

## The Reauthorized IDEA and Significant Judicial Decisions

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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 go into effect on July 1, 2005.
- B. This outline highlights the new statutory changes. Until the new federal regulations are promulgated, which may be a year from now, many questions of statutory interpretation remain. In addition, consideration needs to be given to any state law or regulation that may exceed the IDEA 2004 requirements.
- C. The outline includes both current legal requirements followed by IDEA 2004 changes.

### II. Individuals With Disabilities Education Improvement Act of 2004 History

- A. House passed its reauthorization bill in April 2003.
- B. Senate passed its reauthorization bill in May 2004.
- C. Conference Committee appointed in October 2004.
- D. Conference Committee bill approved in November 2004.
- E. The President signed the IDEA bill into law - December 3, 2004.
- F. The IDEA changes, except for the personnel requirements, take effect on July 1, 2005.

### III. IDEA Purposes

- A. To ensure that children with disabilities have a Free Appropriate Public Education (FAPE) available to meet their unique needs and prepare them for further education, employment, and independent living.
- B. To ensure that the rights of children with disabilities and their parents are protected.
- C. To assist states, localities, educational service agencies and Federal agencies in providing for the education of all children with disabilities.
- D. To assist States in the implementation of a statewide, comprehensive, coordinated, multi-disciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families.
- E. To ensure that educators and parents have the necessary tools to improve

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educational results for children with disabilities.

F. To assess and ensure the effectiveness of efforts to educate children with disabilities.

### IV. Identification and Evaluation

#### A. Child Find

1. Covers all children with disabilities, including students attending private schools.
2. The IDEA Regulations (hereafter referred to as the Regulations) require that the local education agency (LEA) consult with appropriate representatives of private school children with disabilities on how to carry out child find activities (34 C.F.R. Section 300.451(b)). In addition, expenditures for child find are not considered as part of the pro rated amount which LEA's need to spend on services for private school children with disabilities. (Section 453(c)).
3. The Regulations clarify that the child find requirements apply to highly mobile children (such as migrant and homeless children) and children who may have a disability and be in need of special education even though they are advancing from grade to grade. (Section 125 (a)(2)). Students being home schooled are also subject to child find. (Comments, page 12602).

#### **IDEA 2004 Changes:**

1. Adds children who are homeless or wards of the State.
2. Child find must be designed to allow equitable participation of parentally placed private school children.

#### B. Initial Evaluation

1. An initial evaluation shall be conducted before the initial provision of special education and related services to a child with a disability.
2. The Regulations state that 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. (Section 532 (h)). 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 (Section 533 (a)).

#### **IDEA 2004 Changes:**

1. 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

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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.

2. Screening by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation is not deemed an evaluation.
3. An evaluation involving two school districts in the same academic year shall be coordinated and expeditiously completed.

### **C. Notice/Consent for initial evaluation**

1. Written notice of initial evaluation
2. Consent for initial evaluation
3. The regulations clarify that parental consent is not required before reviewing existing data as part of an evaluation or administering a test/evaluation administered to all children. (Section 505(c)(i)).
4. Refusal to consent. The District may use mediation and due process hearing procedures to pursue the evaluation.

### **IDEA 2004 Changes**

1. 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 parent consent is required if the parent cannot be found, parental rights have been terminated or a judge has appointed an individual with educational authority.

### **D. Evaluation Contents**

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

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### 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. (Section 532 (a)(2)).
- 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. (Section 532 (c)(2)).
- c) In addition, general curriculum is referred to as the "same curriculum as for nondisabled children." (Section 347(a)(2)(i)).

### **IDEA 2004 Changes**

1. 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.

### E. Re-evaluations

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 3 years.
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.
3. The Regulations require that the agency have a record of its attempts in requesting consent for re-evaluation in meeting the reasonable measure requirement. (Section 505(c)(2)).

### **IDEA 2004 Changes:**

1. A reevaluation does not need to occur more than once per year unless the parents and LEA agree.

### F. Scope of Re-evaluation

1. If the IEP Team and "other qualified professionals" determines 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 Regulations permit the IEP Team and other qualified individuals to review the

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existing evaluation data to determine the scope of the evaluation without a Team meeting required. (Section 533(b)).

### G. Ineligibility

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

The Regulations clarify that an 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 (Section 534 (c)(2)). Note that graduation with a regular diploma constitutes a change of placement requiring prior written notice. (Section 122 (a)(3)(iii)).

### H. Independent Educational Evaluation

1. Parents have the right to obtain an Independent Educational Evaluation (IEE).
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 Regulations allow 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. (Section 502 (b)(4)).
4. The IEE at public expense must meet the same criteria as the district uses for its evaluations.

## V. Eligibility

### A. The term "child with a disability" means a child

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 impairments, autism, traumatic brain injury, deaf-blindness, multiple disabilities, other health impairments, or specific learning disabilities; and who, by reason thereof, needs special education and related services. (Section 1402 (3)).

The Regulations clarify that an attention deficit disorder or an attention deficit hyperactivity disorder is included under the other health impairment category. In addition, limited strength, vitality or alertness includes a heightened alertness to environmental stimuli. (Section 7(c)(9))

In addition, the Regulations regarding autism state that a child who manifests characteristics of autism after age 3 could be diagnosed as autistic. (Section 7

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(c)(1)(ii)).

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 now includes travel training and related services (if state standards include related services as special education). (Section 26).

- B. Decisions made by a team of qualified individuals and the parent.
- C. Copy of the eligibility determination and evaluation report provided to parent.
  - 1. The Analysis and Comments clarify that the contents of the evaluation report is left up to state and local discretion. (Page 12635). Note, however, that the Regulation retain specific requirements for a written report for students suspected of having a specific learning disability. (Section 543).
- D. Not eligible if the determinant factor is the lack of instruction in reading or math or limited English proficiency.
- E. States have the discretion of using the “developmental delay” standard for determining eligibility for students ages 3 through 9.
- F. Free Appropriate Public Education (FAPE) (Statutory Section 1402(8))

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.

### **IDEA 2004 Changes:**

- 1. An LEA may opt out of using the severe discrepancy part of the specific learning disabilities definition and replace it by using a response to scientific research based intervention model of eligibility as part of the evaluation procedures.
- 2. 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,

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phonics, vocabulary development, reading fluency including oral reading skills and reading comprehension strategies.

3. States must establish policies and procedures designed to prevent inappropriate over-identification or disproportionate representation by race or ethnicity.

### VI. Individual Education Programs (IEP)

#### A. IEP Team

1. the parents;

If, under state law, parental rights have been transferred to a student who has become a legal adult, the parents would be part of the IEP Team if invited by the student or the public agency. (Appendix A, Question 6).

2. at least one regular education teacher of such child (if the child is, or may be, participating in regular education);

The Regulations require that a regular education teacher 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. (Section 346 (d)(1) and (2)).

Appendix A to the Regulations clarifies that if the agency does not provide regular preschool education services to nondisabled children, the agency "could" designate an individual who, under state standards, is qualified to serve nondisabled children of the same age. (Appendix A, Question 3).

If the child has more than one regular education teacher responsible for carrying out a portion of the IEP, the LEA may designate which teacher or teachers will serve as Team members taking into account the best interest of the child. (Appendix A, Question 26). The agency and parents should discuss and try to reach agreement as to the extent of the regular teacher's participation at the meeting on a case-by-case basis. (Appendix A, Question 24). The Analysis and comment also states the remaining members of the IEP Team should be consulted. (Comments, page 12583)

3. at least one special education teacher, or where appropriate, at least one special education provider of such child;

The Comments indicate that the special education teacher or service provider should be the person who is or will be responsible for implementing the IEP. (Comments, page 12584).

4. a representative of the LEA who

a) is qualified to provide, or supervise the provision of, specially designed

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- 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.

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 Regulations give the party inviting these other individuals the authority to determine whether they have knowledge or special expertise. (Section 344(c)).

7. whenever appropriate, the child with a disability.

If transition is being discussed, the student shall be invited to participate at the IEP meeting. (Section 3446(b)(1)).

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.
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. (Section 349 (a)(2)).

NOTE: Appendix A to the federal regulations states that if consensus cannot be reached regarding IEP decisions, the public agency has the ultimate responsibility to ensure FAPE and make the decision. In such case, the agency must provide the parents prior written notice. Every effort should be made to resolve differences through mediation or other informal steps. (Question 9, Appendix A)

### **IDEA 2004 Changes:**

1. An IEP Team member may be excused from attending the IEP Team meeting if the parents and LEA agree because the area of the curriculum or related service is not being modified or discussed. The agreement must be in writing and include parent consent.
2. An IEP Team member may be excused from attending the IEP Team meeting even if their curricular area is being discussed by the written agreement of the parent and the LEA. The IEP Team member shall submit their input to the Team in writing.
3. The IEP meeting may be held by using alternate means such as a videoconference or conference call if the parents and LEA agree.
4. If the child was previously served under Part C, the parent has the right to request

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that the Part C Coordinator or representative be invited to the initial IEP meeting.

### 5. Team Considerations

- a) Strengths of the child
- b) Concerns of the parent
- c) Evaluation results
- d) If behavior impedes learning of self or others, strategies, positive behavioral interventions and supports
- e) Language needs of a child with limited English proficiency
- f) Instruction in Braille for students who are blind or visually impaired
- g) 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
- h) Assistive Technology Device/Service needs

If the IEP Team determines that a student needs a device or service under these special considerations in order to receive FAPE, a statement to that effect must be part of the IEP. (Section 346(c)).

The IEP Team would decide, on a case-by-case, basis whether the school purchased assistive technology device is required in a child's home or other setting. (Section 308 (b)).

### B. IEP Contents

#### 1. Present Level of Performance

- a) involvement and progress in the general curriculum

#### 2. Goals/Benchmarks/Objectives

- a) involvement and progress in the general curriculum

The comments to the Regulations define short-term objectives as measurable, intermediate steps and benchmarks as major milestones. (Appendix A, Question 1)

Also, the annual goals must only address those general curriculum areas in which the child's involvement and progress are affected by the child's disability. (Appendix A, Question 4) If only modifications or accommodations are needed, no IEP goal for that area is required. (Comments, page 12472).

#### 3. Special Education and Related Services

- a) anticipated frequency, location and duration
- b) projected date for the beginning of services

The Comments define location as the type of environment where the services

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will be provided (comments at page 12594). Also, the amount of services specified must clearly reflect the agency's commitment but may be a range of services based on the student's needs, not personnel availability (Appendix A, Question 35). The Regulations amend the definition of the term "special education" to include travel training (Section 26(b)(4)) and the related service, "parent counseling and training" to include helping parents acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP. (Section 24 (b)(7)).

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. (Comments, Page 12593).
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.

Appendix A requires the placement Team (which could be the IEP Team (Appendix A, Questions 37) to consider the full range of supplementary aids and services a child might need to be educated in the regular classroom. Each placement decision must be individually based and not be made solely on factors such as the category of disability, significance of disability, availability of services or space configuration of the service delivery system, or administrative convenience. (Appendix A, Question 1).

The Regulations prohibit the Team from denying placement in an age appropriate regular classroom solely because the student requires curriculum modifications. (Section 552(e)). However, the regulations do not require that a child has to fail in a less restrictive option before an appropriate setting is determined. (Comments, page 12638).

7. Supplementary Aids and Services

Supplementary Aids and Services is now 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/Modifications, if any, in District and State assessments.

The Regulations require that if the IEP Team determines that the child will not participate, a statement as to why the assessment is not appropriate and how the child will be assessed must be included. (Section 347(a)(5)).

States are required to develop guidelines for participation of students with disabilities who cannot participate in standard assessments and develop an alternate assessment. Students with significant cognitive disabilities may be

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assessed by alternate academic standards should the IEP determine it is appropriate.

### 9. Transition

- a) no later than 14 years of age, and annually up-dated, transition services addressing courses of study
- b) no later than 16 years of age, other transition services including interagency responsibilities
- 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.

The previous regulatory requirement mandating that the IEP Team include in the IEP a statement and justification for not including a transition service (such as instruction, community experiences, etc.) has been deleted. (Comments, page 12409).

### 10. How progress will be measured and how parents will be informed of their child's progress, at least as often as parents of children who are not disabled.

The Comments clarify that the progress reports may be in written report form and/or a meeting. Generally reports are not expected to be lengthy or burdensome. (Comments, page 12594).

### 11. Extended School Year (ESY)

Each public agency shall ensure that ESY services are available as necessary to provide FAPE. (Section 309(a)).

ESY services may not be limited to particular categories of disabilities or unilaterally limited to a type, amount or duration of service. (Section 309(b)).

The Comments state that states should have flexibility in determining the standard for ESY services. In addition, although ESY services must be provided in the least restrictive environment, public agencies are not required to create new programs as a means of providing integrated settings. (Comments, pages 12576-12577).

### **IDEA 2004 Changes:**

1. 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)
2. Annual measurable goals must include academic and functional goals.
3. The special education and related services in the IEP must be based on peer-reviewed research to the extent practicable.

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4. 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: 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.

5. A description of how progress toward the IEP goals will be measured and when periodic progress reports will be provided to the parent.
6. The IEP may be amended between the annual IEP meeting 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 parent shall be provided a revised copy of the IEP with the amendments incorporated.
7. An assistive technology device/related service does not include a medical device that is surgically implanted or the replacement of such device.
8. A related service includes nursing services designed to enable a student to receive FAPE.
9. The state must develop guidelines for the provision of appropriate assessment accommodations and participation in alternate assessments when necessary.
10. 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 Timeframes/Implementation

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. (Section 343(b)).
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. (Section 345(b)).
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. (Section 342(b)(2)).

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5. Each service provider must be informed of his/her specific responsibilities related to implementing a child's IEP. (Section 342(b)(3)).
6. The public agency shall give the parent a copy of the IEP at no cost. (Section 345(f)).
7. The SEA or public agency has the option to require, prohibit, limit or regulate the use of recording devices at an IEP meeting. If there is a prohibition, the agency must provide for an exception if necessary to ensure Part B parental rights. (Appendix A, Question 21).
8. Although there is a requirement that IEP services be provided and the school makes a good faith effort to assist the child to achieve the IEP goals/objectives/benchmarks, Part B does not require that an agency or personnel be held accountable if the child does not achieve the growth projected in the IEP. (Section 350).
9. 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 (Section 136(f)). The Comments indicate that although encouraged to do so, there is no requirement that the public agency provide parents with information on how paraprofessionals /assistants are assisting their children in the provision of services. (Comments, page 12562).
10. An agency must obtain written informed consent from the parents if 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. (Section 142(f)).

### **IDEA 2004 Changes:**

1. 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.
2. 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.
3. The new LEA shall take steps to promptly obtain the educational records and the previous LEA shall promptly respond to such request.

## **VII. Placement Issues**

### **A. Least Restrictive Environment**

1. To the maximum extent appropriate, children with disabilities are educated with

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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, 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 Regulations underscore that placements under the LRE mandate apply to pre-school children with disabilities (Section 552). The Comments add that the full continuum of alternate placements (including community based settings with typically developing age peers) must be available. (Comments, page 12639).

### B. Unilateral Placements

1. Applies to students who previously received special education services from a public agency.

The Comments add that hearing officers and courts retain equitable authority to award “appropriate” relief (including reimbursement) even if the student was not previously served in special education. (Comments, page 12602).

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.
3. The Regulations also require 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. (Section 403 (c)).
4. 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 their 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

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- d) upon a judicial finding of unreasonableness with respect to actions taken by the parents.
- e) Note: The legislative history of the Act (see Senate Report 105-17) clarifies that both hearing officers and courts have this authority.
- f) 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.

### C. Private School Students

1. 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 residing in the district to the total number of children with disabilities residing 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.

2. Special education services may be provided on site, including parochial schools, to the extent consistent with law.
3. The Regulations clarify that there is no individual right to receive some or all special education services the child would receive if enrolled in public school. (Section 454(a)(1)).
4. When identified as special education eligible through child find procedures, the school must a FAPE available to the student should the parents decide to enroll the student in the public school.
5. Unless the parent has made it clear of their intent to keep the student in the private school, and are not interested in a public program or placement, an IEP must be developed. (OSEP Memo 00-14, May 4, 2000, Question 8).
6. The public agency must consult with representatives of private school children to:
  - a) decide how child count will be conducted (either on Dec. 1 or the last Friday of October)
  - b) determine the number and needs of private school children with disabilities in order to decide which children will receive services, what services, how and where they will be provided and how they will be evaluated.
  - c) Location may be considered by the district. It may be reasonable that based on the consultation process, a district may elect not to provide services to a child

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with a disability who attends a private school outside the district. (OSEP Memo 00-14, Question 37).

7. 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. (Sections 454 and 455). If necessary, the child must be provided transportation, the cost of which may be included in the pro-rated amount required to be expended. (Section 456).
8. Due process hearings are available to parents of private school students only on the issue of child find and evaluation. The only avenue of challenging service decisions is by filing an administrative complaint with the SEA. (Section 457).
9. Students who are home schooled would be included only if, under state law, home schools are considered private schools. (Comments, page 12602).

### **IDEA 2004 Changes:**

1. 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.
2. The LEA shall consult with private school representative 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.
3. 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.
4. 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.
5. Services limited to students enrolled by their parents in private schools in the school district served by the LEA.

## **VIII. Disciplinary Actions**

- A. Short-term suspensions, appropriate interim alternative settings or other settings may be ordered for not more than 10 school days (to the extent such alternatives would be applied to children without disabilities).

The Regulations provide that a child with a disability can be removed from their 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. (Section 520(a)(1)(I)). In such

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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. (Section 122(d)(1)).

The Comments for the first time address in-school suspensions, portions of days and school bus suspensions. 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 nondisabled children to the extent they would in their current placement. Portions of a day that a child is suspended do count toward the 10 cumulative days. Bus suspensions also count if transportation is a part of the IEP and no alternative transportation is provided. (Comments, page 12619).

### B. Change of Placement

#### 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. (Section 519).

Whether a pattern of removals constitutes a change of placement would be determined on a case-by-case basis by the “public agency” subject to review through due process and judicial proceedings. (Comments, page 12618).

The Comments make it clear that the IDEA does not impose absolute limits on the number of days that a child can be removed. They state:

It is also extremely important to keep in mind that the provisions of the statute and regulation concerning the amount of time a child with a disability can be removed from his or her regular placement for disciplinary reasons are only called into play if the removal constitutes a change of placement and the parent objects to proposed action by school officials (or objects to a refusal by school officials to take an action) and requests a due process hearing. (Comments, Page 12414).

### C. Services

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
2. Provide services to the extent necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the child’s IEP, if the removal is—
3. Under the school personnel’s authority to remove for not more than 10 consecutive

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school days as long as that removal does not constitute a change of placement (Section 121 (d)(2)).

4. School personnel, in consultation with the child's special education teacher, determine the extent to which services are necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving 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. (Section 121 (d)(3)(i)).
5. The child's IEP team determines the extent to which services are necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving 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. (Section 121 (d)(3)(ii)).

### D. Interim Alternative Educational Setting (IAES) up to 45 days

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
2. IAES placement/service determination
  - a) IEP Team decision
  - b) IAES must enable the student to continue to participate in the general curriculum, although in another setting
  - c) IAES must provide services and modifications described in current IEP which will enable the student to meet IEP goals
  - d) IAES must provide services and modifications to address the behavior "so that it does not recur."

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 2 ½ inches in length.

Although a manifestation determination must be made no later than 10 school days, placements in an IAES apply whether the behavior is or is not a manifestation of the child's disability. (Comments, page 12621).

### **IDEA 2004 Changes:**

1. The IAES can be used up to 45 school days.

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2. Allows a student to be placed in an Interim Alternative Education Setting for 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.

### F. Safety/Dangerousness

1. A school district may seek a hearing officer order placing a student in an IAES for up to 45 days if:
  - a) the district has demonstrated by substantial evidence that maintaining the current placement is substantially likely to result in injury to the student or others;
  - b) the current placement is appropriate; and
  - c) the district has made reasonable efforts to minimize the risk of harm in the current placement.

The Regulations clarify that 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. (Section 521).

### IDEA 2004 Changes

1. The definition of substantial evidence has been removed.

### G. Behavior Assessments/Behavior Intervention Plans

1. Not later than 10 business days after taking disciplinary action involving placement in an IAES, first removing a child for more than 10 school days in a school year or commencing a removal that constitute a change of placement the school district shall:
  - a) convene an IEP meeting to:
    - (1) develop a functional behavioral assessment plan to address the behavior if one had not been conducted; or
    - (2) if student already has a behavior plan, to review the plan and its implementation and modify it as necessary.

The Regulations clarify that the 10 days are business days. As soon as practicable after developing the assessment plan, and completing the assessments, the IEP Team shall meet to develop appropriate behavioral interventions. (Section 520 (b)(2)). Should a child with a behavioral plan be removed for more than 10 school days in a school year (and it does not constitute a change of placement), any IEP Team member shall determine whether an IEP meeting is necessary to revise the plan. (Section 520(c)).

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A functional behavioral assessment would not be deemed an evaluation requiring parental consent if it is simply a review of existing data. In other cases, it would be deemed an evaluation requiring consent. (Comments, page 12620).

### H. Manifestation Determination

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 or placement is made in an Interim Alternative Education Setting.
2. Procedures
  - a) IEP Team and “other qualified personnel”
  - b) Determination made immediately, if possible, but no later than 10 school days after the date on which the decision to take that action is made
  - c) Parent notification of disciplinary action and all procedural safeguards accorded
3. Considerations (Section 1415(k)(4)(C))
  - a) evaluation and diagnostic results
  - b) relevant information supplied by the parents
  - c) observations of the student
  - d) IEP and placement

### I. Standards

1. IEP Team may determine that the behavior was not a manifestation of the disability only if in relation to the behavior:
  - a) the IEP and placement are deemed appropriate;
  - b) the IEP services and behavior intervention strategies were implemented;
  - c) the disability did not impair the ability of the child to understand the impact and consequences of the behavior; and
  - d) the disability did not impair the student’s ability to control the behavior.

The Regulations require that immediate steps be taken to remedy any deficiency in the IEP, placement or implementation. (Section 523(f)).

The Comments state that although it may be possible, a public agency is not required to return a child to their current placement from an IAES before the expiration of the 45 days, even if the Team determines the child’s behavior was a manifestation of their disability. (Comments, page 12625).

### **IDEA 2004 Changes:**

1. A manifestation determination shall be made by the parent, LEA and relevant IEP Team members to decide if the behavior was caused by, had a direct or substantial relationship to the disability or was the direct result of the failure to

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implement the IEP.

2. 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 determine.

### J. Manifestation

1. No further disciplinary removals.
2. Determine if IEP/Placement warrant revision.

### K. No Manifestation

1. Regular Disciplinary Hearing
  - a) Special education and Disciplinary records sent to disciplinary hearing authority
2. Continue to provide a free appropriate public education

The Regulations require the IEP Team determine the extent to which services are necessary to enable progress in the general curriculum and appropriately advance toward meeting the IEP goals. (Section 121(d)(3)(ii)).

### L. Expedited Due Process Hearings

1. Parent may challenge manifestation determination or any decision regarding placement with a right to have an expedited due process hearing.

The Regulations require that each State establish a timeframe for expedited hearings that results in a decision being mailed within 45 days. No exceptions or extensions allowed. (Section 528(b)).

2. “Stay Put” is the IAES pending the decision or the expiration of IAES, which ever occurs first, unless otherwise agreed upon
3. If proposed change is to occur after IAES, “stay put” is the child’s placement prior to the IAES
4. “Stay Put” Exception for dangerousness
  - a) Expedited hearing applying dangerousness standard.

### **IDEA 2004 Changes:**

1. Expedited hearing is defined as one occurring within 20 school days of the request with a decision rendered within 10 school days of the hearing.

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2. The student shall remain in the IAES pending the hearing decision or until the expiration of the suspension period, whichever occurs first, unless otherwise agreed to.

### M. Students Not Yet Eligible

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;
  - c) the behavior or performance of the child demonstrates need for special education; or
  - d) the teacher or other school personnel expressed concern about the child's behavior or performance to the special education director or to other school personnel. The Regulations clarify that such concern is expressed in, accordance with the agency's established child find or special education referral systems. (Section 527(b)(4)).

### **IDEA 2004 Changes:**

1. Eliminates the criteria that the behavior or performance of the child demonstrates need for special education.
2. 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.
3. 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.

The Regulations provide such placement can include suspension or expulsion without educational services. (Section 527(d)(2)(ii)).

### N. Referral to Law Enforcement/Judicial Authorities

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

The Regulations allow the transmission of the records only to the extent permitted by the Family Educational Rights and Privacy Act. (Section 529(a)(2)).

Absent parent consent, FERPA allows disclosure if pursuant to a subpoena or court

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order, in connection with an emergency, or pursuant to a State statute concerning the juvenile justice system. (Comments, page 12631).

### O. Discipline Records

1. A state may require that LEAs include 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 include:
  - a) statement of disciplinary action, and
  - b) IEP

## IX. Procedural Safeguards

### A. State/Local procedures must be established

### B. Parent Participation

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.

### **IDEA 2004 Changes**

1. 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.

### C. Written Notice

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

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2. The notice must:
  - a) be in parents' 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 resources to assist parents

Note that notice is also required for IEP meetings.

### **IDEA 2004 Changes**

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

#### D. Consent

1. Consent is required in order to conduct an initial evaluation, a re-evaluation or initially provide special education.
2. Consent is required for the initial provision of special education.

The Regulations change the terms to "informed consent".

### **IDEA 2004 Changes:**

1. 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.
2. 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.

#### E. Notice of Procedural Safeguards shall be provided at a minimum:

1. Initial referral for evaluation
2. Re-evaluation
3. Notice of each IEP meeting
4. Filing a due process hearing complaint

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### **IDEA 2004 Changes:**

1. The procedural safeguards must be provided to each parent of a student with a disability once per year unless the student is initially referred, the parent requests an additional copy or the parent initiates a due process complaint.
- E. Content of Procedural Safeguards must include a full explanation of: (Section 1415(d)(2) and Regulatory Section 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

### **IDEA 2004 Changes:**

1. Adds the following to the contents
    - a) statute of limitations period to file complaints
    - b) resolution meetings
    - c) time period for filing an appeal with the Court
- F. Mediation (Section 1415(e) and Regulatory Section 506)
1. Available, at a minimum, to parties who request a hearing
  2. Voluntary
  3. Not used to delay/deny rights
  4. Conducted by a qualified and impartial mediator
    - a) trained in effective mediation techniques

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- b) knowledgeable in special education law
  - c) list maintained by State
5. State shall cover cost of mediation
  6. Written Mediation Agreement
  7. Confidentiality Pledge - Discussions not used as evidence in subsequent proceedings
  8. May require parents who chose not to use mediation to meet with a disinterested party to encourage use of mediation

The Regulations state that mediators be selected either on a random basis or mutually selected by the parties. (Section 506(b)(2)(ii)).

The Comments clarify that the enforcement of a mediation agreement, like other binding agreements, will be based on applicable State and Federal law. (Comments, page 12612).

### **IDEA 2004 Changes:**

1. States must offer mediation options to parents and LEAs even if a due process hearing has not been requested
2. A mediation agreement is a legally binding agreement enforceable in State or Federal Court.
3. Eliminates the option of requiring parents who don't choose mediation to meet with a disinterested party.

### G. Due Process Hearings

1. The parent or public agency may initiate a hearing on issues relating to identification, evaluation, educational placement or the provisions of FAPE.
2. Notice by Parent/Attorney (Section 1415(b)(7))
  - a) name and address of child
  - b) school of attendance
  - c) description of the nature of the problem including facts
  - d) proposed resolution
  - e) model form developed by State

It is up to the hearing officer to determine whether the issue is proper for a due process hearing, not the public agency. (Comments, page 12613). A public agency may not deny/delay the right to a hearing due to insufficient notice. (Section 507 (c)(4)).

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### 3. Disclosure of Evaluation Information

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

The Regulations clarify that the “5 Day Rule” means five business days. (Section 509 (a)(3) and (b)).

### 4. Hearing Procedures

- a) right to representation by attorneys/advocates
- b) right to present evidence, cross-examine and compel attendance of witnesses
- c) parent has option of written or electronic verbatim records
- d) parent has option of a written or electronic decision

The Comments clarify that parents have a right to access a written verbatim record of the hearing. (Comments, page 12614).

NOTE: The Regulations addressing the “stay put” provision state that if a state hearing officer’s decision is in agreement with the parents that a change in placement is appropriate, the decision becomes the stay put placement during subsequent appeals. (Section 514(c)).

### **IDEA 2004 Changes:**

1. 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 if the parent had not been informed or misinformed by the LEA.
2. 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. Either party can file a claim with the hearing officer within 15 days that such notice is legally insufficient. The LEA must provide the parent with prior written notice responding to each issue unless it previously did so. The receiving party must file a response within 10 days addressing the issues raised.
3. 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 by both parties or mediation is requested.
4. If resolution is reached, a signed legally binding agreement will be developed which may be voided within 3 business days. Such agreement shall be enforceable in Court.
5. A due process hearing will be scheduled if no resolution is reached within 30 days.

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Hearing timelines commence at this point.

6. 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 5 days before the hearing).
7. A due process hearing decision shall be enforceable in State or Federal Court.
8. 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.
9. A party may appeal a decision to Court within 90 days of receiving the decision unless the state establishes a different time frame.
10. Denial of FAPE based on procedural violations allowed only if it is found 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.

### H. Attorney's Fees

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
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

### **IDEA 2004 Changes:**

1. An SEA/LEA that prevails may seek attorneys' fees from a Court against the parent attorney if the action is deemed frivolous, unreasonable, without foundation or prolonged the litigation.
2. An SEA/LEA that prevails may seek attorneys 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.

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### I. Surrogate Parent

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

### IDEA 2004 Changes

1. The SEA shall make an effort to appoint a surrogate parent within 30 days.
2. The surrogate parent shall not be an employee of the SEA, LEA or other agency involved in the care or education of the child.
3. An unaccompanied homeless youth shall be appointed a surrogate.

### J. State Administrative Complaints

1. An organization or individual may file a signed written complaint alleging Part B violations.
2. The Regulations add that the complaint must allege a violation not more than one year ago unless it is determined that a longer period is reasonable or compensatory education is requested (in which case a three year period applies). (Section 662(c)).
3. The State shall investigate, issue a report within 60 days and or corrective action, if warranted.

The Regulations clarify that a State may order monetary reimbursement, compensatory education or other appropriate action. (Section 660(b)).

### K. Personnel Issues

1. Standards
  - a) Special Education Teachers
    - (1) The highly qualified teacher standards under the No Child Left Behind Act apply to special education teachers with slight modifications. All teachers who teach core academic subjects must be highly qualified by the end of 2005-2006 school year.
    - (2) All teachers must have at least a bachelor's degree and be fully certified as special education teachers (including alternate routes to certification) or passing a State licensing exam. Waivers on an emergency, provisional or temporary basis do not qualify.
    - (3) If a special education teacher is providing only consultative or collaborative support to a highly qualified teacher, the special educator need not be

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subject credentialed.

- (4) 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:
  - (a) meeting the NCLBA requirements for Elementary, Middle School or High School teachers who are new or not new or
  - (b) 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.
- (5) If a special education teacher is teaching two or more core academic subjects exclusively to students with disabilities, the teacher may:
  - (a) meet the NCLBA standards
  - (b) 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).
  - (c) if a new teacher, if 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.
- (6) 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.
- (7) 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.
- (8) Paraprofessionals must be appropriately trained and supervised in accord with state law or policy.

### L. 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 who teach 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.

#### 2. Core Academic Subjects

- a) English, reading, language arts, mathematics, science, foreign languages,

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civics and government, economics, arts, history and geography.

### 3. 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.

- e) Personnel Flexibility - - United States Department of Education Guidance, March 2004

#### (1) Rural Teachers

(a) Teachers in qualified rural school districts who are highly qualified in at least one subject will have 3 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.

#### (2) Science Teachers

(a) 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.

#### (3) HOUSSE for Current Teachers

(a) Current teachers do not have to return to school or take a test to become highly qualified. States may streamline the HOUSSE evaluation

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process to determine if a teacher is highly qualified in multiple subjects by using factors such as experience, expertise and professional training.

### M. 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 January 8, 2006.
- 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) 2 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
- c) 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

### N. 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

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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.

### O. Pre-School Issues

#### 1. Section 619

- a) Permissive use of Section 619 funds to provide early intervention services, including an education component that promotes school readiness.
- b) At the state's discretion, continue services coordination or case management for families who receive Part C services.
- c) A state that provides early intervention services in accordance with Part C to a child eligible for Section 619 services is not required to provide such child with a FAPE.

#### 2. Part C

- a) A state may develop a policy between the SEA and Part C Lead Agency which allows parents to choose to continue Part C services.
- b) Such state policy shall ensure that parents receive an annual notice giving them the right to elect services under Part C on Section 619 explaining the differences between the programs.
- c) The state shall provide data on the number and percentage of students eligible under Section 619 whose parents choose Part C.
- d) Early intervention services include sign language and cued language services.
- e) Early intervention personnel include vision specialists, including ophthalmologists and optometrists.
- f) IFSP includes measurable results or outcomes, including pre-literacy language skills, as appropriate. Services must be based on peer-reviewed research. IFSP must include criteria and procedures to determine progress.
- g) State referral policy must address children involved in substantiated cases of child abuse/neglect and those affected by illegal substances or withdrawal symptoms from prenatal drug exposure.

### P. Miscellaneous

#### 1. Federal and State Regulations

- a) The United States Secretary shall promulgate regulations only to the extent necessary to ensure compliance with the statutory requirements. A 75-day comment period shall apply to proposed regulations.
- b) The SEA must identify in writing to LEAs and the U.S. Secretary of Education any state policy/regulation/rule that is not required by the Federal Law.
- c) The state shall minimize the number of rules/regulations/policies to which LEAs and schools are subject to.
- d) By the date the final regulations are published, the US Department of

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Education shall publish model IEP form, IFSP, process safeguard notice and model PWN.

2. State and Federal Compliance/Monitoring Issues
  - a) The SEA shall develop performance goals and indicators, including annual measurement objectives, which addresses:
    - (1) State's definition of adequate yearly progress
    - (2) Graduation rates
    - (3) Dropout rates
    - (4) Other factors as determined by the SEA
  - b) The SEA must annually report to the Secretary and the Public on the State's progress in meeting the performance goals.
  - c) Priority areas for state and LEA monitoring will focus on improved results and functional outcomes for students with disabilities. There must be quantifiable indicators addressing:
    - (1) FAPE
    - (2) LRE
    - (3) Child Find
    - (4) Resolution sessions
    - (5) Mediation
    - (6) Arbitration
    - (7) Transition
    - (8) Disproportionate representation
3. Each state must develop a State Performance Plan, by December 2005, subject to the approval of the Secretary, which will include measurable and rigorous targets in the priority areas. The SEA will provide annual performance reports to the Secretary.
  - a) The Secretary shall determine if the SEA:
    - (1) Meets the requirements of the IDEA
    - (2) Needs Assistance
    - (3) Needs Intervention
    - (4) Needs Substantial Interventions
4. Enforcement Options include:
  - a) Technical Assistance
  - b) Imposing special conditions on the IDEA grant
  - c) Requiring a corrective action or improvement plan
  - d) Requiring a compliance agreement
  - e) Withholding IDEA funds
  - f) Seeking recovery of funds
  - g) Referring matter to the Department of Justice for enforcement

## The Reauthorized IDEA and Significant Judicial Decisions

### 5. Funding

#### a) “Full Funding”

- (1) A goal, based on discretionary funding, is set to reach Federal funding of 40% of the national average per pupil cost by 2011.

#### b) Risk Pool

- (1) A state may reserve up to 10% of funds to establish a reserve fund for high cost students.

#### c) Flexibility

- (1) An LEA may use up to 15% of its IDEA funds to develop and implement coordinated, early intervening services for students K-12. The LEA must report to the SEA on the number of students served and the number subsequently found special education eligible.

#### d) Maintenance of Effort

- (1) An LEA may treat up to 50% of IDEA funding increase as local funds unless the SEA has determined the LEA is unable to establish and maintain FAPE.

### 6. Instructional Materials

- a) The SEA shall adopt the National Instructional Materials Accessibility Standards for persons who are blind or with print disabilities or provide assurances to the Secretary of Education.

### 7. Pilot Programs

#### a) Paperwork Reduction

- (1) Up to 15 states can apply to the Secretary to waive Part B requirements, up to 4 years, to reduce excessive paperwork and non-instructional time burdens that don't improve educational and functional results for students.

#### b) Multi-Year IEPs

- (1) The secretary may authorize up to 15 proposals providing an opportunity allowing comprehensive multi-year IEPs designed to coincide with natural transition points.

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 in responding to individual student situations.