

The IDEA 2004 and IDEA 2006 Regulations: What You Need to Know

District of Columbia Special Education Due Process Hearing Officer Training

August 2007

***The training outlines provided by Art Cernosia, Esq. are current up through September 2007 and August 2007, respectively. Mr. Cernosia makes no guarantee regarding the accuracy of the information included in these outlines after the dates of production.

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I. Introduction

- A. The 2004 IDEA reauthorization - the Individuals with Disabilities Education Improvement Act of 2004 (IDEA 2004) - was signed into law on December 3, 2004. Other than the personnel requirements which went into effect when the bill was signed in December 2004, the new statutory provisions went into effect on July 1, 2005.

This outline summarizes the current statutory and regulatory requirements. The impact of the 2006 IDEA final regulations is highlighted throughout the outline under the bold font headings. Even with the new federal regulations promulgated, many questions of statutory interpretation remain. In addition, consideration needs to be given to any state laws or regulations which may exceed the IDEA 2004 requirements along with provisions of applicable consent decrees.

Throughout the outline, reference is made to a series of Question and Answer documents prepared by the Office of Special Education and Rehabilitative Services (OSERS) in the United States Department of Education. These documents contain informal guidance representing the Department's interpretation of the IDEA statute and regulations and are not legally binding. One can view these documents in full at: <http://idea.ed.gov>

II. Individuals With Disabilities Education Improvement Act of 2004 History

- A. The President signed the IDEA bill into law - December 3, 2004.
- B. The IDEA changes, except for the personnel requirements, took effect on July 1, 2005. (Public Law 108-446)
- C. The final IDEA regulations, released in August 2006, took effect on October 13, 2006. (34 Code of Federal Regulations, Part 300)
- D. Title 5, D.C. Board Rules, Chapters 25 and 30 revised

III. Identification and Evaluation

- A. Child Find (34 CFR 300.111 and 131)
 - 1. Covers all children with disabilities, including students attending private schools placed by their parents.

The IDEA places the responsibility for child find activities on the Local Education Agency (LEA) where the private elementary or secondary school is located regardless of the residency status of the student. Child find activities must allow for the equitable participation for parentally placed private school students. The IDEA also requires that the LEA consult with appropriate representatives of private schools that serve children with disabilities and representatives of parents who have placed their children in private schools on how to carry out child find activities. In addition, expenditures for child find are not considered as part of the pro rated amount which LEAs need to spend on services for private school children with disabilities.

Note: In D.C., an LEA includes any public agency or any charter school unless the charter school ceded responsibility to the DC Public Schools. (Chapter 30, Section 3001)

The IDEA clarifies that the child find requirements apply to highly mobile children (such as migrant children), homeless children, children who are wards of the state and children who may have a disability and be in need of special education even though they are advancing from grade to grade.

Note: The definition of a homeless child includes not only those children and youth who are living on the streets, cars, parks, etc., but also includes migratory children and children who are sharing housing of other persons due to loss of housing, economic hardship, or a similar reason (McKinney-Vento Homeless Assistance Act, 42 U.S.C. 11434a, Section 725).

As applied to preschoolers, ages 3-5, the agency responsible for child find depends on whether the child is parentally placed in a day care center or preschool, meeting the state's definition of an elementary school. If yes, the LEA where the private preschool program is located is responsible for child find. If no, the LEA of residence is responsible for child find (Letter to Smith, (OSEP, December 1, 2006)).

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- Clarifies that parentally placed private elementary and secondary students are subject to child find by the LEA where the private school is located even if the student is from out of state. (300.131 (f))
- Parental consent must be obtained before personally identifiable information is released between officials in the LEA where the private school is located and officials in the LEA of the parent's residence (300.622 (a))

Note: In D.C., the written referral for an evaluation is sent to the Principal if the student is currently enrolled in D.C., the referral is sent to the Superintendent's designee if the student is not enrolled in D.C. at the time of the referral. (Chapter 30, Section 3004.1)

B. Initial Evaluation (34 CFR 300.301)

1. An initial evaluation shall be conducted, pursuant to a request by the parents or the public agency, before the initial provision of special education and related services to a child with a disability.

In conducting the evaluation, the LEA must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information to determine whether the child is special education eligible and the content of the child's IEP.

The evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the child's disability category. Also, if appropriate, members of the IEP Team and other qualified personnel review existing information to determine what additional data needs to be collected as part of the evaluation.

The evaluation must be completed and the eligibility determination must be made within 60 days from the date of consent unless the State establishes a different timeframe. Exceptions are permitted in situations where the student moves to a new LEA prior to the eligibility determination (in which case the LEA and the parent must agree to a specific time when the evaluation will be completed) or if the parent fails to produce the student for the evaluation.

Note: In D.C., the timeframe is 120 days from referral to the student's placement (including evaluation, eligibility and placement).

Screening by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation is not deemed an evaluation.

In addition, an evaluation involving two school districts in the same academic year shall be coordinated and expeditiously completed.

C. Evaluation Contents (34 CFR 300.305)

1. Relevant functional and developmental information

2. Information from parents
3. Information related to enabling access in and progress in the general curriculum
4. Technically sound instruments that assess cognitive and behavioral factors in addition to physical and developmental factors
5. Review of existing data
6. Current classroom-based assessments and observations
7. Teacher and related service providers' observations

The regulatory requirements include:

- a. Materials and procedures used to assess a child with limited English proficiency are selected and administered to ensure that they measure the extent to which the child has a disability and needs special education, rather than measuring the child's English language skills.
- b. If assessment is not conducted under standard conditions, a description of the extent to which it varied from standard conditions (e.g., the qualifications of the person administering the test, or the method of test administration) must be included in the evaluation report.

In addition, general curriculum is referred to as the "same curriculum as for nondisabled children."

8. Evaluations are to be administered in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally unless not feasible.

D. Notice/Consent for initial evaluation (34 CFR 300.300)

1. Written notice of initial evaluation

2. Consent for initial evaluation

Parental consent is not required before reviewing existing data as part of an evaluation or administering a test/evaluation administered to all children.

3. Refusal to consent. The District may use mediation and due process hearing procedures to pursue the evaluation.

4. If the child is a ward of the state (which does not include a child who has a foster parent) and not residing with a parent, reasonable efforts shall be made to obtain parent consent. No parental consent is required if the parent cannot be found, parental rights have been terminated, or a judge has appointed an individual with educational authority.

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- If the parent does not provide consent for the initial evaluation or reevaluation, the LEA may pursue the issue through mediation or a due process hearing. The LEA does not violate its child find responsibilities if it declines to pursue the evaluation after making reasonable efforts to obtain parental consent. (300.300 (a)(3)(ii) and (c)(i))
- If a parent of a student who is home schooled or parentally placed in a private school does not provide consent for the initial evaluation or reevaluation, the LEA may not use mediation or a due process hearing to override the parent's refusal. The LEA is not required to consider such child as eligible for services. (300.300 (d)(4))

E. Re-evaluations (34 CFR 300.303)

1. A re-evaluation is required to be conducted if conditions warrant, if the child's parent or teacher requests, but at least once every three years. The three year re-evaluation may be waived by agreement of

the LEA and the parents. In addition, a re-evaluation need not be conducted more than once per year unless the parents and the LEA both agree.

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- The Analysis and Comments the Regulations published in the Federal Register of August 14, 2006 (hereafter referred to as the Comments) state that if the parent requests a reevaluation more than once per year and the LEA does not agree that it is needed, the LEA shall provide the parents with written notice of the agency's refusal to conduct the reevaluation. (Page 46640 of the Federal Register)

2. Consent required. A District may conduct the re-evaluation without consent if it has taken reasonable measures to obtain consent and the parent has not responded.

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- The IDEA requires that the agency have a record of its attempts in requesting consent for re-evaluation in meeting the reasonable measure requirement.
- If the parent does not provide consent for the reevaluation and the LEA chooses not to pursue the reevaluation by using the consent override provision (such as a due process hearing or mediation) the LEA need not continue to provide FAPE to the child if the LEA determines that based on existing data the child does not continue to meet special education eligibility criteria.

In such case, the LEA must provide the parent with prior written notice of its proposal to discontinue the provision of FAPE to the child. Questions and Answers on IEPs, Evaluations, and Reevaluations, Questions D-2 (OSERS (2007)).

F. Scope of Re-evaluation (34 CFR 300.305)

1. If the IEP Team and “other qualified professionals” determine that no additional data is needed to confirm continued eligibility, the District shall:
 - a. Provide notice to parents.
 - b. Afford the right of parents to request additional assessments. The district is not required to conduct the assessment unless requested by the parents.
2. The IDEA permits the IEP Team and other qualified individuals to review the existing evaluation data to determine the scope of the evaluation without a Team meeting required.

G. Exiting Special Education (34 CFR 300.305(e))

1. An LEA shall reevaluate a child with a disability before determining that the child is no longer eligible for special education services.

A re-evaluation is not required due to a termination of eligibility resulting from graduation with a regular high school diploma or exceeding the State’s age eligibility for FAPE. Note that graduation with a regular diploma constitutes a change of placement requiring prior written notice.

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- The term regular high school diploma does not include an alternative degree that is not fully aligned with the State’s academic standards, such as a certificate or a general educational development credential (GED). (300.102 (a)(3)(iv))
- The Comments state that the IDEA does not require an LEA to evaluate a student for other agency purposes such as a vocational rehabilitation program, a college

or other postsecondary setting. (Page 46644)

- The Comments raise the question of whether parents who previously consented to special education services have the right to subsequently remove their child from special education. In a letter previously issued by OSEP, the OSEP stated: “If a public agency believes that a child continues to be eligible for special education, it cannot simply defer to the parent’s request and remove the student from special education services” (Letter to Williams (OSEP 1991). The Department indicated in the Comments that they anticipate publishing a notice of proposed rulemaking in the near future seeking input on this issue. (Page 46633)

H. Independent Educational Evaluation (34 CFR 300.502)

1. Parents have the right to obtain an Independent Educational Evaluation (IEE). Upon requesting an IEE, the public agency shall provide to the parents information about where an IEE may be obtained and the agency criteria applicable for IEEs.
2. The IEE is at public expense if the parent disagrees with the district’s evaluation unless the district initiates a due process hearing.
 - a. District has the right to initiate a hearing without unnecessary delay to show that its evaluation is appropriate.
3. The IDEA allows a public agency to ask for (but not require) an explanation by the parent why he/she objects to the agency’s evaluation. Such request may not unreasonably delay payment or due process.
4. The IEE at public expense must meet the same criteria as the district uses for its evaluations.

Note: In D.C., the SEA determines maximum hourly rates and total amounts for Independent Educational Evaluations allowing for exceptions for unique circumstances. (Chapter 30, Section 3027)

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- The independent educational evaluation must be considered by the LEA in any decision made with respect to FAPE if the IEE meets the agency criteria. (300.502 (c)(1))
- A parent is entitled to only one independent educational evaluation at public expense each time the agency conducts an evaluation with which the parent disagrees. (300.502 (b)(5))

V. Eligibility

- A. The term ‘child with a disability’ means a child – (34 CFR 300.8)
1. with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (hereinafter referred to as ‘emotional disturbance’), an orthopedic impairment, autism, traumatic brain injury, deaf-blindness, multiple disabilities, other health impairments, or specific learning disabilities; and
 2. who, by reason thereof, needs special education and related services.

Special education is defined as specially designed instruction (adapting, as appropriate, the content, methodology, or delivery of instruction) to address the unique needs of the child that results from the disability and to ensure access to the general curriculum. Special education includes travel training and related services (if state standards include related services as special education).

- B. Decisions made by a team of qualified individuals and the parent. (34 CFR 300.306)
- C. Copy of eligibility determination and evaluation report provided to parent. (34 CFR 300.306)
Note: In D.C., the report shall include the signatures and title of qualified examiners who administered the assessments and wrote the report.

- D. Not eligible if the determinant factor is the lack of instruction in math or due to the limited English proficiency of the student. In addition, a student is not eligible for special education services if it is found that the determinant factor in learning problems is the lack of appropriate instruction in reading, including essential components of reading instruction as defined by the ESEA. The ESEA defines the essential components as: phonemic awareness, phonics, vocabulary development, reading fluency including oral reading skills, and reading comprehension strategies. (34 CFR 300.306)
- E. States have the discretion of using the “developmental delay” standard for determining eligibility for students ages three through nine. (34 CFR 300.8 (d))
Note: In D.C., developmental delay covers students ages 3 through 7. It does not cover students who meet the following disability categories: autism, traumatic brain injury, mental retardation, emotional disturbance, other health impairment, orthopedic impairment, visual impairment including blindness, hearing impairment including deafness and speech-language impairment. (Chapter 30, Section 3001)
- F. An LEA may opt out of using the severe discrepancy part of the specific learning disabilities definition (SLD) and replace it by using a response to scientific research based intervention (RTI) model of eligibility as part of the evaluation procedures. (34 CFR 300.307)
- G. States must establish policies and procedures designed to prevent inappropriate over-identification or disproportionate representation by race or ethnicity. (34 CFR 300.646)

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- The definition of “other health impairment” now includes Tourette syndrome. (300.8 (c)(9))
- States must adopt criteria for determining SLD. A State must permit a process that determines if a child responds to scientific research-based interventions and may permit the use of other alternative research based procedures. (300.307 (a)).

Note: The language in the proposed regulations would have allowed a State to prohibit the use of severe discrepancy was removed from the final regulations. The Comments to the regulations state that States are “free to prohibit the use of a discrepancy model.” (Page 46646)

- A child may be deemed to have a SLD if:
 - the child does not achieve adequately for the child’s age or does not meet State approved grade level standards in one or more of the following areas when provided with learning experiences and instruction appropriate for the child’s age or State approved grade level standards:
 - oral expression, listening comprehension, written expression, basic reading skills, reading fluency skills, reading comprehension, math calculations, math problem solving
 - the child does not make sufficient progress to meet age or State approved grade level standards when using a process based on response to scientific, research-based interventions or
 - the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both relative to age, State approved grade level standards or intellectual development relevant to determining a SLD using appropriate assessments. (300.309 (a)(1))
- The eligibility team must consider data that prior to, or as part of the referral process, the child was provided appropriate instruction in regular education settings delivered by qualified personnel and repeated date based documented assessments of achievement at reasonable intervals, reflecting formal assessments during instruction which was reported to the parents. (300.309 (b))
- Parental consent must be promptly requested to evaluate if the

child needs special education and related services if the child has not made adequate progress after an appropriate period of time, a referral for a special education evaluation must be made. (300.309 (c)) The terms “promptly” and adequate” are not defined in the IDEA regulations. A State may choose to establish a specific timeline that would require an LEA to seek parental consent for an evaluation if a student has not made progress that the district deemed adequate. Questions and Answers on Response to Intervention and Early Intervening Services, Question C-5 (OSERS (2007))

- The IDEA allows parents to request an evaluation at any time. If the LEA is using the RTI process and the parents request an evaluation, the LEA must conduct the evaluation or provide the parent with prior written notice of its refusal to evaluate. The parent can then request a due process hearing to resolve the dispute. Questions and Answers on Response to Intervention and Early Intervening Services, Question C-1 (OSERS (2007)).

- The 60 day timeframe for evaluation must be adhered to unless extended by mutual written agreement. (300.309 (c))

- If RTI was used, documentation is required addressing: the instructional strategies used and the student centered data collected; parent notification of the State’s policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided; strategies for increasing the child’s rate of learning; and the parent’s right to request an evaluation. (300.311 (a)(7))

- If a State or LEA requires the use of RTI in identifying children with SLD, then all children suspected of having a SLD in all schools in the LEA would be required to use the process. An LEA cannot use RTI for purposes of eligibility determinations until RTI was fully implemented in the LEA. Questions and Answers on Response to Intervention and Early Intervening Services, Question F-4 (OSERS (2007)).

VI. Free Appropriate Public Education (FAPE)

- A. If eligible, the student is entitled to a FAPE. The term ‘free appropriate public education’ means special education and related services that –
1. have been provided at public expense, under public supervision and direction, and without charge;
 2. meet the standards of the State educational agency;
 3. include an appropriate preschool, elementary, or secondary school education in the State involved; and
 4. are provided in conformity with the individualized education program.

VII. Individual Education Programs (IEP)

- A. IEP Team (34 CFR 300.321)
1. the parents;
Note: In D.C., the LEA may designate an advocate to assist the parent as a member of the Team with the consent of the parent. (Chapter 30, Section 3003).
 2. not less than one regular education teacher of such child (if the child is, or may be, participating in regular education);

A regular education teacher must be part of an IEP Team when developing, reviewing, and revising the child’s IEP to the extent appropriate. The regular education teacher should assist in the determination of appropriate positive behavioral interventions/strategies, supplementary aids and services, program modifications, and supports for school personnel.
 3. not less than one special education teacher, or where appropriate, at least one special education provider of such child;
Note: In D.C., if the Team will be addressing evaluation or determining eligibility, the Team shall include qualified individuals

with credentials and expertise to conduct evaluations in the areas of suspected disability. (Chapter 30, Section 3003.3)

4. a representative of the LEA who –
 - a. is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
 - b. is knowledgeable about the general curriculum; and
 - c. is knowledgeable about the availability of resources of the LEA.

The LEA representative must have the authority to commit the LEA to implement the IEP resulting from the meeting.

5. an individual who can interpret the instructional implications of evaluation results – who may be one of the above members;
6. at the discretion of the parent or the LEA, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

The party inviting these other individuals has the authority to determine whether they have knowledge or special expertise to participate.

7. whenever appropriate, the child with a disability.

If transition is being discussed, the student shall be invited to participate at the IEP meeting. If the child does not attend, the school shall take other steps to ensure that the child's preferences and interests are considered.

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- The Comments indicate that if the student is a minor, the parents (unless their rights have been limited or extinguished) have the authority to determine whether

the student should attend the IEP Team meeting. (Page 46671)

8. If transition services are being discussed, representatives of other agencies who are likely to be responsible for paying for or providing transition services must be invited.

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- To the extent appropriate, with the consent of the adult student or parents, the public agency shall invite representatives of other agencies likely to be responsible for providing or paying for transition services. (300.321 (b)(3))
9. If the public agency is considering a private school placement, it shall ensure that a representative of the private school attends the meeting or participates through other means.
 10. If the child was previously served under Part C, the parent has the right to request that the Part C Coordinator or representative be invited to the initial IEP meeting.
 11. An IEP Team member may be excused from attending the IEP Team meeting, in whole or in part, if the parents and LEA agree in writing because the area of the curriculum or related service is not being modified or discussed. The agreement must be in writing.

An IEP Team member may be excused from attending the IEP Team meeting even if their curricular area or related service area is being discussed by the written agreement and consent of the parent and the LEA. The IEP Team member shall submit their input to the Team in writing prior to the meeting.

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- The Comments distinguish between an agreement with the parents and receiving consent from the parents. An agreement refers to a written understanding between the parent and LEA regarding excusal. Consent means

that the parent has been fully informed and understands that the granting of consent is voluntary and may be revoked. Therefore, the LEA must provide the parent with sufficient information regarding the proposed excusal of a member. (Pages 46673-46674)

- The Comments also clarify that the LEA determines the specific personnel to fill the roles for the school's required IEP Team participants (i.e., regular classroom teacher). A parent does not have the legal right to require other members of the school/public agency who are not designated by the LEA to attend the IEP Team meeting. (Page 46674). If the IEP Team includes not less than one regular education teacher of the child, the excusal provisions would not apply to the excusal of other regular education teachers of the child. Questions and Answers on IEPs, Evaluations, and Reevaluations, Question C-2 (OSERS (2007)).
- The Comments state that if the LEA is aware of the need to request that an IEP Team member needs to be excused, the LEA could, but is not required, to include this in the notice of the meeting since the LEA may not be aware of the need to request an excusal at the time the notice is sent out. (Page 46678)
- The Comments also caution that an LEA may not routinely or unilaterally excuse an IEP Team member. An LEA that routinely excuses IEP Team members from attending IEP Team meetings would not be in compliance with the IDEA and therefore would be subject to the State's monitoring and enforcement provisions. (Page 46674)
- The Comments clarify that a State must allow the LEA and parents the right to agree to excuse an IEP Team member. This is not an optional requirement for a state. (Page 46673)
- The LEA representative may be excused from an IEP meeting, in whole or in part, when the parents and

LEA agree in writing.

It may not be reasonable, however, for the LEA to agree to the excusal of the LEA representative if that individual is needed to ensure that decisions can be made at the meeting about the commitment of agency resources necessary to implement the IEP. Questions and Answers on IEPs, Evaluations, and Reevaluations, Question C-1 (OSERS (2007)).

12. The IEP may be amended between the annual IEP meetings without the necessity of calling a new IEP meeting if agreed to by the parents and the LEA. The amendment or modification to the IEP shall be in writing. Upon request, the parents shall be provided a revised copy of the IEP with the amendments incorporated.

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- If changes are made to the child's IEP as a result of an agreement with the parent outside the IEP Team meeting process, the child's IEP Team must be informed of those changes. (300. 324(a)(4)(ii))
- Although the IDEA does not specify how the IEP Team receives notices of the changes made to the IEP, the LEA must maintain records to show compliance with the IDEA requirements. Questions and Answers on IEPs, Evaluations, and Reevaluations, Question C-7 (OSERS (2007)).
- If the IEP is amended without convening an IEP Team as agreed to by the parents and LEA, the LEA is still required to provide the parent with prior written notice of any proposed or refused changes to the identification, evaluation, educational placement or the provision of FAPE to the child. Questions and Answers on IEPs, Evaluations, and Reevaluations, Question C-9 (OSERS (2007)).

B. Team Considerations (34 CFR 300.324)

1. strengths of the child
2. concerns of the parent
3. evaluation results
4. if behavior impedes learning of self or others, strategies, positive behavioral interventions and supports.
Note: In D.C., the behavior intervention plan is incorporated into the IEP. (Chapter 30, Section 5007.3)
5. language needs of a child with limited English proficiency
6. instruction in Braille for students who are blind or visually impaired unless the Team determines otherwise after an evaluation of the child's skills
7. communication needs of students and for students who are deaf or hard of hearing, the child's language and communications needs and the opportunities to directly communicate with peers and professional personnel
8. assistive Technology Device/Service needs
9. an agency is prohibited from requiring a child to obtain a prescription for a medication as a condition for attending school, getting an evaluation, or receiving services.

C. IEP Contents (34 CFR 300.320)

1. Present Level of Academic Achievement and Functional Performance
 - a. Involvement and progress in the general curriculum.

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- The Comments specify that every IEP is required to include a statement of the child's present level of academic achievement and functional performance. The Comments stated that the Department cannot

change the regulations to only require functional performance levels only if determined appropriate by the IEP Team. (Page 46662)

- The Comments discuss that the term “functional” is generally understood to refer to skills or activities that are not considered academic and often used in the context of routine activities of everyday living. (Page 46661)

2. Goals/Objectives/Benchmarks

- a. Measurable annual goals including academic and functional goals
- b. An IEP must include short term objectives or benchmarks only for those students with disabilities who will be assessed using alternate achievement standards (students with significant cognitive disabilities).

3. Special Education and Related Services

- a. Anticipated frequency, location, and duration
- b. Projected date for the beginning of services
- c. The special education and related services in the IEP must be based on peer-reviewed research to the extent practicable.
- d. An assistive technology device/related service does not include a medical device that is surgically implanted or the replacement of such device.
- e. A related service includes nursing services designed to enable a student to receive FAPE.

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- The Comments define peer reviewed research generally as “research that is reviewed by qualified and independent reviewers to ensure that the quality of

the information meets the standards of the field before the research is published”. However, the comments note that there is no single definition of the term. (Page 46664)

- The Comments state that there is nothing in the IDEA that requires an IEP to include specific instructional methodologies. An IEP Team may address specific instructional methods in the IEP if they choose to do so. (Page 46665)
- The Comments clarify that the IDEA does not require the IEP to include information about the specific person(s) providing the special education and related services. (Page 46667)
- Related services do not include a medical device that is surgically implanted, the optimization of device functioning, maintenance of the device, or the replacement of that device. Services may include routine checking of an external component of a surgically implanted device. (300.34 (b))
- Related services do include appropriate monitoring and maintenance of medical devices needed to maintain health and safety of a child (including breathing, nutrition or operation of other bodily functions). (300.34 (b)(2)(ii))
- Interpreting services include sign language transliteration and transcription services (communication access real time translation, C-Print and Type Well). (300.24)
- The final Regulations combine school health and school nurse services into one category.
- Physical education services, specially designed if necessary, must be available to every child receiving FAPE unless children without disabilities do not receive physical education in that grade. (300.108)

4. Program Modifications
5. Support for school personnel to assist the student in meeting IEP goals, progress in the general curriculum, and to be educated with nondisabled children. Support could include special training for staff in meeting a unique and specific need of the child.
6. Explanation of the extent, if any, to which the child will not participate in class and extracurricular and non-academic activities with nondisabled children.
7. Supplementary Aids and Services

Supplementary Aids and Services is defined as aids, services, and other supports that are provided in regular education classes or other educationally related settings to enable students with disabilities to be educated with nondisabled students to the maximum extent appropriate.

8. Participation in District and State wide assessments

- a. Accommodations/Alternative Assessments

The State must develop guidelines for the provision of appropriate assessment accommodations and participation in alternate assessments when necessary. The IEP shall include appropriate assessment accommodations. If an alternate assessment based on alternate academic content standards will be used to measure the student's proficiency (students with significant cognitive disabilities), the IEP must include the reasons why the student requires such assessment and what alternate assessment will be administered.

- b. Modified Academic Achievement Standards

The United States Department of Education has issued final regulations allowing states to develop modified academic achievement standards for students with disabilities who can make significant progress, but not reach grade level achievement standards after receiving appropriate instruction.

Each state is required to develop clear guidelines for IEP Teams to determine which students qualify for the alternate assessments based on modified academic achievement standards. The criteria for IEP Teams include:

1. The student's disability has precluded the student from achieving grade level proficiency as demonstrated by objective evidence of the student's performance;
2. The student's progress, in response to appropriate instruction, is such that even if significant growth occurs, the IEP Team is reasonably certain the student will not achieve grade level proficiency within the year covered by the IEP;
3. The student's progress must be measured by multiple assessments over a period of time;
4. The IEP goals for the subjects assessed must be based on academic content standards for that grade; and
5. The student could receive a modified assessment in one or more subjects.

c. AYP Determinations

For Adequate Yearly Progress determinations, up to 2% of all students assessed at the LEA and SEA level would be deemed proficient if they successfully pass the alternate assessment based on modified academic achievement standards. This is in addition to up to 1% of all students assessed who may be deemed proficient if they successfully pass the alternate assessment based on alternate academic content standards.

States must use the same "n" or cell size for every subgroup.

States may allow a student to take the state assessment multiple times. The student's best score will be used for accountability determinations.

Also, for the Adequate Yearly Progress determination for the subgroup of students with disabilities, the regulations allow a student with a disability who exits special education to be counted for up to two additional AYP cycles in the subgroup of students with

disabilities. Federal Register, April 9,2007

9. Transition

- a. Transition services (designed with a results oriented process focused on improving the academic functional achievement of the child) must be addressed in the IEP of the student no later than in the year in which they turn 16 years of age.
Note: In D.C., a statement of transition service needs must be in the IEP by age 14 to be implemented no later than age 16.
- b. Appropriate measurable post-secondary goals based upon age appropriate transition assessments related to training, education, employment and where appropriate, independent living skills.

2006 IDEA Regulations

- The Comments clarify that the IEP must have transition goals for training, education, and employment. The only area which postsecondary goals are not required is in the area of independent living skills which are only required if appropriate. (Page 46668)
- The IEP must include measurable postsecondary goals related to education, employment and training whether or not the child's skill levels related to these area are age appropriate based on age appropriate transition assessments. Questions and Answers on IEPs, Evaluations, and Reevaluations, Question A-1 (OSERS (2007)).
- There is no requirement under the IDEA for the LEA to measure postsecondary transition goals once the student has graduated with a regular diploma or exceeds the mandatory age range for the provision of FAPE under State law. Questions and Answers on IEPs, Evaluations,

and Reevaluations, Question A-4 (OSERS (2007)).

- c. At least one year before reaching the age of majority, a statement of rights under State law.
- d. Alternative strategies to meet transition objectives if other agencies fail to provide IEP services

NOTE: When a student exits from special education as a result of earning a diploma or aging out, the LEA shall provide the student with a summary of their academic achievement and functional performance along with recommendations how to assist the student in meeting their post-secondary goals.

- 10. A description of how progress toward the IEP goals will be measured and when periodic progress reports will be provided to the parent.
- 11. Extended School Year (ESY)

Each public agency shall ensure that ESY services are available as necessary to provide FAPE

2006 IDEA Regulations

- The Comments provide that States may use “recoupment” and “likelihood of regression or retention” as their sole criteria, but are not limited to these standards and have considerable flexibility in determining eligibility for ESY services and in establishing State standards for making ESY determinations. (Page 46582)
- The Comments state that there is nothing to limit the LEA from providing ESY services during times other than the summer, such as before and after regular school hours or during school vacations if the IEP Team determines that the student requires services during those times in order to receive FAPE. (Page 46582)

D. IEP Meeting Requirements/IEP Implementation (34 CFR 300.323)

1. An IEP must be made available “within a reasonable period of time” following receipt of parental consent for the initial evaluation. An IEP meeting must be held within 30 days of the eligibility determination.
2. The parents must receive notice of the purpose, time, location of the meeting, and who will be in attendance (including whether the student will be invited). In addition, they must be informed of their right to bring other individuals with knowledge or expertise. The IEP meeting may be held by using alternate means such as a video conference or conference call if the parents and LEA agree.

In the event that the parent does not attend, the agency must have a documented record of its attempts to arrange a mutually agreed on time and place for the meeting.

3. An IEP must be in effect before special education and related services are provided. The IEP should be implemented “as soon as possible” after the IEP meeting.
4. The IEP must be accessible to each service provider who is responsible for its implementation.
5. Each service provider must be informed of his/her specific responsibilities related to implementing a child’s IEP.
6. The public agency shall give the parent a copy of the IEP at no cost.
7. A State may allow paraprofessionals who are appropriately trained and supervised under State standards to assist in the provision of special education and related services.
8. An agency must obtain written informed consent from the parents each time private insurance will be used to fund IEP services. Parents must be informed that the IEP services will be provided regardless if the parents use their private insurance.

2006 IDEA Regulations

- The agency must obtain parental consent each time access to public benefits or public or private insurance is sought. The parents must be notified that their refusal to allow access to their public insurance or benefits does not relieve the agency of its responsibility to ensure that all required services are provided at no cost to the parents. (300.154 (d)(2)(iv))

“Each time” that access to public benefits or insurance is sought should be consistent with the timeframes of the IEP. Consent may be obtained one time for the duration of specific services under the IEP and the LEA would not be required to obtain separate consent each time a Medicaid agency or other public insurer is billed for the provision of the service. If the agency is seeking to use the parent’s public insurance to pay for additional services or is changing the amounts of the service (due to the IEP being revised), additional parental consent would be required. Letter to Smith (OSEP, January 23, 2007)

9. If a student on an IEP transfers from one LEA to another LEA in the same State within the same school year, the new LEA shall provide comparable services, in consultation with the parents, until the new LEA either adopts the previous IEP or develops a new IEP.

If a student on an IEP transfers from one LEA to another LEA in a different State within the same school year, the new LEA shall provide comparable services, in consultation with the parents, until the new LEA conducts a new evaluation, if necessary, and develops a new IEP.

The new LEA shall take steps to promptly obtain the educational records and the previous LEA shall promptly respond to such request.

2006 IDEA Regulations

- The Comments clarify that if a student on an IEP transfers to a new state and the new LEA determines that an evaluation is necessary, it would be deemed an

initial evaluation requiring parental consent. (Page 46682)

- The Comments also state that if there is a disagreement as to what “comparable services” are, the dispute could be resolved through mediation or a due process hearing. (Page 46682)
- If, after taking reasonable steps to obtain the transfer student’s records from the previous LEA, including the IEP and other special education records, the new LEA is not able to obtain the IEP from the previous LEA or from the parent, the new LEA is not required to provide special education services to the student. However, the new LEA must place the student in the regular school program and conduct a special education evaluation if the new LEA determines that an evaluation is necessary. Questions and Answers on IEPs, Evaluations, and Reevaluations, Question B-2 (OSERS (2007)).
- Neither the IDEA statute or the regulations establish timelines for the new LEA to adopt the transfer student’s IEP or to develop a new IEP. The new LEA must take steps, within a reasonable period of time, to avoid any undue interruption in the provision of required services. Questions and Answers on IEPs, Evaluations, and Reevaluations, Question B-4 (OSERS (2007)).

VIII. Placement Issues

- A. Least Restrictive Environment (LRE) (34 CFR 300.114-120)
 - 1. To the maximum extent appropriate, children with disabilities are educated with children who are not disabled. Each public agency shall ensure that a continuum of alternative placements is available.
 - 2. Parents must be made members of placement teams.

3. State funding formulas based on the type of setting in which the child is served must be reviewed to ensure that it does not support the violation of LRE requirements. If so, the State must revise the funding mechanism as soon as feasible.
4. LRE also applies to non-academic and extracurricular services and activities such as recess, meals, athletics, counseling, groups and clubs.
5. The placement must be as close as possible to the child's home unless the IEP requires some other arrangement.
Note: In D.C., if the student needs a non-public day school placement, the student must be placed within D.C. unless no program is appropriate. (Chapter 30, Section 3013.6)

2006 IDEA Regulations

- The Comments clarify that placement decisions cannot be made solely on factors such as category of disability, severity of the disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience. (Page 46588)
- The Comments discuss the difference between placement and location. "Placement" refers to the points along the continuum of placement options and "location" is the physical surrounding such as the particular classroom. The school should have the flexibility to assign the child to a particular school or classroom provided that it is consistent with the placement determination. Schools are strongly encouraged to place the student in the school and classroom the child would attend if not disabled. (Page 46588)
- The Comments provide that while the school must notify parents regarding placement decisions, there is nothing in the IDEA that requires a detailed explanation in the child's IEP of why their educational needs cannot be met in the location of the parent's

request. (Page 46588)

B. Unilateral Placements (34 CFR 300.148)

1. Applies to students who previously received special education services from a public agency.
2. A Hearing Officer or Court may order reimbursement if a FAPE was not made available in a timely manner before the student was removed from public school.

The IDEA also requires that the court or hearing officer determine that the private placement made by the parents is appropriate. Such placement may be found to be appropriate even if it does not meet state standards.

3. Parental Notice of Unilateral Private Placement – Reimbursement for the costs of a unilateral private school placement may be reduced or denied if:
 - a. at the most recent IEP meeting that the parents attended prior to removal of their child from the public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the LEA, including stating their concerns and intent to enroll their child in a private school at public expense; or
 - b. 10 business days prior to the removal of the child from public school, the parents did not give written notice to the LEA of their intent to make a unilateral private school placement and a statement of their concerns; or
 - c. prior to the parent's removal of the child from the public school, the LEA informed the parents in writing of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or
 - d. upon a judicial finding of unreasonableness with respect to actions taken by the parents.

- e. EXCEPT -
- (1) if the parent is illiterate and cannot write in English;
 - (2) compliance with the notice requirement would likely result in physical or serious emotional harm to the child;
 - (3) the school prevented the parent from providing such notice; or
 - (4) the parents had not received notice from the LEA of their obligation to provide notice of their intent to make a unilateral private school placement.

United States Department of Education Guidance

A LEA may file a due process complaint when a parent notifies the LEA that the parent intends to unilaterally place their child in a private school because FAPE is an issue. OSERS cited the Yates v. Charles County 212 F.Supp. 2d 470 (D. Md. (2002)) decision to support this position. Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children With Disabilities, Question C-3 (OSERS (2007))

- C. Parentally Placed Private School Students (34 CFR 300.130-144)
1. The LEA where the private elementary or secondary school is located must conduct child find and provide equitable services to parentally placed students without regard to where the children reside.

2006 IDEA Regulations

- Clarifies that parentally placed private elementary and secondary students are subject to child find by the LEA where the private school is located even if the

student is from out of state. (300.131 (f)).

- The LEA where the private elementary or secondary school is located cannot charge the LEA of residence, even if the student is a resident from another state, for child find and equitable services. Questions and Answers on Serving Children With Disabilities Placed by Their Parents at Private Schools, Question G-5 (OSERS (2007)).

2. To the extent consistent with their number and location in the State, amounts expended by a school district in providing services must be equal to a proportional amount of Federal special education funds.

The proportionate share is based on the proportion of the number of parentally placed private school children with disabilities to the total number of children with disabilities in the district. Numbers are based on eligible private school children with disabilities not just the numbers of such children being provided services under a service plan.

2006 IDEA Regulations

- The proportionate share must include both Section 611 grants (ages 3-21) and Section 619 grants (ages 3-5). (300.133 (a))
 - Evaluation costs are not considered part of the service expenditures. (300.131(d))
 - If the LEA does not spend all the proportionate funds by the end of the FY, there is a carry over for one additional year. (300.133(a)(3))
3. Special education services may be provided on site, including parochial schools, to the extent consistent with law.
 4. There is no individual right to receive some or all special education services the child would receive if enrolled in public school

2006 IDEA Regulations

- The Comments state that if found eligible by the LEA where the private school is located, the LEA of residence must make a FAPE available. An IEP must be developed by the LEA of residence unless the parent makes clear their intention to keep their child in the private school. Parental consent required to share information between the LEAs. (Page 46593)
5. The LEA shall consult with private school representatives and representatives of parents who place their children in private schools regarding: the child find procedures; determination of the proportionate share of Federal funds; how the consultation process will operate throughout the year; how, where and by whom special education and related services will be provided; types of services; methods of delivering services; and how and when decisions will be made. The LEA shall get written affirmation of their participation.

The LEA must provide private school representatives with a written explanation if the LEA disagrees with the private school on the provision and types of services.

Private schools can file a complaint with the State Education Agency if it alleges the LEA failed to consult in a meaningful and timely way. An appeal of the SEA decision can be filed with the United States Secretary of Education.

2006 IDEA Regulations

- The Comments give the SEA flexibility to determine how private schools can file a complaint with the State. The State is not required to utilize the state administrative complaint requirements under the IDEA. (Page 46595)
6. Service plans must be developed for a private school child who receives services at a meeting with the IEP Team and representative of the private school. If the private school representative cannot attend, the LEA shall use other methods to ensure their participation. If necessary, the child must be provided transportation, the cost of which may be included in the pro-rated amount required to be

expended.

7. Due process hearings are available to parents of private school students only on the issue of child find. The only avenue of challenging service decisions is by filing an administrative complaint with the SEA.

2006 IDEA Regulations

- The due process hearing regarding child find would be with the LEA in which the private school is located. (300.140 (b)(2))
8. Students who are home schooled would be included only if, under State law, home schools are considered private schools.
 9. The LEA shall provide the SEA the number of children evaluated in private schools, the number of children found eligible for special education and the number of children served.

IX. Disciplinary Actions

- a. Short Term (34 CFR 300.530)

Short term suspensions, appropriate interim alternative settings, or other settings may be ordered for not more than 10 consecutive school days (to the extent such alternatives would be applied to children without disabilities) and for additional removals that do not constitute a change of placement.

A child with a disability can be removed from his/her current placement for up to 10 school days for any violation of school rules to the extent removal would be applied to a child without disabilities. In such a case, a public agency need not provide services for 10 school days or less if services are not provided to a child without disabilities who is similarly removed.

2006 IDEA Regulations

- The Comments clarify that the IDEA does not require that children with disabilities suspended or expelled for

disciplinary reasons continue to be educated with children who are not disabled during the period of their removal. (Page 46586)

- The Comments clarify that the U.S. Department of Education's long standing policy regarding in school suspensions, portions of a day of suspension and bus suspensions, remain in effect.
In school suspensions are not counted if: the child is afforded the opportunity to continue to appropriately progress in the general curriculum, continue to receive the IEP services and continue to participate with non-disabled children to the extent they would in their current placement. Portions of a day that a child is suspended may be considered as a removal in determining whether a pattern of removals exists. Bus suspensions also count if transportation is a part of the IEP and no alternative transportation is provided. (Page 46715)

B. Change of Placement (34 CFR 300.536)

1. A change of placement occurs if –
 - a. The removal is for more than 10 consecutive school days; or
 - b. The child is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another.

2006 IDEA Regulations

- The regulations add another factor for determining whether a disciplinary change of placement has occurred - because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals. (300.536 (a)(2)(ii))
- The Comments provide that the decision of whether a change of placement has occurred is

made by school personnel. The IEP Team need not be involved although there is nothing to prohibit school personnel from involving the parents or IEP Team. (Page 46714)

- It is the longstanding position of the U.S. Department of Education that there is no need to make a change of placement removal under the disciplinary provisions if there is agreement between school personnel and the parents regarding a change in the educational placement when the child has violated the school's code of conduct. Questions and Answers on Discipline Procedures, Question A-1 (OSERS (2007))
- c. The school may consider any unique circumstances on a case-by-case basis when determining whether to order a change of placement.

2006 IDEA Regulations

- The Comments state that “unique circumstances” is best determined at the local level by school officials who know the child and all the facts and circumstances regarding the child's behavior. Factors that could be considered include: the child's disciplinary history, ability to understand consequences, expression of remorse and supports provided by the school prior to the misconduct. (Page 46714)

C. Services (34 CFR 300.530 (d))

1. In the case of a child with a disability who has been removed from his or her current placement for more than 10 school days in that school year, the public agency, for the remainder of the removals, must –

Provide services to the extent necessary to enable the child to participate in the general curriculum, although in another setting and

to progress toward meeting the goals set out in the child's IEP if the removal is under the school personnel's authority to remove for not more than 10 consecutive school days as long as that removal does not constitute a change of placement.

2. School personnel, in consultation with at least one of the child's teachers, determine the extent to which services are necessary to enable the child to continue to participate in the general education curriculum and to progress toward meeting the goals set out in the child's IEP if the child is removed under the authority of school personnel to remove for not more than 10 consecutive school days as long as that removal does not constitute a change of placement.
3. The child's IEP team determines the extent to which services are necessary to enable the child to continue to participate in the general curriculum and progress toward meeting the goals set out in the child's IEP if the child is removed because of behavior that has been determined not to be a manifestation of the child's disability, if the disciplinary action constitutes a change of placement.

2006 IDEA Regulations

- The Comments provide that the term "participate" in the general curriculum should not be interpreted to mean that a school must replicate every aspect of the services the child would receive if in their classroom. (Page 46716)
- The Comments explain that students who are suspended or who have been placed in an IAES or another setting due to discipline must participate in all general State and District wide assessments. (Page 46718)

D. Interim Alternative Educational Setting (IAES) (up to 45 school days)
(34 CFR 300.530 (g))

1. Basis for placing a student in an IAES:
 - a. Carries/possesses a weapon in school or at school functions

- b. Knowingly possesses or uses illegal drugs
 - c. Sale or solicitation of a controlled substance
 - d. Infliction of serious bodily injury to another person at school, on school premises or at a school function. Serious bodily injury requires a showing of substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of function of a bodily member, organ or mental faculty.
2. IAES placement/service determination by the IEP Team

The term “dangerous weapon” means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2½ inches in length.

2006 IDEA Regulations

- The Comments provide that the IAES is up to 45 school days which could extend to the new school year. (Page 46722)
- Federal cases have held that rape meets the definition of serious bodily injury because the victim suffered protracted impairment of mental faculties. Questions and Answers on Discipline Procedures, Question B-1 (OSERS (2007)).
- An IAES must be selected by the IEP Team so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in their IEP.
The LEA may not offer “home instruction” as the sole IAES option to be considered by the IEP Team.
Questions and Answers on Discipline Procedures, Questions C-1 and C-2 (OSERS (2007)).

E. Safety/Dangerousness (34 CFR 300.532)

1. A school district may seek a hearing officer order placing a student in an IAES for up to 45 school days if:

a. it is determined that maintaining the current placement for the student is substantially likely to result in injury to the student or to others.

Note: In D.C., the standard is includes: (a) A determination that DCPS has demonstrated by substantial evidence that maintaining the current placement of such child is substantially likely to result in injury to the child or to others; (b) A consideration of the appropriateness of the child's current placement; and (c) A consideration of whether DCPS has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services. (Chapter 25, Section 2510.4)

2006 IDEA Regulations

- The Comments explain that in such a case, the school district would have the burden of proof. (Page 46723)
- Although not addressed by the regulations, it is the United State's Department of Education position that a school district may seek judicial relief, such as a temporary restraining order when appropriate, to remove a student from his/her placement for disciplinary reasons without exhausting the administrative remedy of filing a due process hearing complaint. Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children With Disabilities, Question C-5 (OSERS (200)).

This matter would be addressed in an expedited hearing. Should the standard be met, a hearing officer would need to determine the IAES proposed by the school after consultation with the child's special education teacher.

2006 IDEA Regulations

- The regulations allow an LEA to seek a Hearing Officer's order again, after the expiration of the 45 school days, if the LEA believes that returning the child to the original placement is substantially likely to result in injury to the child or others. (300.532 (b)(3))

F. Behavior Assessments/Behavior Intervention Plans (34 CFR 300.530)

1. After taking disciplinary action involving a change of placement that is determined to be a manifestation of the student's disability, placement in an IAES or a removal for more than 10 consecutive school days that is deemed not to be manifestation, the IEP Team must, as appropriate, provide the child a functional behavioral assessment (FBA) and develop/review a behavior intervention plan.

Note: In D.C., 2510.3 Either before or not later than ten (10) days after taking a disciplinary action involving the removal of the student for up to 10 school days or placement in an interim alternative educational placement: (a) If DCPS did not conduct a functional behavioral assessment and implement a behavioral intervention plan for such child before the behavior that resulted in the suspension described above, DCPS must convene an IEP meeting to develop an assessment plan to address that behavior; or (b) If the child already has a behavioral intervention plan, the IEP Team must review the plan and modify it, as necessary, to address the behavior. (Chapter 25, Section 2510.3)

2006 IDEA Regulations

- The Comments clarify that what constitutes a FBA is best left to the LEA, the parents, and relevant members of the IEP Team who are responsible for determining manifestation. (Page 46721)

G. Manifestation Determination (34 CFR 300.530 (e))

1. Required if the school is considering removing the child with a disability from their educational placement for more than 10 school days in a given school year when it is deemed a change in placement.

2006 IDEA Regulations

- The regulations require that on the date of which the decision is made to make a removal that constitutes a change of placement due to a violation of the code of student conduct, the LEA must notify the parents of that decision and provide a copy of their procedural rights statement. (300.530 (h))

2. Procedures

- a. Determination made by the parent and relevant IEP Team members (as determined by the parents and LEA)
- b. Determination made immediately, if possible, but no later than 10 school days after the date on which the decision to change the placement is made.

3. Considerations

- a. all relevant information in the student's file
- b. relevant information supplied by the parents
- c. teacher observations of the student
- d. IEP and placement

4. Manifestation Standard

- a. Whether the behavior was caused by, or had a direct and substantial relationship to the disability, or was the direct result of the failure to implement the IEP.

Note: In D.C., in carrying out a manifestation review, the IEP Team may determine that the behavior of the child was not a manifestation of such child's disability only if the IEP Team determines that: (1) In relationship to the behavior subject to disciplinary action, the child's IEP, and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement; (2) The

child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and (3) The child's disability did not impair the ability of the child to control the behavior subject to disciplinary action. (Chapter 25, Section 2510.9)

2006 IDEA Regulations

- The Comments cite the Congressional Conference Committee's Report that "the manifestation determination will analyze the child's behavior as demonstrated across settings and across times when determining whether the conduct in question is a direct result of the disability". (Page 46720)
- If the parents and relevant members of the IEP Team cannot reach consensus on whether the behavior was a manifestation of the child's disability, the LEA must make a determination and provide the parent with prior written notice of its decision. Questions and Answers on Discipline Procedures, Question F-2 (OSERS (2007))
- A manifestation determination must be made each time that a student is removed for more than 10 consecutive school days or each time the LEA determines that a series of removals constitutes a change of placement. Questions and Answers on Discipline Procedures, Question F-3 (OSERS (2007)).

H. Manifestation (34 CFR 300.530 (f))

1. If there is a manifestation, a functional behavioral assessment will be conducted and a behavior intervention plan will be implemented or revised, as appropriate. The student will return to the last placement unless the parents and the LEA otherwise agree as part of the behavior intervention plan.

I. No Manifestation (34 CFR 300.530 (c))

1. Regular Disciplinary Hearing
 - a. Special education and Disciplinary records sent to disciplinary hearing authority
 2. Continue to provide a free appropriate public education
- J. Expedited Due Process Hearings (34 CFR 300.532)
1. Parent may challenge manifestation determination or any decision regarding placement with a right to have an expedited due process hearing. The expedited hearing shall occur within 20 school days of the request and shall result in a determination within 10 school days after the hearing.
 2. “Stay Put” is the IAES pending the hearing officer’s decision or the expiration of disciplinary removal, whichever occurs first, unless otherwise agreed upon.
 3. “Stay Put” Exception for dangerousness
 - a. Expedited hearing applying dangerousness standard.

2006 IDEA Regulations

- In the event an expedited hearing is requested, a resolution meeting must occur within seven days of the hearing request with a 15 day period of resolution unless the parties have mutually waived the resolution process. (300.532 (c)(3))
- The Comments explain that, in an expedited due process hearing, there is no procedure for challenging the sufficiency of the request for the expedited due process hearing. (Page 46725)
- States may establish different state imposed procedural rules for expedited Hearings. (300.532 (c)(4))

- K. Students Not Yet Eligible (34 CFR 300.534)

1. May assert IDEA protections if it is shown school district had knowledge that the child had a disability before the behavior incident.
 2. The district shall be deemed to have such knowledge if:
 - a. parent has expressed concern in writing to school personnel that the child is in need of special education;
 - b. parent has requested an evaluation; or
 - b. the teacher or other school personnel expressed specific
 - c. concern about a pattern of behavior of the child to the special education director or to other supervisory school personnel.
- Note: In D.C., another factor to consider is whether the behavior or performance of the child demonstrates the need for such services. (Chapter 25, Section 2510.21 (b))

If the LEA does not “have knowledge” that a child is a child with a disability prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measures as are applied to children without disabilities who engage in comparable behaviors.

If a parent requests an evaluation of a regular education child who is suspended or expelled, the evaluation must be expedited. Pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

Such placement can include suspension or expulsion without educational services.

2006 IDEA Regulations

- Teachers or other LEA personnel are not required to submit a written statement expressing concern about a pattern of behavior demonstrated by the child before this standard is met. Questions and Answers on Discipline Procedures, Question A-6 (OSERS (2007)).
- Participation in the Response to Intervention (RTI) process ,in and of itself, would not appear to meet the “basis of

knowledge” standard under the IDEA’s disciplinary regulations. Questions and Answers on Response to Intervention and Early Intervening Services, Question F-3 (OSERS (2007)).

L. Referral to Law Enforcement/Judicial Authorities (34 CFR 300.535)

1. IDEA does not limit a district from reporting a crime to appropriate agencies.
2. Transfer of special education and disciplinary records.

The IDEA allows the transmission of the records only to the extent permitted by the Family Educational Rights and Privacy Act. Absent parent consent, FERPA allows disclosure if pursuant to a subpoena or court order, in connection with an emergency, or pursuant to a State statute concerning the juvenile justice system.

M. Discipline Records (34 CFR 300.229)

1. A State may require that LEAs include and transmit information regarding current or previous disciplinary actions to be included in the education records of a student with a disability to the same extent as students who are not disabled.
2. Content of the record includes a description of:
 - a. behavior requiring disciplinary action
 - b. disciplinary action taken
 - c. other relevant information regarding the safety of the child or others
3. Transmission of records includes:
 - a. statement of current and past disciplinary action, and
 - b. IEP

X. Procedural Safeguards

- A. State/Local procedures must be established (34 CFR 300.500)
- B. Parent Participation (34 CFR 300.501 and 300.30)
 - 1. The IDEA requires that parents be given an opportunity to participate in meetings with respect to the identification, evaluation, educational placement and provision of a free appropriate public education.
 - 2. Parent means a natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent), a guardian (but not the State if the child is a ward of the State) or an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare or a surrogate parent

Note: The IDEA also allows a State to transfer parental rights to a student who reaches the age of majority unless a Court has determined the adult student be incompetent under state law.

Note: In D.C. IDEA rights transfer at age 18. (Chapter 30, Section 3023)

2006 IDEA Regulations

- The biological or adoptive parent shall be presumed to be the parent when more than one party qualifies under the IDEA definition of parent unless the natural/adoptive parent does not have the legal authority to make educational decisions or there is a judicial decree or order specifying a person to act as the parent for educational decisions. (300.30(b))
- C. Written Notice (34 CFR 300.503)
 - 1. Parents must receive prior written notice whenever the agency proposes to or refuses to change:

- a. identification
 - b. evaluation
 - c. educational placement; or
 - d. provision of a free appropriate public education
2. The notice must:
- a. be in parent's native language, unless it is clearly not feasible to do so
 - b. describe the action
 - c. explain why the agency is proposing/refusing such action
 - d. description of other options considered
 - e. evaluations and other information used as a basis for the action
 - f. other relevant factors
 - g. how a copy of the procedural safeguards can be obtained
 - h. resources to assist parents

Note that notice is also required for IEP meetings.

Parents may elect to receive notices by e-mail if the agency makes this option available.

D. Consent (34 CFR 300.300)

1. Consent is required in order to conduct an initial evaluation or a re-evaluation consisting of more than a review of existing information.
2. Consent is required for the initial provision of special education.

The LEA must seek the informed consent from the parent before

providing special education and related services. There is no override provision in the event the parent does not provide informed written consent. In such an instance, the LEA cannot be charged with a violation of failure to provide a FAPE to the student.

Note: In D.C., consent is also required for any change of placement. (Chapter 30, Section 3026)

If no consent for services is received, the LEA is not required to convene an IEP meeting or develop an IEP for the special education and related services for which the LEA is requesting consent.

2006 IDEA Regulations

- The regulations state that “consent” means that the parents have been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication; the parent understands and agrees in writing to carry out the activity and that the granting of consent is voluntary and may be revoked at any time although the revocation is not retroactive. (300.9)
 - The Regulations require the LEA to make reasonable efforts to obtain informed consent for the initial services. (300.300 (b)(2))
 - The Comments clarify that “initial provision of services” means the first time a parent is offered special education and related services after the child has been evaluated and found eligible. (Page 46633)
 - The Comments also clarify that “fully informed” means that a parent has been given an explanation of what the special education and related services are and the types of services that might be found to be needed for their child, rather than the exact program of services that would be included in an IEP. (Page 46634)
3. Consent is required if the LEA will be asking the parents to use their private or public insurance or other benefits to cover the costs of the

special education or related services.

2006 IDEA Regulations

- The Regulations require that parental consent be sought each time the LEA is proposing to access the parents' private insurance or public benefits or insurance. The parents must be notified that refusal to allow access to their insurance does not relieve the agency of its responsibility to ensure that all required services are provided at no cost to the parents. (300.154)

E. Notice of Procedural Safeguards (34 CFR 300.504)

Shall be provided at a minimum:

1. Initial referral for evaluation
2. Once per year
3. Parental request for an additional copy
4. Filing a due process hearing complaint or administrative complaint

2006 IDEA Regulations

- The Regulations also require that a notice of procedural safeguards be provided when the school is seeking a disciplinary change of placement. (300.530 (h))

F. Content of Procedural Safeguards must include a full explanation of: (34 CFR 300.504)

1. independent educational evaluation
2. prior written notice
3. parental consent

4. access to educational records
5. opportunity to present complaints to initiate due process
6. “Stay Put” – placement during pendency of due process
7. procedures for placement in an interim alternative educational setting
8. requirements for unilateral placements by parents seeking public payment
9. mediation
10. due process hearings - including disclosure of evaluation results
11. state level appeals (if applicable)
12. civil actions
13. attorneys’ fees
14. state administrative complaint procedures
15. statute of limitations period to file complaints
16. resolution meetings
17. time period for filing an appeal with the Court

2006 IDEA Regulations

- The Regulations add the requirement that the safeguards address the differences between the due process complaint and the State complaint procedures, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures. (300.504 (c)(5)(iii))
- The United States Department of Education’s Office of Special Education Programs issued a 44 page model

Procedural Rights Statement which can be accessed at:
www.ed.gov/policy/special/guid/idea/modelform-safeguards.doc

- G. Mediation (34 CFR 300.506)
1. States must offer mediation options to parents and LEAs even if a due process hearing has not been requested.
 2. Voluntary
 3. Not used to delay/deny rights
 4. Conducted by a qualified and impartial mediator
 - a. trained in effective mediation techniques
 - b. knowledgeable in special education law
 - c. list maintained by State
 5. State shall cover cost of mediation
 6. Written Mediation Agreement - A mediation agreement is a legally binding agreement enforceable in State or Federal Court. The agreement will provide that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence during subsequent legal proceedings

2006 IDEA Regulations

- The SEA may select mediators on a random or rotational basis or some other impartial basis. (300.506 (b)(3)(ii))
- A mediator could be an employee of a LEA not involved in educating the student. (300.506 (c))
- There is nothing to prohibit a State from using other enforcement mechanisms to enforce a mediation

agreement provided that the use is not mandatory and does not delay or deny the right to seek enforcement in a Court. (300.537)

- The Comments allow the parties to sign a confidentiality pledge to ensure that discussions during the mediation remain confidential, irrespective of whether the mediation is successful. (Page 46696)

H. Due Process Hearings (34 CFR 300.507-515)

1. Due Process Hearing Complaints

- a. The parent or public agency may initiate a hearing on issues relating to identification, evaluation, educational placement or the provisions of FAPE. A due process hearing must be initiated within two years of the moving party either knowing of or should have known of the disputed decision, unless the state establishes an explicit state time limit. Exceptions are if the parent had not been informed or misinformed by the LEA.
- b. Either party requesting a due process hearing must file a written request to the other party and the SEA, which specifies the issues, the facts, and the proposed resolution to the extent known.

2. Sufficiency of the Due Process Hearing Complaint

- a. Either party can file a claim with the hearing officer within 15 days that such notice is legally insufficient. The Hearing Officer has five days on which to issue a ruling.
- b. The Complaint shall be deemed sufficient unless the receiving party files a sufficiency challenge and the hearing officer finds the complaint insufficient.

2006 IDEA Regulations

- The Comments to the Regulations clarify that there is no requirement that the party who alleges that a

complaint notice is insufficient state in writing the basis for the allegation. (Page 46698)

3. Response to the Complaint

1. The LEA must provide the parent with prior written notice responding to each issue unless it previously did so.
2. The receiving party must file a response with the party which filed the complaint within 10 days addressing the issues raised.

2006 IDEA Regulations

- The Comments to the Regulations state that the IDEA does not establish consequences for the failure to respond to a due process hearing complaint notice. However, if either party fails to respond to or to file the requisite notices, it could increase the likelihood that the resolution meeting will not be successful in resolving the dispute and that a more costly and time-consuming due process hearing will occur. (Page 46699)

4. Resolution Sessions

- a. If a party requests a due process hearing, a resolution meeting shall be held within 15 days with the parents and relevant members of the IEP Team who have knowledge of the facts identified in the request. No LEA attorney may attend unless the parent brings their attorney. A resolution meeting shall be held unless waived, in writing, by both parties or mediation is requested.
- b. If resolution is reached, a signed, legally binding agreement will be developed which may be voided within three business days. Such agreement shall be enforceable in Court.
- c. A due process hearing will be scheduled if no resolution is reached within 30 days. Hearing timelines commence at this point.

2006 IDEA Regulations

- Except where the parties have jointly waived, in writing, the resolution process or to use mediation, the failure of the parents to participate in the resolution meeting will delay the timelines for the resolution process and the due process hearing until the meeting is held. (300.510 (b)(3))
- If the LEA has been unable to obtain the parents participation in the resolution meeting after reasonable efforts have been made and documented (including the attempts to reach a mutually agreed on time and place for the meeting), the LEA at the conclusion of the 30 day period may request that the hearing officer dismiss the due process complaint. (300.510 (b)(4))
- If the LEA fails to hold the resolution meeting within 15 days or fails to participate, the parent may seek the intervention of the hearing officer to begin the due process hearing timeline. (300.510 (b)(5))
- There is nothing to prohibit a State from using other enforcement mechanisms to seek enforcement of a resolution agreement provided it is not mandatory and does not delay or deny the right to seek enforcement from a Court. (300.537)
- The 45 day due process hearing timeline starts after either: both parties waive, in writing, the resolution meeting, the 30 day resolution period has expired with no resolution reached, the mediation/resolution starts but the parties agree, in writing, that no agreement is possible before the expiration of the 30 day period or the parties agree to continue to mediate after the 30 day period but one party withdraws from the mediation process. (300.510 (c))
- The IDEA 200 regulations do not require a resolution session when the public agency files a due process

complaint. Since the resolution process is not required, the 45 day timeline for issuing a due process hearing decision begins the day after the agency's due process complaint is received by the other party and the SEA. However, if the parties elect to use mediation, the 30 day resolution process is still applicable. Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children With Disabilities, Questions D-1 and D-3 (OSERS (2007)).

- The Comments provide that the parties may agree to enter into a confidentiality agreement as part of the resolution process. A State could not require a confidentiality agreement. (Page 46696)
- A State may adopt procedures that include a requirement that an LEA or SEA, as appropriate, advise the parent in writing that the timeline for starting the resolution process will not begin until the parent provides both the LEA **and** SEA with a copy of the due process complaint. (emphasis added) Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children With Disabilities, Question C-1 (OSERS (January 2007))

5. Amending the Complaint

- a. No new issues can be raised that were not in the original request unless agreed to by the parties or allowed by the hearing officer (at least five days before the hearing).

2006 IDEA Regulations

- The Comments state that a hearing officer has the discretion whether to allow the non-complaining party to raise issues that were not raised in the due process hearing complaint. (Page 46706)

6. Disclosure of Evaluation Information

- a. evaluations and recommendations to be introduced at hearings
- b. disclosed at least five business days prior to hearing

7. Hearing Procedures

- a. right to be accompanied and advised by counsel and by individuals with special knowledge and training with respect to the problems of children with disabilities
- b. right to present evidence and confront, cross-examine and compel attendance of witnesses
- c. right to prohibit the introduction of any evidence that has not been disclosed to that party at least five business days before the hearing
- d. parent has the option of written or electronic verbatim record of the hearing
- e. parent has the option of a written or electronic findings of fact and decision
- f. parents have the right to determine if the hearing will be open to the public and whether the student will be present

2006 IDEA Regulations

- The Department, in the Comments, stated that they are considering the issue of non-attorney representation in a due process hearing and anticipate publishing a notice of proposed rule making seeking public comment on the issue. (Page 46699)
- If the hearing complaint involves an application for initial services under Part B of the IDEA (ages 3-21) from a child who is transitioning from Part C of the

IDEA (ages Birth-3) and the child is no longer eligible for Part C services because the child has turned 3, the public agency under Part B is not required to provide the Part C services that the child had been receiving. If the child is eligible for Part B services and the parent consents to the initial provision of special education services, then the public agency must provide those services not in dispute. (300.518 (c))

8. Enforcement of a Due Process Decision

- a. A due process hearing decision shall be enforceable in State or Federal Court.
- b. A parent may file an administrative complaint with the SEA.

9. Appeal

- a. A party may appeal a decision to Court within 90 days of receiving the decision unless the state establishes a different time frame.

10. Due Process Hearing Officers

- a. Hearing Officers shall possess knowledge and ability to: understand state and federal statutes regulation and interpretations by the Courts; conduct hearings and to render and write appropriate decisions under appropriate standard legal practices.

11. FAPE/Procedural Violations

- a. A hearing officer can conclude that a FAPE was denied based on procedural violations only if the procedural violations resulted in a deprivation of educational benefit, significantly impeded the parents' opportunity to participate in the decision making process, or impeded the student's right to FAPE.

I. Attorney's Fees (34 CFR 300.517)

1. Court has discretionary authority to award reasonable fees to parents who prevail.
2. No fees for IEP meetings unless ordered by Hearing Officer or Court.

2006 IDEA Regulations

- A resolution meeting is not considered a meeting ordered by a Court or Hearing Officer. (300.517 (c)(2)(iii))
3. State may prohibit fees for mediations conducted prior to hearing request.
 4. Court may reduce fees if:
 - a. parent unreasonably protracted final resolution;
 - b. fees are unreasonable;
 - c. hearing request did not provide appropriate information.
 5. Fees may be denied if parents rejected an offer of written settlement, made at least 10 days before the hearing, which was as favorable as the decision.
 6. An SEA/LEA that prevails may seek attorney's fees from a Court against the parent attorney if the action is deemed frivolous, unreasonable, without foundation, or prolonged the litigation.

An SEA/LEA that prevails may seek attorney's fees from a Court against the parent attorney or the parent if the complaint was presented for improper purposes such as to harass the district, cause unnecessary delay, or needlessly increased the cost of litigation.

J. Surrogate Parent (34 CFR 300.519)

1. A surrogate parent shall be appointed whenever:

- a. parents are not known;
 - b. parents cannot be located after reasonable efforts; or
 - c. child is a ward of the state.
2. The SEA shall make an effort to appoint a surrogate parent within 30 days.
 3. The surrogate parent shall not be an employee of the SEA, LEA or other agency involved in the care or education of the child.
 6. An unaccompanied homeless youth shall be appointed a surrogate.

K. State Administrative Complaints (34 CFR 300.151-153)

1. An organization or individual may file a signed written complaint alleging Part B violations.

The complaint must allege a violation not more than one year ago.

2. The State shall investigate, issue a report within 60 days and or corrective action, if warranted.

The State may order monetary reimbursement, compensatory education or other appropriate action to correct the non-compliance.

2006 IDEA Regulations

- The public agency must be given an opportunity to respond to the complaint and to submit a proposal to resolve the complaint. (300.152 (a)(3))
- With the agreement of the parties, an opportunity to engage in mediation or other alternative means of dispute resolution must be afforded. (300.152 (a)(3)(ii))
- Clarifies that the enforcement of due process hearing

decision against a public agency must be handled through the complaint process. (300.152 (c)(3))

- Maintains the one year statute of limitation period but removes the three year period if compensatory services are being requested. (300.153(c))
- The Comments state the regulations neither prohibit nor require the establishment of procedures to permit a party to request reconsideration of the complaint decision. (Page 46607)

L. Confidentiality (34 CFR 300.611-627)

1. The State shall take steps to ensure the protection of any personally identifiable data, information and records collected by the SEA and LEAs.
2. The parents have the same rights as parents under the Family Educational Rights and Privacy Act (FERPA) to access and challenge alleged inaccurate or misleading information in their child's education records with the following additions:
 - a. Timelines for inspections—Right to inspect and review their child's education records without unnecessary delay, before an IEP meeting, resolution meeting or a due process hearing but in no case later than 45 days.
 - b. Consent—The parent must give written consent before their child's education records are shared between the LEA where a parentally private school is located and the LEA of the parents' residence.
 - c. Destruction of Records—The agency must inform the parents when personally identifiable information maintained under the IDEA is no longer needed to provide educational services to the student. The information must be destroyed at the request of the parent. However, a permanent record of the student's name, address, phone number, grades, attendance records, classes attended, grade level completed and year completed may be maintained.

XI. Personnel Issues

A. Standards (34 CFR 300.18)

1. Special Education Teachers

- a. The highly qualified (HQ) teacher standards under the No Child Left Behind Act (NCLBA) apply to special education teachers with slight modifications. All elementary and secondary teachers who teach core academic subjects must be highly qualified by the end of 2005-2006 school year.

2006 IDEA Regulations

- Adds the definition of core academic subjects to include English, reading, language arts, mathematics, science, foreign languages, civics and government, economics, arts, history and geography. (300.10)
- The highly qualified requirements do not apply to teachers hired by private elementary and secondary schools even if the IEP Team places the student in the private school or for private school teachers contracted by the LEA to provide services under service plans. (300.18 (h)). However, States may go beyond IDEA requirements and require private school teachers to hold certain credentials or certifications. Questions and Answers on Serving Children With Disabilities Placed by Their Parents at Private Schools, Question F-2, (OSERS (2007)).
- For charter schools, highly qualified means that the teacher meets the certification or licensing requirements set for in the State's public charter school law. (300.18 (b)(1)(i))

- The Comments state that the highly qualified special education teacher requirements apply to early childhood or preschool programs if a State includes the programs as part of its elementary school system. If the early childhood or preschool program is not part of the State's public elementary school system, the highly qualified requirements do not apply. (Page 46555)
 - The Comments clarify that teachers who teach at multiple levels must meet the same requirements as all other special education teachers to be considered highly qualified. (Page 46555)
 - The Comments allow each State to determine when and on what basis to accept another State's determination that a particular teacher is highly qualified. (Page 46560)
- b. All teachers must have at least a bachelor's degree and be fully certified as special education teachers (including alternate routes to certification) or pass a State licensing exam. Waivers on an emergency, provisional, or temporary basis do not qualify.
- c. If a special education teacher is providing only consultative or collaborative support to a highly qualified teacher, the special educator need not be subject credentialed.

2006 IDEA Regulations

- The Comments defer to each State whether the special education teacher is providing consultation services. There is no definition of consultation in the IDEA regulation. (Page 46558)
- The Comments state that whether or how co-teaching is implemented is a matter that is best

left to State and local officials' discretion. (Page 46561)

- d. If a special education teacher teaches core academic subjects exclusively to students assessed against alternate achievement standards (students with significant cognitive disabilities), then whether a new teacher or not, he/she may become highly qualified by either:
- (1) meeting the NCLBA requirements for Elementary, Middle School, or High School teachers who are new or not new; or
 - (2) meeting the Elementary standards under the NCLBA or if instruction is above the Elementary level, has subjected matter knowledge appropriate to the level of instruction being provided, as determined by the SEA, which is needed to effectively teach.

2006 IDEA Regulations

- The Comments provide an example of a high school student who is determined by the IEP Team to be assessed against alternate achievement standards, has knowledge and skills in math at the 7th grade level but is functioning in all other areas on the elementary level. The teacher would need to have knowledge in 7th grade math under the regulations. (Comments at Page 46559)
- e. If a special education teacher is teaching two or more core academic subjects exclusively to students with disabilities, the teacher may:
- (1) meet the NCLBA standards
 - (2) if not a new teacher, demonstrate competence in all core academic subjects taught in the same manner as experienced teachers including through the State's highly objective uniform state system of evaluation

(HOUSSE).

- (3) if a new teacher and highly qualified in math, language arts or science, he/she must demonstrate competencies in other core subjects, including through the HOUSSE standards within two years of employment.

2006 IDEA Regulations

- The regulations provide that for a fully certified regular education teacher who subsequently becomes fully certified or licensed as a special education teacher, they will be considered a new special education teacher. (300.18 (g)(2))
 - A State may develop a separate HOUSSE for special education teachers and may include a single HOUSSE evaluation that covers multiple subjects. The State's HOUSSE could not establish a lower standard for content knowledge and must meet all the HOUSSE requirements for regular education teachers. (300.18 (e))
2. Nothing in the IDEA creates a right of action on behalf of a student or class of students for failure to employ highly qualified staff. A complaint may be filed with the SEA, however.

2006 IDEA Regulations

- The Comments clarify that a parent or student may not file a due process hearing request based on the failure of a particular SEA or LEA employee to be highly qualified. (Page 46561)
- The Comments provide that if the only reason a parent believes that their child was denied a FAPE is that the child did not have a highly qualified teacher, the parent would have no right of action under the IDEA. (Page

46562)

3. Related Service personnel must meet the applicable state licensing, certification, or comparable requirements. The requirement that the standards be based on the State's highest requirements applicable to the profession or discipline is eliminated. No emergency, temporary, or provisional waivers allowed.
4. Paraprofessionals must be appropriately trained and supervised in accord with state law or policy.

B. NCLBA Highly Qualified Standards

1. Coverage

- a. All public teachers hired after the first day of the 2002-2003 school year who teach core academic subjects in a Title I schoolwide program school or are paid by Title I funds in a targeted assisted school.
- b. All public school elementary and secondary teachers who teach core academic subjects no later than the end of the 2005-2006 school year.

United States Department of Education Guidance

The United States Department of Education announced a flexible policy regarding the requirement that all elementary and secondary education teachers be "highly qualified" by the end of the 2005-2006 school year. The U.S. DOE will determine whether the state is implementing the law and making a good faith effort to reach the "highly qualified" goal by examining four elements:

- a. the state's definition of a highly qualified teacher;
- b. how the state reports to parents and the public on classes taught by highly qualified teachers;
- c. the completeness and accuracy of highly qualified teacher data reported to the Department; and

- d. the steps the state has taken to ensure that experienced and qualified teachers are equitably distributed among classrooms with poor and minority children and those with peers.

In addition, the Department will look at the State's efforts to recruit, retain and improve the quality of the teaching force. If these conditions are met, a state will be able to negotiate a revised plan for meeting the highly qualified requirements by the end of the 2006-2007 school year.

(Policy Letter from Secretary Spellings, October 21, 2005)

2. Highly Qualified

- a. Full State certification as a teacher which may include alternative routes to certification; or

Pass a State teacher licensing examination and hold a license to teach in this State.

- b. Teachers on waivers or temporary certification are not highly qualified.

- c. Teachers new to the profession must:

- (1) hold a bachelor's degree, and
- (2) at the elementary level, pass a rigorous State test in the subject knowledge and teaching skills in reading/language arts, writing, math, and other basic areas of curriculum,
- (3) at the middle and high school levels, pass a rigorous State test in each academic subject taught or in each academic subject taught have an undergraduate major (or equivalent course work), a graduate degree, or advanced certification or credentialing.

- d. Teachers not new to the profession must:

- (1) hold a bachelor's degree, and based on a high

objective uniform State standard of evaluation (HOUSSE), demonstrate competency in each academic subject taught.

3. Personnel Flexibility – United States Department of Education Guidance, March 2004

a. Rural Teachers

- (1) Teachers in qualified rural school districts who are highly qualified in at least one subject will have three years to become highly qualified in the additional subjects they teach. Such teachers must be provided professional development, intense supervision, or structured mentoring to assist them in becoming highly qualified in those additional subjects.

b. Science Teachers

- (1) States will determine, based on their current certification requirements, if a teacher is highly qualified in a broad field of science or in individual fields of science such as biology or chemistry.

c. HOUSSE for Current Teachers

- (1) Current teachers do not have to return to school or take a test to become highly qualified. States may streamline the HOUSSE evaluation process to determine if a teacher is highly qualified in multiple subjects by using factors such as experience, expertise, and professional training.

C. Paraprofessionals

1. Coverage

- a. Any paraprofessional who provides instructional support hired after January 8, 2002 if they are paid by Title I funds or work in a Title I schoolwide program.

- b. Any paraprofessional who provides instructional support hired before January 8, 2002, if they are paid by Title I funds or work in a Title I schoolwide program, must be qualified by the end of the 2005-2006 school year.
- c. All paraprofessionals must have a secondary school diploma or recognized equivalent regardless of the hiring date.

2. Application to Special Education Paraprofessionals

- a. The requirements for persons who deal with special education students differ depending upon the situation.

If a person (funded by Title I) working with special education students does NOT provide any instructional support (such as a person who solely provides personal care services), the person is not considered a paraprofessional under Title I, and the requirements do not apply. If a person works in a Title I schoolwide program and has instructional support duties, the requirements apply without regard to the source of funding that supports the position.

3. Qualifications

- a. Two years of Higher Education, or
- b. Associates Degree, or
- c. Meet rigorous standards of quality (math, reading, writing)

4. Non-instructional personnel exempted, such as those providing only technical support, clerical duties, or personal care services.

5. Direct supervision for instructional support

- a. teacher must plan instructional activities
- b. teacher evaluates student achievement

6. One-to-one tutoring permitted if scheduled at a time when the student would not otherwise receive instruction from a teacher

D. Parents Right to Know

1. At the beginning of each school year, parents of students attending a Title I school must be notified of their right to request information regarding the professional qualifications of their student's classroom teachers and whether their child is being provided services by paraprofessionals and, if so, their qualifications.
2. A school receiving Title I funds must also inform parents if a teacher of their child in a core academic subject is not highly qualified, if the teacher has taught their child at least four consecutive weeks.

IDEA Case Law Up-Date

I. Evaluation/Eligibility

- A. The Court held that a student with Asperger's Syndrome is eligible for special education services in spite of the fact that she was doing well academically. The "adverse affect" on her educational performance was the impact of her disability on her social skills and communication skills since the Court found nothing in the IDEA supports the conclusion that educational performance is limited to academic performance. In addition, the Court found the IDEA term "adverse affect" does not have a qualifier such as substantial or significant. Therefore, any adverse affect meets the standard.
- Finally, the Court found that the student was in need of specialized instruction in social skills and therefore met the eligibility requirement of being in need of special education. (Mr. and Mrs. I v. Maine School Administrative District 55, 480 F. 3d 1, 47 IDELR 121(United States Court of Appeals, 1st Circuit (2007))
- B. The Court affirmed the school's right to conduct a medical evaluation of a student, as part of a reevaluation, in spite of the guardian's refusal to

consent to such evaluation. It was found that the school articulated reasonable grounds for the necessity of the evaluation. The Court rejected the argument that the medical evaluation would violate the student's right to privacy stating that the guardian could decline special education under the IDEA rather than to have the medical evaluation. (Shelby S. v. Conroe Independent School District, 45 IDELR 269 (United States Court of Appeals, 5th Circuit (2006)). Appeal Denied by the United States Supreme Court.

- C. When a parent requests an Independent Educational Evaluation (IEE) at public expense, the LEA must “without unnecessary delay” either comply with the request or initiate a due process hearing to show its evaluation is appropriate. The Court held that the district failed to file its due process request “without unnecessary delay” when it took almost three months from the parent’s request to the filing of a due process hearing complaint. The unexplained and unnecessary delay in requesting the hearing waived the right of the LEA to contest the IEE. Pajaro Valley Unified School District v. J.S. 47 IDELR 12 (N.D. CA (2007)).

- D. The Court found that the DCPS violated the IDEA and denied a FAPE when it stopped the evaluation process of a student who was placed in an out of state residential school by his parents. Further, the Court stated the child find process under the IDEA does not prevent a parent from initiating a request for the initial evaluation from the LEA of residence. The Hearing Officer ordered that the parents be reimbursed for the private school placement. The Court remanded this issue for a determination whether the private school is an appropriate placement for the student and whether the cost of the placement is reasonable. District of Columbia v. Abramson, ___ F. Supp. ___, 107 LRP 37758 (D.C. (2007)).

II. IEP/FAPE

- A. The U.S. Supreme Court in Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley, et al. (102 S. Ct. 3034, IDELR 553:656 (1982)) held that an inquiry in determining whether a FAPE is provided is twofold:
 - 1. Have the procedures set forth in the IDEA been adequately complied with?

2. Is the IEP reasonably calculated to enable the child to receive educational benefits?

B. The IDEA requires that an IEP be implemented “as soon as possible” after it has been developed. By design, this is a flexible requirement and permits some delay between the development and implementation dates.

The requirement necessitates a specific inquiry into the causes of the delay with factors such as: (1) the length of the delay; (2) the reasons for the delay, including the availability of the mandated educational services; and (3) the steps taken to overcome whatever obstacles have delayed prompt implementation of the IEP. The Court noted that there is a “breaking point” when administrative delays will deprive the student of their right to FAPE. The case was remanded to the District Court to apply the above Standards in determining whether the 3 to 4 month delay in implementing IEP services denied the students a FAPE. (D.D. v. New York City Board of Education 465 F.3d 503, 46 IDELR 181 (United States Court of Appeals, 2nd Circuit (2006))).

C.. The school district violated the IDEA when it unilaterally amended the IEP by removing the student’s participation in the state’s alternate assessment program. In addition, the parents were not provided prior written notice of the change. The Court, in affirming the hearing officer, found that these procedural violations were more than harmless errors. In addition, the Court found that the student was entitled to occupational therapy and a certified sign language interpreter (County School Board of York County v. A.L., 46 IDELR 94 (United States Court of Appeals, 4th Circuit (2006))).

Note: This is an unpublished decision.

D. The Court held, as a matter of law, that in a case where the parents express doubt whether a school can satisfactorily provide IEP services, the IEP must identify a particular school in order to have a proper offering of FAPE.

The Court noted that this decision is limited to situations where the parents and school have a dispute about location. The Court’s holding should not be read so broadly that a school can never offer a FAPE without identifying a particular location in which IEP services are expected to be provided.

A.K. v. Alexandria City School Board, ___ F.3d ___, 107 LRP 22828 (United States Court of Appeals, 4th Circuit (2007)).

- E. The Court held that the FAPE standard, as established by the United States Supreme Court in Rowley, has been superseded by the 1997 Amendments to the IDEA. The Court remanded the case to the ALJ to determine whether the IEP met the IDEA standard of “equality of opportunity, full participation, independent living and economic self-sufficiency” and whether the programs conferred a “meaningful educational benefit” in light of these criteria.

In addition, the Court found the IEP was in violation of the IDEA due to the “absence of any specification of teaching methodologies and time allotments to various services”. (J.L. v. Mercer Island School District, 46 IDELR 273 (W.D. WA (2006)). On Appeal.

- F. The Court rejected the parents’ contention that the No Child Left Behind Act imposed additional obligations to provide the student with educational benefit in order to receive a FAPE. The Court held that the NCLBA does not alter the standard under the IDEA. Kirby v. Cabell County Board of Education, ___ F.Supp. ___, 46 IDELR 156 (S.D. W.V. (2006)).
- G. The No Child Left Behind Act contains no specific language which purports to alter the IDEA’s FAPE and IEP requirements. The IDEA does not require that FAPE determinations be based on the results of the NCLBA assessments nor does it require that the IEP be designed specifically to enhance the student’s scores on the NCLBA tests.

However, the NCLBA assessments can be considered as one factor in the broader inquiry as to whether the student’s education is meaningful. Leighty v. Laurel School District, 457 F.Supp. 546, 46 IDELR 214 (W.D. PA (2006)). See also Fisher v. Stafford Township Board of Education, ___ F.Supp. ___, 47 IDELR 134 (Dist.Ct. NJ (2007)).

- H. The Court held that a student was not denied a FAPE even though the student did not receive all of the speech and language therapy sessions specified in his IEP. The standard applied is whether the aspects of the IEP not followed were “substantial or significant” or, in other words, whether the deviations from the IEP were material. In this case, the Court found the handful of sessions missed were not enough to constitute a FAPE deprivation. Catalan v. District of Columbia 47 IDELR 223 (D.C. (2007)).

III. Related Services

- A. The United States Supreme Court Decision – Irving Independent School District v. Tatro, 104 S. Ct. 3371, IDELR 555:511 (1984).
1. The United States Supreme Court established three-prong test for determining whether a particular service is considered a related service under the IDEA. To be entitled to a related service:
 - a. A child must have a disability so as to require special education under the IDEA;
 - b. The service must be necessary to aid a child with a disability to benefit from special education; and
 - c. The service must be able to be performed by a non-physician.
- B. A school was ordered to provide a student with individual nursing services as a related service in his IEP. The court followed a “bright line” rule in the Tatro case. Since the services were not required to be administered by a doctor and were supportive services necessary for the student to attend school, they were required related services regardless of the cost (Cedar Rapids Community Sch. Dist. v. Garret F., 25 IDELR 139, U.S. Supreme Court (1999)).
- C. A student with a progressively worsening vision condition required vision therapy as a related service in order to receive a FAPE. The evidence supported the parents’ contention that the student’s visual problems would have worsened significantly and interfered with his ability to benefit from his education had he not received the vision therapy (Dekalb County School District v. M.T.V., 164 Fed. Appx. 900, 45 IDELR 30 (United States Court of Appeals, 11th Circuit (2006)). This is an unpublished decision.

IV. Least Restrictive Environment

- A. The Court of Appeals affirmed the lower court's decision that the least restrictive educational placement for a student who is classified as moderately mentally retarded is a regular classroom setting. The Court adopted a four factor balancing test considering:
1. The educational benefits of placement full-time in a regular class;
 2. The non-academic benefits of such placement;
 3. The effect of the student on the teacher and children in the regular class; and
 4. The costs involved (Sacramento City Unified School District v. Holland, 4 F. 3d 1398, 20 IDELR 812 (U.S. Court of Appeals, 9th Circuit (January 24, 1994)). A Review denied by the U.S. Supreme Court.
- B. Under the four-part test adopted in Sacramento City Unified School District v. Rachel H., a temporary placement in an off-campus, self-contained program was the least restrictive environment for a 15-year-old student with Tourette Syndrome and Attention Deficit Hyperactivity Disorder (ADHD). The student was not benefiting academically in his mainstream placement, as evidenced by declining achievement. Moreover, the district had offered him supplementary services and accommodations without success. His non-academic benefits were minimal, since he did not model his behavior on that of his non-disabled peers and he remained socially isolated. Evidence of the student's negative effect on others included violent attacks on two students, assault of a staff member, and disruption of the class by profanity and sexually-explicit remarks. Cost considerations in hiring an aide were irrelevant, in light of the determination that this service would not benefit the student (Clyde K. ex rel. Ryan K. v. Puyallup School District, 35 F. 3d 1396, 21 IDELR 664. (U.S. Court of Appeals, 9th Circuit (1994))).
- C. In determining the Least Restrictive Environment for a student, the Team must consider accommodating the student in a regular class placement, including modifying the curriculum. The Court stated that they expect that the Team will consider more than mere token gestures in determining appropriate accommodations for the student allowing him/her to be placed in a regular education setting.

In addition to academic benefits, the Court found that consideration must be given to non-academic benefits such as modeling behavior and language in a regular class setting (Daniel R.R. v. El Paso School District, 874 F.2d 1036, (United States Court of Appeals, 5th Circuit (1989))).

- D. In holding that a 9-year-old student classified as “trainable mentally retarded” should be placed in a regular elementary school, the United States Court of Appeals for the 6th Circuit held that the IDEA represents “a very strong congressional preference” for “mainstreaming.” The Court adopted a standard that to the maximum extent appropriate, students with disabilities should be placed in a nonsegregated setting if it is “feasible” to provide the necessary services in such a setting - cost was listed as a proper factor to consider (Roncker v. Walters, 700 F.2d. 1058 (U.S. Court of Appeals, 6th Circuit (1983))).
- E. The parents of a kindergarten student, who has Down Syndrome, challenged the IEP Team’s decision to change his IEP trial placement (in effect for nine weeks) in a regular kindergarten class to a special education class. In concluding, the LRE was the special education class, the Court rejected the parents’ arguments that the regular class placement was “sabotaged” due to the school’s failure to provide curricular adaptations, supplementary aids and services, training for staff, and properly communicate with the family (T.W. v. Unified School District No. 259, Wichita, Kansas, 43 IDELR 187 (U.S. Court of Appeals, 10th Circuit (2005))). This is an unpublished decision.
- F. A change in the school site for a student with a hearing impairment was not a change in his educational placement under the IDEA requiring prior written notice. In addition, his IEP was not fundamentally changed when he was required to ride the special education bus instead of the regular school bus (Veazey v. Ascension Parish School Board, 42 IDELR 140 (United States Court of Appeals, 5th Circuit (2005))).

V. Unilateral Placements

- A. The U.S. Supreme Court in Burlington, MA v. Department of Education et al., 105 S. Ct. 1996, IDELR 556:389 (U.S. 1985), held that parents may be awarded reimbursement of costs associated with a unilateral placement if it is found that:
1. The school district's IEP is not appropriate;
 2. The parent's placement is appropriate; and
 3. Equitable factors may be taken into consideration (see B.G. v. Cranford Board of Education, 702 F. Supp. 1158, IDELR 441:327 (D NJ 1988)).
- B. Parental placement at a school which is not state approved or does not meet the standards of the state does not itself bar public reimbursement under the Burlington standard (Florence County School District Four et al. v. Carter, 114 S. Ct. 361, 20 IDELR 532 (U.S. 1993)).
- C. The Court, in awarding reimbursement to the parents for their unilateral placement in a private school, held that the IDEA does not require that a student previously received special education services from the public school as a pre-condition for seeking reimbursement.

Also, the Court stated that although the IDEA does not require that the private school be a state approved school meeting state education agency standards, the same considerations and criteria that apply in determining the appropriateness of the public school's placement should be considered in determining the appropriateness of the parents' private placement.

The parents need to demonstrate, with "objective evidence", that the private placement provides specially designed instruction to meet the student's unique needs to permit the student to receive educational benefit (Frank G. v. Board of Education of Hyde Park, 459 F.3d 356,46 IDELR 33 (United States Court of Appeals, 2nd Circuit (2006)). See also Board of Education of the City School District of the City of New York v. Tom F., 193 Fed. Appx. 26, 106 LRP 48499 (United States Court of Appeals, 2nd Circuit (2006)) Appeal accepted by the United States Supreme Court.

- D. The Court held that a hearing officer or Court may award the parents reimbursement for services even if the student was never enrolled in a public school special education program. However, the Court affirmed the

IEP offered by the school district was appropriate. The parent's dispute centered on a difference in methodology (verbotonal v. auditory-verbal therapy). The legal standard is FAPE not the "best" method for providing services (M.M. v. School Board of Miami Dade County, 437 F.3d. 1085, 45 IDELR 1 (United States Court of Appeals, 11th Circuit (2006))).

- E. The Court, in affirming the Administrative Hearing Officer's decision that a student was not eligible for services under the IDEA or Section 504, held that reimbursement for an unilateral private school placement is not available in a claim brought under Section 504 or the state's Section 504 regulations (Janet G. v. State of Hawaii, 410 F. Supp. 2d 958, 45 IDELR 5 (District Court Hawaii (2005))).
- F. The Court denied the parents' request for reimbursement for the costs of their private school placement in a school not approved by the State for special education. In affirming the ALJ, the Court found that the LEA's proposed placement, which was at a different approved private school, would provide FAPE to the student. The Court noted that the parents' witnesses supporting their preferred placement conceded they did not know the LEA's proposed private school well enough to comment on its appropriateness for the student. Z.W. v. Board of Education of Anne Arundel County, 47 IDELR 4 (United States Court of Appeals, 4th Circuit (2006)).
- G. The parent was not entitled to reimbursement for their private placement since the school district offered a FAPE. The Court found no merit to the objections of the parent that they were not provided a meaningful opportunity to participate and that the placement was predetermined by the school. Paoella v. District of Columbia 46 IDELR 271 (United States Court of Appeals, DC Circuit (2006)) Note: Not a published decision.
- H. The IEP offered the student provided a FAPE and therefore the parents were not entitled to reimbursement for their unilateral private school placement. The Court found that the parents did not offer any evidence to show that the district's procedural error by not providing the parents notice of its refusal to change the student's placement resulted in substantive harm to the student's education. In addition, the student's grades, teachers' reports and test scores indicated that the student had received educational benefit at the previous school implementing the IEP. Roark v. District of Columbia 46 IDELR 249 (D.C. (2006)).

VI. Discipline

- A. A student was transferred from one elementary school to another as a result of behavioral incidents. The IEP Team determined that there was no manifestation between the disability and behavior.

The Court held that there was no change in educational placement which it defined as the environment in which educational services are provided, not the location to which the student is assigned.

The Court also affirmed the no manifestation decision of the team since the student's actions showed "forethought and investigation" and, therefore, was not impulsive (A.W. v. Fairfax County Schools, 372 F. 3d 674, 41 IDELR 119 (U.S. Court of Appeals, 4th Circuit (2004)).

- B. The Court upheld the IEP for a third grade student who exhibited several incidents of misconduct and assaultive behavior. Although an IEP must address disability related behaviors, the IDEA does not contain specific substantive requirements for IEP behavior intervention plans. Therefore, the Court held the behavior intervention plan cannot be deemed insufficient since there is no legal criteria by which to judge it (Alex R. v. Forrestville Valley Community Unit School District #221, 375 F.3d 603, 41 IDELR 146 (U.S. Court of Appeals, 7th Circuit (2004)).
- C. The Court, in upholding the appropriateness of an IEP, held that nothing in the IDEA or state law requires that a behavior intervention plan be in writing. The Court found that the staff responded to the student's behaviors with set procedures and documented the student's behavioral incidents and the school's responses (School Board of Independent School District #11 v. Renollett, 440 F. 3d 1007, 45 IDELR 117 (U. S. Court of Appeals, 8th Circuit (2006)).
- D. OSEP issued a policy clarification that if the parents refuse to provide consent for the initial provision of special education services, the parents have refused the benefits of FAPE and, therefore, the IDEA disciplinary procedures do not apply (See Letter to Yudien, 38 IDELR 267 (OSEP (2003)).

- E. In denying reimbursement to the parents for their son's unilateral placement in a private school, the Court found that the post-expulsion IEP calling for an alternative placement provided a FAPE. Although the alternative placement did not offer all the programs and activities that the student had been enrolled in (Japanese immersion program, extra-curricular activities) prior to his disciplinary problems, the Court found no requirement under the IDEA to do so (Reiser v. Fairfax County School Board, 44 IDELR 187 (E.D. VA (2006))).

Note: This outline is intended to provide workshop participants with a summary of selected Federal statutory provisions and selected judicial interpretations of the law. The presenter is not, in using this outline, rendering legal advice to the participants. The services of a licensed attorney should be sought.