free appropriate public education. Again, this is in sharp contrast to IDEA's requirement that parents may file complaints about other matters, such as the "identification, evaluation or educational placement of the child". The language could also be interpreted to NOT require a statement of facts for other problems for which a hearing could be requested. It is difficult to imagine that Respondents would be satisfied with facts related to only some of Petitioners' claims properly brought as part of an IDEA hearing request. The language of proposed 290-8-9.08(9)(c)3.(c)(viii)(2) creates additional confusion in that it tracks the current language regarding the substantive basis for a hearing request rather than the proposed language (Ala. Admin. 290-8-9.08(c) - "proposal or refusal to initiate or change" vs. "action or omission pertaining to..."). As discussed above, both versions can be interpreted as narrower than IDEA's language ("any matter"). The proposed rule also amounts to adding a pleading requirement not recognized by IDEA. Because ALSDE's proposed language can be interpreted to restrict or limit the scope of a due process hearing in a manner contrary to IDEA, we believe that it may contradict federal law. See *Letter to Lenz*, 37 IDELR 95 (OSEP 2002) (finding that Texas' imposition of any additional notice requirements on either party (in a manner that restricts the issues that may be heard) is inconsistent with IDEA because such requirements would impose additional procedural hurdles on the right to a due process hearing that are not contemplated by the IDEA).

We understand that there may be complaints which are unclear regarding what is being challenged. However, IDEA already has a remedy for this, and it is a challenge to the sufficiency of the complaint. In the event that a complaint does not include,

> *"a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and*
> *(IV) a proposed resolution of the problem to the extent known and available to the party at the time",*

we believe that IDEA authorizes a hearing officer to find the complaint insufficient and to require the complainant to clarify the nature of the dispute and the facts underlying it. In our experience, hearing officers already do this when a challenge to the complaint is made. It is also routine for hearing officers to ask the respondent whether it understands the nature of the complaint. While there have been a few times we have been asked to supply more details, typically the district's attorney states that he or she is aware of the nature of the allegations.

B. Filing versus Sending the Complaint.

Additionally, the proposed rules change in 290-8-9.08(9)(c)1.(I) requires that a complaint be *"filed"* with the State Superintendent, instead of *"sent"* to that individual. This proposal raises many questions. What is the purpose of this change? What exactly does "filing" mean? Adding to the confusion is the requirement that the complaint also be "sent" to the party from which relief is sought. Does "filing" mean something different than "sending"? If so, what does filing require that sending does not? As a practical matter, court papers are typically "filed" through an electronic filing service, which sends email confirmation of court receipt. It is unclear whether Alabama's proposed new requirement would include or exclude email correspondence. We believe that the change is unnecessary and that, especially for an unrepresented parent, the requirement is too confusing.

C. An Additional Requirement Regarding Sufficiency of the Complaint.

As explained above, IDEA already contains language which allows a party to challenge the sufficiency of the complaint. See 20 U.S.C. 1415(b)(7)(B) and (c)(2). IDEA's implementing regulation states that,

> (d) *Sufficiency of complaint.* (1) The due process complaint required by this section must be deemed sufficient unless the party receiving the due process complaint notifies the hearing officer and the other party in writing, within 15 days of receipt of the due process complaint, that the receiving party believes the due process complaint does not meet the requirements in paragraph (b) of this section.
>
> (2) Within five days of receipt of notification under paragraph (d)(1) of this section, the hearing officer must make a determination on the face of the due process complaint of whether the due process complaint meets the requirements of paragraph (b) of this section, and must immediately notify the parties in writing of that determination.

34 C.F.R. 300.508(d).

Alabama's current rules incorporates this provision.

However, the draft proposed rules also includes the following language in new subsection 290-8-9.08(9)(c)1.(iv),

> *A complaint that includes all the information required in the model complaint form (as applicable to the case) or in Section 1 (ii), above, is presumptively sufficient; a complaint that does not include the information specified in the model complaint form or in Section 1 (ii) is presumptively insufficient, and shall be amended to meet the requirements of this rule upon a finding of insufficiency no later than seven (7) calendar days from the date such finding is made and served on the petitioner by the hearing officer. No hearing may be held or relief granted until a complaint that meets the sufficiency requirements set forth herein has been filed and served on all parties.*

Again, the proposed language appears to impose another requirement for due process hearing requests which is unnecessary given the fact that rules already include directions regarding how to handle an "insufficient" complaint. We believe the proposed language also adds confusion, especially for an unrepresented parent, regarding the terms "filed" and "served". Again, do these terms require something more and/or expensive and/or uniquely legal (like hiring a process server or paying for certified mailing of a due process hearing request) than what is currently required?

It is our recommendation that the state language remain the same, or that it mirror the federal language.

V. PROPOSED CHANGES TO RESOLUTION MEETING RULES.

IDEA requires a resolution meeting within a certain time period after a request for a due process hearing is made, unless waived by both parties. If an agreement is reached, its terms are reduced to writing and the agreement is legally binding, except that both parties have a three day window of opportunity in which to void the resolution agreement. See 20 U.S.C. 1415(f)(1)(B).

The proposed rule bifurcates resolution, dividing the substantive issues relating to the child's education underlying the complaint from issues regarding attorney fees. The language appears to be based on two presumptions. The first is that attorney fees are typically the "sticking point" regarding resolution; the second is that, in the event that a resolution agreement is reached without mentioning fees, a parent's attorney would still be able to secure fees under the law.

Prior to addressing the presumptions, we believe that it is important to recognize that Congress expressly provided an award of reasonable attorney fees to prevailing parents as one of

IDEA's due process rights. 20 U.S.C. 1415(i)(3)(B). Congress saw fit to award fees to as to encourage attorneys to represent children. See 20 U.S.C. 1415(d)(2)(L), 1415(i)(3). As quoted above in *Schaffer v. Weast*, 546 U.S. 49, 61 (2005), the Supreme Court specifically pointed to parents' ability to recover attorney fees as perhaps the most important procedural safeguard designed to protect parent rights.

Additionally, due to Supreme Court precedent, not every plaintiff who obtains good results for their child is entitled to attorney fees. Certain circumstances must exist in order for a party to secure fees, such as relief which is judicially sanctioned. In *Buckhannon Board & Care Home Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), the Supreme Court held that 'prevailing party status' requires a judicially sanctioned change in the parties' legal relationship, such as a judgment on the merits or a court-ordered consent decree. Federal courts have consistently applied this standard to IDEA cases. See, e.g. *Robert K. v. Cobb County School District*, 279 Fed. Appx. 798 (11th Cir. 2008) (citing *Buckhannon* in the context of prevailing party inquiry under IDEA).

The effect of this body of law is that ALSDE's proposed changes allowing bifurcation of resolution meetings may well leave the parent without any way to recover their attorney fees, which effectively weakens IDEA's parental safeguards. In other words, in the event that a case is resolved at the resolution meeting, except for attorney fees, a parent may be left without a way to secure the fees because there either has to be an agreement which expressly includes fees or which expressly includes an enforceable Order. As a result, we believe the proposed language may well serve as a limitation on a parent's right to counsel.

There is no evidence that separating out fee agreements was something anticipated by Congress. Indeed, courts have routinely held that a parent's fees are a valid element of settlement, meaning that is appropriate for the fees to be negotiated during the resolution phase. See, e.g., *D.D. v. Dist. of Columbia*, 470 F. Supp. 2d 1, (D.D.C. 2007) (parent did not have to accept a settlement offer which omitted attorney fees. IDEA does not preclude discussion of attorney fees at resolution sessions and resolution session is a proper venue for discussing payment of attorney fees.).

Regarding the second presumption, the reason our cases typically do not settle at the resolution meeting is not attorney fees. Rather, cases do not resolve at resolution meetings because the parties have not reached an agreement regarding the substantive evaluations and/or placement and/or programmatic issues which gave rise to the hearing. Often a lack of complete educational records can also impact the ability to get a case resolved at the resolution meeting. As discussed above, historical information regarding, for example, the reading programs a child may have received in the past, is important for determining exactly which reading program a parent may want to request in order to resolve her concerns about a current program's effectiveness. New rules requiring school districts to timely send copies of records to parents would, in our opinion, increase the number of cases that could resolve at the resolution meeting more than any rule bifurcating the attorney fee issues. In fact, we believe a rule requiring either hard copies or electronic copies of a child's records

to be sent to parents or their representatives within 15 days of such request would serve to greatly reduce the time for resolution of complaints at all stages (i.e., resolution meetings, mediation, before complaints are filed).

The proposed rules regarding resolution meetings omits Alabama's promise, as an SEA, to allow the use of other state enforcement mechanisms (a state complaint, mediation, or due process hearing) for enforcement of resolution agreements. The proposed rule also omits the corresponding requirement that the "use of those mechanisms is not mandatory and must not delay or deny a party the right to seek enforcement of the written agreement in a State court of competent jurisdiction or in a district court of the United States." See current Ala. Admin. 290-8-9.08(9)(c)3.(viii). It is unclear why this section regarding alternate enforcement mechanisms has been eliminated. By limiting a parent's ability to enforce an agreement to simply filing in court, the proposed rule greatly increases costs for parents in enforcing a resolution agreement. The filing fee for federal district court is now approximately $450.00. In contrast, there is no filing fee currently associated with filing a due process hearing request. The proposed rule also raises the problem of appropriate exhaustion under IDEA, as discussed above in connection with claims pursuant to Section 504.

It is our recommendation that the state language remain the same, or that it mirror the federal language.

VI. INCLUSION OF ADDITIONAL HEARING RULES.

According to the Supreme Court, "IDEA hearings are deliberately informal and intended to give ALJs the flexibility that they need to ensure that each side can fairly present its evidence. IDEA, in fact, requires state authorities to organize hearings in a way that guarantees parents and children the procedural protections of the Act. See § 1415(a)." *Schaffer v. Weast*, 546 U.S. 49, 61 (2005).

Pursuant to ALSDE proposed rule 290-8-9.08(9)(c)12.(i)(I), as part of a hearing officer's prehearing activities, the hearing officer "*shall ensure and demand specificity for each and every allegation raised in a due process hearing.*" To the extent that this additional language is meant to represent an additional requirement beyond determining the sufficiency of the complaint, it imposes a burden on petitioners (primarily parents) that it does not impose on respondents (typically school districts). There is no corresponding requirement that the hearing officer "demand specificity" for all defenses to due process allegations.

Pursuant to ALSDE proposed rule 290-8-9.08(9)(c)12.(i)(IX), as part of a hearing officer's prehearing activities, the hearing officer shall issue a "Prehearing Order" that, inter alia, "*shall address the parties' joint stipulation of exhibits and joint stipulation of facts for the due process hearing*." No where else in the proposed rules are the joint stipulation of exhibits and joint stipulation of facts mentioned. It is unclear if the joint stipulations are something that the parties would work together to propose at a time after the prehearing order or if this is something that would

be required to be proposed prior to issuance of the order.

If the joint stipulation of exhibits was required before the prehearing order, then it would seem to contradict the five day rule for disclosure of evidence. IDEA guarantees a parent certain due hearing rights by statute, including "the right to present evidence and confront, cross-examine, and compel the attendance of witnesses". 20 U.S.C. 1415(h). IDEA does not contain an elaborate or complicated system for presentation of evidence. The statute does, however, provide the following:

> (2) Disclosure of evaluations and recommendations
>
> (A) In general
>
> Not less than 5 business days prior to a hearing conducted pursuant to paragraph (1) [impartial due process hearing], each party shall disclose to all other parties all evaluations completed by that date, and recommendations based on the offering party's evaluations, that the party intends to use at the hearing.
>
> (B) Failure to disclose
>
> A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

20 U.S.C. 1415(f)(2).

IDEA's regulations mirror the statutory language. See 34 C.F.R. 300.512. The only notice requirements for witnesses in IDEA is connected to the five day rule found in 20 U.S.C. 1415(f)(2). Because the proposed rule regarding stipulation of exhibits could be interpreted to place an additional notice burden on a parent's due process hearing rights, we believe it would violate IDEA. See *Letter to Lenz*, 37 IDELR 95 (OSEP 2002) ("Other than the notice provisions expressly contained in the IDEA, no other notice provisions can be applied to limit the statutory right to a due process hearing."). It could also deprive parents of additional time prior to a hearing to develop their case.

Because traditional discovery is not provided for under the due process hearing rules, requiring stipulated facts puts both parties, but most particularly the parent, at a disadvantage as the parent has likely had little chance to question district witnesses prior to a due process hearing. Again, because the joint stipulation of facts is not described or explained elsewhere in the proposed rules, it is unclear how this would be implemented.

Under the "General Procedures Pertaining to the Hearing" subsection, ALSDE proposes adding a presumptive time limit for due process hearings, which hearing officers can alter for good and sufficient cause. See new Ala. Admin. 290-8-9.08(9)(c)12.(iii)(VI)(I). The proposed rule sets the presumptive limit at three calendar days. While we understand the State's interest in providing general time limits for a hearing, we believe four days is a better length of time than three days. In practice, the at least the first hour and sometimes as much as the first half day for any due process

hearing is typically taken up with opening statements and other administrative matters. Actual witness testimony and/or presentation of exhibits through testimony does not typically start until later in the day. We believe limiting hearings to a time period that is very short may have the unintended consequence of causing petitioners to file multiple hearing requests about smaller, discreet issues rather than one hearing request that covers all issues then known regarding a particular child. Multiple hearing requests would ensure that a petitioner had more time for each issue, although it may also cause inefficiencies including repeated presentation of past general history for a child to multiple hearing officers.

Proposed 290-8-9.08(9)(c)12.(iii)(VI)(I) also provides that a hearing "should be conducted upon consecutive or successive business days and scheduled during a prehearing conference". We believe this is a good guiding principle for due process hearings. When hearing dates are weeks apart, it is often difficult to remember exactly what was covered previously. This new guideline may also serve to shorten the overall time between the initial complaint and final resolution of a matter. Of course, there are times when consecutive or successive days are not practicable and we believe the proposed rule appropriately gives hearing officers discretion to alter the schedule for cause.

Although the proposed rules also allow hearing officers discretion regarding equitable time for parties, it is unclear how this would work in practice. Would a party's allotted time for presentation of his/her case include the time spent on cross-examination from the opposing party? How can a parent, who has not had experience in questioning witnesses, estimate the length of time for presentation of his/her case? Another problem is that the losing party to a due process hearing has the right to an appeal to the Federal District Court of Alabama. During the appeal stage, both parties have the right to offer additional evidence; and the Court must give a modified *de novo* review of the record. Courts in Alabama also typically want to review a fully developed record. It is easy to see how limitations on presentation of evidence might frustrate the appeal process. A party denied the right to present certain testimony would likely seek (and may be able) to admit additional evidence and/or assert that they were deprived of the opportunity to fully develop the record. This may well result in a remand to the hearing officer with an Order to develop the record or provide a hearing. This would have the effect of greatly expanding the time period before a final decision on a child's educational programs and services could be made.

Also within the "General Procedures" subsection, ALSDE proposes deleting a portion of the procedure for when a principal party fails to appear. The proposed rule states that "*[i]f a principal party fails to appear, the hearing officer may hold the hearing after noting in the record that proper notice was provided*." The deleted language provided further, "or the hearing may be adjourned or postponed." It is unclear why the remedies following "or" were deleted. We believe the hearing officer should retain discretion to postpone the hearing if, for example, a principal party has an unexpected medical emergency preventing appearance on a particular scheduled date. The imposition of such a harsh penalty without consideration for circumstances or imposition of an alternate remedy could effectively deny parents' right to due process.

VII. PROPOSED RULES REGARDING GRADUATION

IDEA provides that, "In general, [a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school." 20 U.S.C. 1412(a)(1)(A). As part of IDEA's reauthorization in 2004, Congress found that "[a]lmost 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 [children with disabilities] and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to ... be prepared to lead productive and independent adult lives, to the maximum extent possible". 20 U.S.C. 1400(c)(5)(A)(ii) (internal numeration omitted). In light of this and other findings, Congress included as one of IDEA's purposes that the special education and related services provided to students with disabilities be "designed to meet their unique needs and prepare them for further education, employment, and independent living". 20 U.S.C. 1400(d)(1)(A). A student's high school years are an important time for implementation of this purpose.

During each of IDEA's re-authorizations, Congress's intent was to strengthen the rights of and services due to children with disabilities. In 1990, Congress did so by adding the requirement that schools provide transition services to assist children with disabilities in their transition to a post secondary environment. See *Todd D. v. Andrews*, 933 F.2d 1576, fn. 2 (1991) (explaining history of Congress's inclusion of transition services). In 2004, Congress enhanced and bolstered IDEA's transition requirements in order to improve outcomes of such students. The amendment was Congress's reaction to the fact that children with disabilities were leaving school with very poor outcomes in their post secondary environments. Congress placed "added emphasis on transition services so that special education students leave the system ready to be full productive citizens, whether they go on to college or a job." 150 Cong. Rec. S11653-01, S11656 (Nov. 19, 2004) (Conf. Rep. accompanying H.R. 1350) (Statement of Sen. Dodd). IDEA requires that an IEP contain appropriate "transition services" beginning when the child is sixteen years old, or younger if appropriate. See 20 U.S.C. 1400(d)(1)(A); 20 U.S.C. 1414(d)(1)(a)(i)(VIII); 34 C.F.R. 300.320(b). Transition services are defined as a "coordinated set of activities" "focused on improving the academic and functional achievement of a child with a disability to facilitate the child's movement from school to post-school activities" including "vocational education, integrated employment, ... adult services, independent living, or community participation" and, if appropriate, training in the "acquisition of daily living skills". 34 C.F.R. 300.43.

We believe ALSDE's proposed 290-8-9.04(3) in effect changes the upper-age eligibility requirements, limiting eligibility to children with disabilities who have not earned an the Alabama High School Diploma *"through a completed pathway"* and who have not reached their twenty-first birthday by August 1. The "Agencies Responsible for Transition" section at 290-8-9.05(12) has also been altered to state that a school district's responsibility for oversight of participating agencies providing transition services to students with disabilities ends upon the child's receipt of the Alabama High School Diploma *"through a completed pathway"* or by the child exceeding the age of

eligibility for FAPE. The "Graduation Activities and Diplomas" section found at 290-8-9.10(9) has been similarly altered to indicate that completion of the essentials pathway allows students to receive the same diploma as completion of the general education pathway. Although we understand the State's interest in increasing graduation rates as part of its "Plan 2020", we believe ALSDE's proposed update to the administrative rules regarding graduation may cause many special education students to miss out on important opportunities for transition services as well as additional academic remediation. It is our understanding that the essentials pathway is basically the same as the old occupational diploma pathway, and similarly contains many courses that will not be accepted as meeting the high school diploma requirements for most colleges and universities.

We believe additional language should be added clarifying that completion of the "essentials pathway" and receipt of a diploma for doing so does not cut off a special education student's eligibility for continued receipt of appropriate services and programs prior to age 21 or completion of the "general education pathway". Without such additional language, we believe equating an "essentials pathway" diploma with a "regular" diploma based on completion of a general education pathway and subsequently terminating special education eligibility based on this equivalency may violate a student's rights under Section 504 of the Rehabilitation Act as well as Title II of the ADA. These laws prohibit, inter alia, (1) denying a qualified individual with a disability, on the basis of the disability, the opportunity to participate in or benefit from an aid, benefit, or service; and (2) treating individuals with disabilities differently by providing different or separate aid, benefits, or services to individuals with disabilities or any class of individuals with disabilities unless such action is necessary to provide qualified individuals with disabilities with aid, benefits, or services that are as effective as those provided to others. 34 C.F.R. 104.4(b)(1)(i) and (iv) and 28 C.F.R. 35.130(b)(1)(i) and (iv). See also *Letter to White*, 63 IDELR 230 (OSERS 2014).

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We hope that these Comments have been helpful. Please call Deborah Mattison or Rachel McGinley if you have any questions regarding this document.

Deborah Mattison, Esq.
Rachel McGinley, Esq.
Wiggins, Childs, Pantazis, Fisher and Goldfarb
The Kress Building
301 19th Street North
Birmingham, AL 35203
(205) 314-0500