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Individuals with Disabilities Education Act (IDEA): Analysis of Changes Made by P.L. 108-446

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Summary

The Individuals with Disabilities Education Act (IDEA) is the main federal program authorizing state and local aid for special education and related services for children with disabilities. On December 3, 2004, President Bush signed the Individuals with Disabilities Education Improvement Act (P.L. 108-446), a major reauthorization and revision of IDEA. The new law preserves the basic structure and civil rights guarantees of IDEA but also makes significant changes in the law. Most provisions of P.L. 108-446 **go into effect on July 1, 2005**. This report, which will not be updated, details the changes made by P.L. 108-446, which include the following:

- An extensive definition of "highly qualified" special education teachers and requirement that all special education teachers be highly qualified;
- Provisions aimed at reducing paperwork and other non-educational activities (for example, a paperwork reduction pilot program);
- Extensive provisions aimed at ensuring special education and related services for children with disabilities who are homeless or otherwise members of highly mobile populations;
- Increased funds and increased requirements for statewide activities;
- Authorization for states to use IDEA funds to establish and maintain "risk pools" to aid local educational agencies (LEAs) that provide high-cost IDEA services;
- Modifications to requirements for parents who unilaterally place their children with disabilities in private schools to help ensure equal treatment and participation for such children;
- Revised state performance goals and requirements for children's participation in state and local assessments to align these requirements with those in the Elementary and Secondary Education Act of 1965 (ESEA);
- Authority for LEAs that qualify to off-set some expenditures for special education with annual increases in their federal IDEA grant;
- Authority for LEAs to use some of their local IDEA grant for "early intervening services" aimed at reducing or eliminating the future need for special education for children with educational needs who do not currently qualify for IDEA;
- Significant changes to procedural safeguards, including:
    - The addition of a resolution session prior to a due process hearing to encourage the parties to resolve their dispute;
    - Revised test regarding the manifestation determination;
    - Addition of a new category — where a child has inflicted serious bodily injury on another person — to the school's ability to place a child with a disability in an interim alternative educational setting;
- Major changes in compliance monitoring to focus on student performance, not compliance with procedures;
- Authority to extend Part C services for infant and toddler services beyond the age of 2.

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Introduction

The Individuals with Disabilities Education Act (IDEA — 20 U.S.C. §1400 et seq.) is both a grants statute and a civil rights statute. It provides federal funding for the education of children with disabilities and requires, as a condition for the receipt of such funds, the provision of a free appropriate public education (FAPE). The statute also contains detailed due process provisions to ensure the provision of FAPE. Originally enacted in 1975, the act responded to increased awareness of the need to educate children with disabilities, and to judicial decisions requiring that states provide an education for children with disabilities if they provided an education for children without disabilities.[1]

IDEA has been amended several times, most comprehensively (prior to the 108th Congress) by the 1997 IDEA reauthorization, P.L. 105-17, the Individuals with Disabilities Education Act Amendments of 1997. The 108th Congress completed another wide-ranging reauthorization of IDEA. The following is a brief legislative history:

- On April 30, 2003, House passed H.R. 1350 by a vote of 251 to 171.
- On May 13, 2004, the Senate incorporated its bill (S. 1248) in H.R. 1350 and passed H.R. 1350 in lieu of S. 1248 by a vote of 95 to 3.
- The conference committee filed its report on the bill (H.Rept. 108-779) on November 17, 2004.
- The House agreed to the conference report on November 19, 2004, by a vote of 397 to 3.
- The Senate approved the conference report on November 19, 2004, by unanimous consent.
- President Bush signed the bill on December 3, 2004 (P.L. 108-446 — The Individuals with Disabilities Education Improvement Act of 2004).

Most provisions of P.L. 108-446 **go into effect on July 1, 2005**. (See the discussion of Title III at the end of the report for certain exceptions.)

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[1]For a more detailed discussion of the congressional intent behind the enactment of P.L. 94-142, see CRS Report 95-669, *The Individuals with Disabilities Education Act: Congressional Intent*, by Nancy Lee Jones.

This report details the changes made by P.L. 108-446 covering all parts of IDEA but concentrates on Part B, which authorizes grants for children with disabilities ages 3 to 21 and contains key provisions regarding the structure of special education and related services and the procedural safeguards that guarantee the provision of FAPE to children with disabilities. Section references, unless specified otherwise, refer to sections of P.L. 108-446. The prior version of IDEA is referenced with respect to P.L. 105-17 (the 1997 reauthorization of IDEA). The report follows the organization of P.L. 108-446: **Title I**, which amends IDEA, contains amendments to Part A (general provisions), Part B (which authorizes two state grants programs: the grants-to-states program serving mainly school-aged children with disabilities and the preschool state grants program, authorized in §619), Part C (which authorizes the state grants program of infants and toddlers with disabilities), and Part D (which authorizes various national programs and grants); **Title II**, which creates the National Center for Special Education Research within the National Institute of Education Sciences; and **Title III**, which contains miscellaneous provisions, such as the effective dates of the legislation.

Title I — Amendments to the Individuals with Disabilities Education Act

Part A — General Provisions

Part A of IDEA contains findings, purposes, definitions, and certain administrative and general provisions, such as the establishment of the Office of Special Education Programs (OSEP) within the U.S. Department of Education (ED) (§603). The findings and purposes of the 2004 reauthorization largely track the provisions of the 1997 reauthorization. However, there are some changes, particularly in the findings section, which emphasize the need to reduce irrelevant and unnecessary paperwork and to expand opportunities to resolve disagreements between parents and schools in "positive and constructive ways" (§601).

Definitions[2]

P.L. 108-446 retains most of the IDEA definitions (§602); however, the Act adds some important definitions and modifies others.

Highly Qualified Teachers. Arguably one of the most significant new definitions is that of "highly qualified" teachers (§602(10)). P.L. 108-446 links its definition to the definition of "highly qualified" in Section 9101(23) of the Elementary and Secondary Education Act (ESEA)[3] but modifies that definition as it applies to special education teachers. Most notably, it addresses concerns that have

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[2]Definitions in Part A of IDEA apply to the entire Act. Additional definitions are included in, and only apply to, other parts, sections, subsections, etc. Such definitions are discussed elsewhere in this report as warranted.

[3]For information on ESEA requirements, see CRS Report RL30834, *K-12 Teacher Quality: Issues and Legislative Action*, by James Stedman.

been raised about certain groups of special education teachers, such as those who teach more than one "core academic subject."[4]

The ESEA definition of "highly qualified" applies only to teachers of core academic subjects and differentiates between new and veteran teachers and between those teaching at the elementary level and above the elementary level. Thus, under ESEA, the "highly qualified" definition applies only to those special education teachers who teach core subjects (although this is probably most special education teachers).

P.L. 108-446 provides additional requirements and options to the definition with respect to special education teachers.[5] (See **Table 1** below for a summary of these requirements.) First of all, to be highly qualified under IDEA, **all special education teachers** (whether they teach core subjects or not) must hold at least a bachelor's degree and must obtain full state special education certification or equivalent licensure (§602(10)(B)). Special education teachers who have emergency, temporary, or provisional certification do not meet the IDEA definition. In addition, P.L. 108-446 modifies the ESEA requirements with respect to two groups of special education teachers: those **who teach only the most severely disabled children** and those who **teach more than one core subject**. (If the teachers in these two groups meet the IDEA criteria, they are considered to have met the ESEA requirements.)

Both new and veteran special education teachers who teach core subjects exclusively to children with disabilities who are assessed against alternative achievement standards under ESEA[6] can, of course, meet the definition of highly qualified by meeting their applicable ESEA standards. Alternatively, new and veteran teachers of these severely cognitive disabled students at **the elementary level** may meet the highly qualified definition by passing a rigorous state subject-matter test, completing a major or majors in the academic subjects taught, or demonstrating "competence in all the academic subjects in which the teacher teaches based on a high objective uniform State standard of evaluation" (often referred to as HOUSSE).[7] Teachers of these students at levels above elementary school can meet the definition by demonstrating "subject matter knowledge appropriate to the level of instruction ... as determined by the State, needed to effectively teach to those standards [i.e., alternative achievement standards]" (§602(10)(C)(ii)).

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[4]ESEA §9101(11) defines "core academic subjects" to include: "English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography." P.L. 108-446 cross-references this definition (§602(4)).

[5]P.L. 108-446 does not amend the ESEA definition of "highly qualified."

[6]Presumably, reference to students assessed on alternative standards is another way of indicating the most severely cognitive disabled students. ESEA requires that nearly all students be held to the same high state achievement standards. The exception with respect to children with disabilities is that those who are the most severely cognitively disabled (estimated to account for about 1% of total enrollment and 10% of children with disabilities) can be held to alternative achievement standards.

[7]Under ESEA, the HOUSSE option is available only for veteran teachers (ESEA §9101(23)(C)(ii)).

Table 1. Summary of Requirements to Be a Highly Qualified Special Education Teacher

Category of special education teachers	Requirements under P.L. 108-446
All special education teachers	Hold at least a B.A. Must obtain full state special education certification or equivalent licensure Cannot hold an emergency or temporary certificate
New or veteran **elementary school** teachers teaching one or more core academic subjects only to children with disabilities held to alternative academic standards (**most severely cognitively disabled**)	In addition to the general requirements above, may demonstrate academic subject competence through "a high objective uniform State standard of evaluation" (the HOUSSE process)
New or veteran **middle or high school** teachers teaching one or more core academic subjects only to children with disabilities held to alternative academic standards (**most severely cognitively disabled**)	In addition to the general requirements above, may demonstrate "subject matter knowledge appropriate to the level of instruction being provided, as determined by the State, needed to effectively teach to those standards"
New teachers of **two or more academic subjects** who are highly qualified in either mathematics, language arts, or science	In addition to the general requirements above, has two-year window in which to become highly qualified in the other core academic subjects and may do this through the HOUSSE process
Veteran teachers who teach **two or more core academic subjects** only to children with disabilities	In addition to the general requirements above, may demonstrate academic subject competence through the HOUSSE process (including a single evaluation for all core academic subjects)
Consultative teachers and other special education teachers who do not teach core academic subjects	Only meet general requirements above
Other special education teachers teaching core academic subjects	In addition to the general requirements above, meet relevant ESEA requirements for new elementary school teachers, new middle/high school teachers, or veteran teachers

New and veteran special education teachers **who teach two or more core subjects** exclusively to children with disabilities may qualify as highly qualified by meeting the requirements in each core subject taught under applicable ESEA provisions. Alternatively veteran special education teachers teaching two or more core subjects may also qualify as highly qualified based on the ESEA HOUSSE option (§602(10)(D)(ii)), which may include a single evaluation covering multiple subjects.[8] Finally, newly hired special education teachers teaching two or more core

[8]The Conference Report notes that the use of options, such as a single evaluation of multiple (continued...)

subjects who are already highly qualified in mathematics, language arts, or science are given two years from the date of employment to meet the highly qualified definition with respect to the other core subjects taught through the HOUSSE option (§602(10)(D)(iii)). This two-year window is the only exception to the deadline, explicitly applied to special education teachers, for meeting the "highly qualified" definition under either IDEA or ESEA, which is the end of school year 2005-2006 (ESEA, Section 1119(a)(2)).[9]

Regarding other classifications of special education teachers, one can infer that: those who do not teach core subjects would meet the IDEA definition if they meet the IDEA criteria for all special education teachers (full certification and at least a bachelor's degree). With respect to special education teachers who provide only consultative services to other teachers, the Conference Report observes that:

> a special education teacher who provides only consultative services to a highly qualified teacher ... should be considered a highly qualified special education teacher if such teacher meets the requirements of Section 602(10)(A).... Such consultative services do not include instruction in core academic subjects, but may include adjustments to the learning environment, modifications of instructional methods, adaptation of curricula, the use of positive behavioral supports and interventions, or the use of appropriate accommodations to meet the needs of individuals children.[10]

The apparent intent is that consultative teachers who do not provide direct instruction in a core subject need only meet the requirements of having obtained at least a baccalaureate degree and be fully state certified as a special education teacher.

Other special education teachers who teach **only one** core subject would appear to have to meet the relevant criteria under the ESEA definition (in addition to the overarching IDEA certification and degree criteria) and would then also be considered highly qualified under IDEA.[11] Finally, §602(10)(E) provides that the definition does not create a right of action based on an employee's failure to meet the "highly qualified" requirements of the Act.[12]

Other Definitions in §602. Other general definitions added by P.L. 108-446 include:

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[8](...continued)
subjects "must not ... establish a lesser standard for the content knowledge requirements of special education teachers compared to the standards for general education teachers." H.Rept 779, 108th Cong., 2nd Sess. 171 (2004).

[9]See §612(a)(14)(C).

[10]H.Rept. 779, 108th Cong., 2d Sess. 171 (2004).

[11]See H.Rept. 779, 108th Cong., 2d Sess. 171 (2004) regarding new and "not new" special education teachers teaching one core subject.

[12]See also the discussion of personnel qualifications under **State Eligibility** below.

- "Core academic subjects" (§602(4)), which cross-references the definition in the ESEA;
- "Homeless children" (§602(11)), which cross-references the McKinney-Vento Homeless Assistance Act;[13]
- "Limited English proficient" (§602(18)), also an ESEA cross-reference;
- "Universal design" (§602(35)), which cross-references the Assistive Technology Act of 1998;[14]
- "Ward of the state" (§602((36)), which includes a foster child (unless the child has a foster parent, who would meet the definition of "parent"), a ward of the state, or a "child in the custody of a public child welfare agency."

Modified definitions include:

- Adding an exception to the definition of "assistive technology device" (§602(1)) to exclude surgically implanted medical devices;
- Expanding the definition of "parent" (§602(23)) to include, in addition to the natural parent, an adoptive or foster parent, a guardian, an individual with whom the child lives (such as a grandparent), or an individual legally responsible for the child;
- Adding specific services to the definition of "related services" (§602(26)), including interpreting services and certain school nursing services and excluding surgically implanted medical devices.

General Administrative Provisions

P.L. 108-446 continues certain general administrative provisions with respect to the Office of Special Education Services in the U.S. Department of Education (ED) (§603): the abrogation of state sovereign immunity (§604), acquisition of equipment and facilities construction or alteration (§605); and employment of individuals with disabilities (§606). P.L. 108-446 modifies §607 dealing with the Secretary of Education's authority to prescribe IDEA regulations. For example, the Secretary is directed to regulate only as "necessary to ensure that there is compliance with the specific requirements of [IDEA]." This provision was previously found in section 617(b).[15] P.L. 108-446 reduces the public comment period on regulations from 90 days to 75 days.

P.L. 108-446 adds a section dealing with state regulations, which, among other requirements, requires states to identify in writing any "State-imposed requirement that is not required by [IDEA] and Federal regulations." (§608(a)(2)) P.L. 108-446 also adds a paperwork reduction pilot program (§609), which permits the Secretary

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[13]42 U.S.C. §11434a.

[14]"The term 'universal design' means a concept or philosophy for designing and delivering products and services that are usable by people with the widest possible range of functional capabilities, which include products and services that are directly usable (without requiring assistive technologies) and products and services that are made usable with assistive technologies." 29 U.S.C §3002(17).

[15]P.L. 105-17, §617(b).

to waive for up to four years for up to 15 states statutory or regulatory requirements (except civil rights requirements) that applying states link to excessive paperwork or other noninstructional burdens. Finally, P.L. 108-446 adds a section continuing eligibility for competitive IDEA grants for the freely associated states[16] "to the extent that such grants continue to be available to States and local educational agencies under [IDEA]" (§610).

Part B — Assistance for Children with Disabilities Ages 3 to 21

Allotment and Authorization (§611)

Section 611 of IDEA deals with allocations of Part B grants-to-states funds, including set-asides and state and substate formulas. P.L. 108-446 makes only technical changes to some §611 provisions (most notably the state and substate formulas are **not** substantively changed (§611(d) and §611(f)). At the same time, some changes to §611 are significant.

Maximum Grant Calculation and Authorizations (§611(a)(2)). Prior to the enactment of P.L. 108-446, the maximum amount states could receive under the Part B grants-to-states program was based on 40% of the national average per pupil expenditure (APPE) times the number of children with disabilities the state serves.[17] The sum of these maximum grants is often referred to as IDEA "full funding." P.L. 108-446 maintains this maximum-grant calculation through FY2006. Thereafter, the maximum grant will be 40% of APPE times the number of children with disabilities the state served in school year 2004-2005 adjusted by the annual rates of change in the state's population in the age range comparable to ages for which the state provides FAPE for children with disabilities[18] (85% of the adjustment) and in the state's children living in poverty in the same age range (15% of the adjustment).[19]

The prior law authorized "such sums as may be necessary" to carry out the provisions of the grants-to-states program, and this authorization was permanent.[20] P.L. 108-446 provides specific authorization levels for FY2005-FY2011 and authorizes "such sums" for succeeding fiscal years (preserving the permanent authorization (§611(i)). **Table 2** lists the authorization amounts.

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[16]The freely associated states are: the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau (§611(b)(1)(C)).

[17]P.L. 105-17 §611(a)(2).

[18]For most states this age range is 3 to 20 or 3 to 21.

[19]For example, if a state's relevant population for school year 2007-2008 rose by 3% above its 2004-2005 population and its number of children living in poverty rose by 2% above the 2004-2005 number, then its 2007-2008 maximum grant would be the appropriate APPE for that year times the 2004-2005 number of children with disabilities serviced increased by 2.85% (85% of 3% plus 15% of 2% = 2.55% + 0.3% = 2.85%).

[20]P.L. 105-17 §611(j).

Table 2. Authorizations for the IDEA Part B Grants-to-States Program

Fiscal year	Authorization
2005	$12,358,376,571
2006	$14,648,647,143
2007	$16,938,917,714
2008	$19,229,188,286
2009	$21,519,458,857
2010	$23,809,729,429
2011	$26,100,000,000
2012 and subsequent years	such sums as may be necessary

Set-Asides. P.L. 108-446 continues to require certain set-asides from the amount appropriated for the grants-to-states program but changes some of these provisions. The Secretary is authorized to reserve up to 1% of the grants-to-states appropriation for outlying areas[21] and the freely associated states;[22] however, the allocation of these funds has been changed (§611(b)(1)). The freely associated states receive the amounts they received for FY2003; the remainder is allocated to the outlying areas according to their population ages 3 to 21. P.L. 108-446 eliminates the competitive allocation of a portion of the set-aside funds through the Pacific Regional Educational Laboratory.[23]

P.L. 108-446 maintains the set-aside for assistance for children with disabilities in Bureau of Indian Affairs (BIA) schools provided through the Secretary of the Interior (§611(b)(2)).[24] P.L. 108-446 creates a maximum reserve of 0.5% (or $25 million,[25] whichever is less) for technical assistance provided by the Secretary

[21]The outlying areas are defined as "the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands" (§602(22)).

[22]The Secretary provides less than this authorized percentage.

[23]P.L. 105-17 §611(b)(2).

[24]P.L. 108-446 retains the reservation of 1.226% of the total appropriation for the grants-to-states program; however, this percentage has been overridden in recent years through the appropriations process, which has provided annual increases for BIA schools based on the rate of inflation (for example, see language in the Special Education account in Title III of Division F of P.L. 108-447 (Consolidated Appropriations Act, 2005)).

[25]This maximum amount is to be adjusted annually by the rate of inflation.

(required under §616(i)) to improve state data collection (§611(c)). This provision replaces a set-aside from Part B and Part C funds for studies and evaluations.[26]

Funds for State Administration and Other State-Level Activities (§611(e)). IDEA permits states to reserve funds for state administration and for other state-level activities. P.L. 108-446 makes only a minor substantive change in the state administration set-aside (§611(e)(1)): namely, it raises the minimum amount that may be reserved to $800,000 (annually adjusted by the rate of inflation). A state may reserve the maximum amount it could reserve for FY2004 (also adjusted by the rate of inflation),[27] unless the minimum amount is greater. P.L. 108-446 permits states to use amounts resulting from these inflationary increases for certain other state-level activities (§611(e)(6)).

P.L. 108-446 changes the amount states may reserve for other state-level activities and expands those activities (§611(e)(2)). For FY2005 and FY2006, states may reserve 10% of their grant (or 10.5% if the maximum amount for state administration is $850,000 or less (§611(e)(2)A)(ii)).[28] For subsequent fiscal years, the maximum amount is adjusted by the rate of inflation.

In addition to the changed maximum amount of this set-aside, P.L. 108-446 adds to the list of state-level activities. P.L. 108-446 makes two activities mandatory, which were permitted under the prior Act: (1) monitoring, enforcement, and complaint investigation and (2) establishing and maintaining a parental mediation process (§611(e)(2)(B)). Other activities are permitted (§611(e)(2(C)), including some that were available under the prior Act (such as direct services and assisting LEAs to meet personnel shortages) and others that have been added (such as paperwork reduction activities, assistance for local development of positive behavior interventions, support for local capacity building to improve services,[29] and alternative programming for expelled children with disabilities).

Risk Pools for High-Need Children with Disabilities (§611(e)(3)). The core requirement of IDEA is providing all children with disabilities with a free

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[26]Studies and evaluations are still authorized in Part D, §664, but funds for these activities must be appropriated under an authorization provided in Part D, §667.

[27]The mechanism for determining a state's maximum amount for administration has changed but, with exception of the increased minimum amount (for FY2004 the minimum was $572,401), the resulting amount would be the same as under the prior law because under P.L. 105-17 and under P.L. 108-446 maximum state administration funding is based on annual inflationary increases.

[28]These maximum percentages are reduced to 9% and 9.5% if the state does not reserve funds for the local education agencies (LEAs) risk pool (discussed below) (§611(e)(2)(A)(iii)). For FY2004, the average percentage for the maximum set-aside of other state-level activities was about 7%.

[29]Under P.L. 105-17, states reserved funds for local capacity building grants (sometimes known as "sliver grants"). P.L. 108-446 eliminates these grants.

appropriate public education (FAPE),[30] which the Act defines as meaning special education and related services.[31] Related services are defined to include certain medical services.[32] Provision of medical or other expensive services to ensure FAPE has resulted in very high costs for some school districts. P.L. 108-446 aims to address these high costs by permitting states to reserve up to 10% of the funds reserved for other state activities (or 1 to 1.05% of the overall state grant) to establish and maintain a risk pool to assist local education agencies (LEAs) serving high-need children with disabilities.[33] States taking advantage of this option must develop and annually review a state plan in which the state determines which children with disabilities are high need,[34] sets out the procedures by which LEAs participate in the risk pool,[35] and determines how funds are distributed. Funds distributed from the risk pool must only pay for "direct special education and related services" for high-need children with disabilities and may not be used for legal fees or related costs. If some funds are not distributed for services for high-need children, they are to be distributed to LEAs according to the substate formula (§611(e)(3)(I)).

State Eligibility (§612)

Section 612 spells out requirements that states must meet to be eligible for Part B funding. These requirements provide for state guarantees of some of the central provisions of IDEA. In many important respects, P.L. 108-446 retains these guarantees.[36] For example, state eligibility still hinges on its providing FAPE to all children with disabilities in the state, including those who have been suspended or

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[30]§612(a)(1).

[31]§602(9).

[32]§602(26). These provisions, contained in previous law and continued in the 2004 reauthorization, have been interpreted by the Supreme Court to mean that schools must provide medical services unless they are provided by a doctor or hospital. *Independent School District v. Tatro*, 468 U.S. 883 (1984); *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66 (1999).

[33]P.L. 108-446 permits states to reserve up to 5% of the 10% reserve "to support innovative and effective" cost-sharing (§611(e)(3)(B)(ii)).

[34]P.L. 108-446 requires that the cost for serving these children must be greater than three times the national average per pupil expenditure (APPE) as defined in Section 9101 of the ESEA (§611(e)(3)(C)(ii)(I)(bb)).

[35]State-determined LEA eligibility criteria must take "into account the number and percentage of high need children with disabilities served. ..." (§611(e)(3)(C)(ii)(II)).

[36]The introductory language of the previous version of §612(a) under P.L. 105-17 provided for state eligibility "if the State **demonstrates to the satisfaction of** the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions ..." (emphasis added). P.L. 108-446 changes the introductory language of §612(a) by replacing "demonstrates to the satisfaction of" with "submits a plan that provides assurances to." According to the committee report accompanying the Senate IDEA bill, the Secretary of Education had interpreted the prior law "to require the States to submit thousands of pages of documents" based on this language. The change was made to eliminate these administrative procedural requirements. (See S.Rept. 185, 108th Congress, 1st Sess. 14 (2003)).

expelled (§612(a)(1)(A)), basing that education on an individualized education program (IEP) (§612(a)(4), and providing that education be provided in the least restrictive environment (§612(a(5)).[37] At the same time, P.L. 108-446 makes significant changes to some state eligibility requirements: most notably those regarding children enrolled by their parents in private schools, personnel qualifications, performance goals and indicators, and participation in assessments.

Children with Disabilities in Private Schools. A child with a disability may be placed in a private school by the LEA or SEA as a means of fulfilling the FAPE requirement for the child in which case the cost is paid for by the LEA. A child with a disability may also be unilaterally placed in a private school by his or her parents. In the latter situation, the cost of the private school placement is not paid by the LEA unless a hearing officer or a court makes certain findings. However, IDEA does require some services for children in private schools, even if they are unilaterally placed there by their parents. Exactly what these services are or should be has been a contentious subject for many years. The 1997 reauthorization of IDEA expanded on the private school provisions, and the 2004 reauthorization includes several changes to the provisions relating to children who are placed in private school by their parents. The provisions relating to children placed in private schools by public agencies were not changed.

Generally, children with disabilities enrolled by their parents in private schools are to be provided special education and related services to the extent consistent with the number and location of such children in the school district served by a LEA pursuant to several requirements (§612(a)(10)(A)(i)). This provision was changed from previous law by the addition of the requirement that the children be located in the school district served by the LEA. The Senate report described this change as protecting "LEAs from having to work with private schools located in multiple jurisdictions when students attend private schools across district lines."[38]

There are five requirements regarding this provision of special education. The first is that the funds expended by the LEA, including direct services to parentally placed private school children, shall be equal to a proportionate amount of federal funds made available under part B of IDEA. The 2004 reauthorization added the phrase regarding direct services. The Senate report stated that "it is the committee's intent that school districts place a greater emphasis on services provided directly to

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[37]P.L. 108-446 strengthens provisions regarding certain state funding mechanisms or formulas by prohibiting mechanisms based on the setting in which services are delivered if that mechanism results "in the failure to provide a child with a disability a free appropriate public education according to the unique needs of the child as described in the child's IEP [individualized education program]" §612(a)(5)(B). The Conference Report notes that: "The conferees are concerned that some States continue to use funding mechanisms that provide financial incentives for, and disincentives against, certain placements. It is the intent of the changes to Section 612(a)(5)(B) to prevent State funding mechanisms from affecting appropriate placement decisions for students with disabilities.... The new provisions in this section were added to prohibit States from maintaining funding mechanisms that violate appropriate placement decisions, not to require States to change funding mechanisms that support appropriate placements decisions." H.Rept. 779, 108th Cong., 2d Sess., 186 (2004).

[38]S.Rept. 185, 108th Cong., 1st Sess., 15-16 (2003).

such children — like specifically designed instructional activities and related services — rather than devoting funds solely to indirect services such as professional development for private school personnel."[39]

Second, a new provision relating to the calculation of the proportionate amount is added. In calculating this amount, the LEA, after timely and meaningful consultation with representatives of private schools, shall conduct a thorough and complete child find process to determine the number of children with disabilities who are parentally placed in private schools.

Third, the new law keeps the previous requirement that the services may be provided to children on the premises of private schools, including religious schools, to the extent consistent with law. The 2004 reauthorization added the term "religious" while deleting the term "parochial."

Fourth, a specific provision regarding supplementing funds, not supplanting them, is added. State and local funds may supplement and not supplant the proportionate amount of federal funds required to be expended.

Fifth, each LEA must maintain records and provide to the SEA the number of children evaluated, the number of children determined to have disabilities, and the number of children served under the private school provisions. The Senate report stated that this requirement was "to help to ensure that these funds are serving their intended purpose."[40]

The general requirement regarding child find is essentially the same as previous law. The requirement for finding children with disabilities is the same as that delineated in §612(a)(3) for children who are not parentally placed in private schools, including religious schools. As was done in the previous section, the former use of the term "parochial" is replaced by the term "religious" in the new law. New provisions are added concerning equitable participation, activities, cost and the completion period. Child find is to be designed to ensure the equitable participation of parentally placed private school children with disabilities and their accurate count. The cost of child find activities may not be considered in meeting the LEA's proportional spending obligation. Finally, the child find for parentally placed private school children with disabilities is to be completed in a time period comparable to that for students attending public schools (§612(a)(10)(A)(ii)).

P.L. 108-446 adds requirements that the LEA consult with private school officials and representatives of the parents of parentally placed private school children with disabilities. This consultation is to include

- The child find process and how parentally placed private school children with disabilities can participate equitably;

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[39]Ibid.

[40]Ibid, p. 15.

- The determination of the proportionate amount of federal funds available to serve parentally placed private school children with disabilities, including how that amount was calculated;
- The consultation process among the LEA, private school officials and representatives of parents of parentally placed private school children with disabilities, including how the process will operate;
- How, where, and by whom special education and related services will be provided for parentally placed private school children with disabilities, including a discussion of the types of services, including direct services and alternate service delivery mechanisms, how the services will be apportioned if there are insufficient funds to serve all children and how and when these decisions will be made; and
- How the LEA shall provide a written explanation to private school officials of the reasons why the LEA chose not to provide services if the LEA and private school officials disagree (§612(a)(10)(A)(iii)).

The Senate report described the consultation procedure as similar to that in the No Child Left Behind Act and "therefore, the committee does not believe including these provisions places an undue burden on LEAs."[41]

The new law also requires a written affirmation of the consultation signed by the representatives of the participating private schools. If the private school representatives do not sign within a reasonable period of time, the LEA shall forward the documentation to the SEA (§612(a)(10)(A)(iv)).

Compliance procedures are added by P.L. 108-446. Generally, a private school official has the right to submit a complaint to the SEA alleging that the LEA did not engage in meaningful and timely consultation or did not give due consideration to the views of the private school official. If a private school official submits a complaint, he or she must provide the basis of the noncompliance to the SEA, and the LEA must forward the appropriate documentation. If the private school official is dissatisfied with the SEA's determination, he or she may submit a complaint to the Secretary of Education, and the SEA shall forward the appropriate documentation to the Secretary (§612(a)(10)(A)(v)).

The 2004 reauthorization contains a specific subsection regarding the provision of equitable services. Services are to be provided by employees of a public agency or through contract by the public agency. In addition, the services provided are to be "secular, neutral, and nonideological" (§612(a)(10)(A)(vi)). The new law further states that the funds that are available to serve pupils attending private schools shall be controlled and administered by a public agency (§612(a)(10)(A)(vii)).

As noted above, when a child with a disability is unilaterally placed in a private school by his or her parents, the cost of the private school placement is not paid by the LEA unless a hearing officer or a court makes certain findings. As in previous law, this reimbursement may be reduced or denied if the child's parents did not give certain notice (§612(a)(10)(C)(iii)). Both the 1997 and 2004 reauthorizations contain

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[41] Ibid.

an exception to this limitation, but this exception is changed somewhat in the new law. Under the new law, the cost of reimbursement is not to be reduced or denied for the failure to provide notice if:

- the school prevented the parent from providing such notice;
- the parents had not received notice of the notice requirement; or
- compliance would likely result in physical harm to the child.

Previous law had included a provision that reimbursement not be reduced or denied if a parent is illiterate and had included "serious emotional harm."

P.L. 108-446 also contains a new provision allowing, at the discretion of a court or hearing officer, the reimbursement not to be reduced or denied if:

- the parent is illiterate or cannot write in English; or
- compliance with the notice requirement would likely result in serious emotional harm to the child (§612(a)(10)(C)(iv)).

Personnel Qualifications. P.L. 108-446 repeals the requirement that states have comprehensive personnel development systems[42] and makes substantial changes to state requirements with respect to personnel qualifications (§612(a)(14)). P.L. 108-446 continues to mandate that states require qualifications "to ensure that personnel necessary to carry out this part are appropriately and adequately prepared and trained" and adds that personnel serving children with disabilities have "content knowledge and skills to serve" those children (§612(a)(14)(A)). These qualification requirements "shall ensure that [all special education teachers in the state are] highly qualified by the deadline established in section 1119(a)(2) of the Elementary and Secondary Education Act of 1965" (§612(a)(14)(C)).[43] P.L. 108-446 adds a subparagraph dealing with paraprofessionals and providers of related services, which is similar to provisions in the 1997 IDEA except that the current law removes language related to standards that "are not based on the highest requirements in the State."[44]

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[42]P.L. 105-17 §612(a)(14). According to the report accompanying the Senate IDEA bill, the provision was removed because "the committee [was] not convinced that the current requirement has provided any added value to State efforts to secure an adequate supply of qualified personnel." See S.Rept. 185, 108th Congress, 1st Sess., 16 (2003).

[43]The ESEA requires states to ensure that all teachers of "core subjects" are highly qualified by school year 2005-2006. Note that the IDEA modifies the definition of "highly qualified" for special education teachers (see above) to apply to all special education teachers, not just to those teaching core subjects. In addition, the definition extends this deadline for certain new special education teachers who teach more than one core subject.

[44]P.L. 105-17 §612(a)(15)(B)(ii). According to the Conference Report, "Conferees are concerned that language in current law regarding the qualifications of related services providers has established an unreasonable standard for State educational agencies to meet, and as a result, has led to a shortage of the availability of related services for students with disabilities.

"Conferees intend for State educational agencies to establish rigorous qualifications for related services providers to ensure that students with disabilities receive the appropriate

(continued...)

P.L. 108-446 strengthens the state requirement regarding its policy with respect to LEAs' personnel qualifications. Under the prior law, states **could have** adopted a policy that LEAs "make an ongoing good-faith effort" to "hire appropriately and adequately trained personnel."[45] P.L. 108-446 now **requires** states to have a policy that LEAs "take measurable steps to recruit, hire, train, and retain highly qualified personnel" (§612(a)(14)(D). Despite this strengthened requirement, P.L. 108-446 adds language noting that these requirements for personnel qualification do not create an individual right of action (i.e., the right to sue a state) based on the failure of a "State educational agency or local educational agency staff person to be highly qualified" (§612(a)(14)(E).

Performance Goals and Indicators. P.L. 108-446 revises state requirements for performance goals and indicators mainly by linking these to requirements under the Elementary and Secondary Education Act (ESEA). In the prior version of IDEA, states were required to have performance goals for children with disabilities that were "consistent, to the maximum extent appropriate, with other goals and standards for children established by the state" and to establish indicators to measure performance.[46] P.L. 108-446 changes this provision to require that states' performance goals "are the same as the State's definition of adequate yearly progress (AYP),[47] including the State's objectives for progress by children with disabilities" under ESEA (§612(a)(15)(A)(ii). P.L. 108-446 also links performance indicators to ESEA requirements: a state's indicators for measuring progress must include "measurable annual objectives for progress by children with disabilities" under ESEA (§612(a)(15)(B)). Finally, P.L. 108-446 changes states' reporting requirements on progress made toward performance goals from every two years (under the previous law)[48] to every year (under current law) (§612(a)(15)C)).[49]

Participation in Assessments. Under the previous version of IDEA, states were required to include children with disabilities "in general State and district-wide assessment programs, with appropriate accommodations, where necessary."[50] For children who could not participate in these assessments, states had until July 1, 2000, to develop and implement alternative assessments and guidelines for participation in these alternative assessments.[51] P.L. 108-446 amends assessment participation requirements to align them with ESEA requirements. IDEA now requires that **all** children with disabilities be included in **all** state and district-wide assessments,

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[44](...continued)
quality and quantity of care." H.Rept. 779, 108th Cong., 2d Sess. 192 (2004).

[45]P.L. 105-17 §612(a)(15)(C).

[46]P.L. 105-17 §612(a)(16)(A)(ii) and (B).

[47]For further information on AYP, see CRS Report RL32495, *Adequate Yearly Progress (AYP): Implementation of the No Child Left Behind Act*, by Wayne Riddle.

[48]P.L. 105-17 §612(a)(16)(C).

[49] See also the discussion of performance plans under §616 *infra*.

[50]P.L. 105-17 §617(a)(17)(A).

[51]P.L. 105-17 §612(a)(17)(A)(ii).

including assessments required under ESEA, with accommodations or alternative assessments if necessary and as included in the child's individualized education program (IEP) (§612(a)(16)(A)). P.L. 108-446 now assumes that states have developed guidelines for accommodations (§612(a)(16)(B)), and that states have implemented guidelines for alternative assessments (§612(a)(16)(C)). Such alternative assessments must follow ESEA requirements — most notably they must be "aligned with the State's challenging academic content standards and challenging student academic achievement standards" (§612(a)(16)(C)(ii)(I)). P.L. 108-446 also provides states with the option of adopting alternative academic standards as permitted by ESEA regulations. If the number of those tested is sufficient to ensure statistical reliability and confidentiality, the achievement of children with disabilities is to be compared with the achievement of all children and such comparisons are to be publically reported. Finally, P.L. 108-466 requires the state and districtwide tests adhere to "universal design principles" to the extent feasible.[52]

New State Requirements. P.L. 108-446 adds several new requirements to state eligibility determination:

- In complying with the state non-supplanting and maintenance of effort requirements (§612(a)(17) and (18)), "a State may not use funds paid to it under this part to satisfy State-law mandated funding obligations to local educational agencies, including funding based on student attendance or enrollment, or inflation" ((§612(a)(20)).[53]
- After the publication in the Federal Register of the National Instructional Materials Accessibility Standard for instructional material for blind persons and others with print disabilities by the National Instructional Materials Access Center, states are to adopt the standard and either coordinate with the center (authorized in §674(e)) or assure the Secretary of Education that instructional materials will be provided in a timely fashion (§612(a)(23)).
- States must have policies and procedures in effect to prevent over-identification and mis-identification of children with disabilities (§612(a)(24)).
- SEAs and LEAs are prohibited from requiring that "a child obtain a prescription for a substance covered by the Controlled Substances Act (21 U.S.C. §801 et seq.) as a condition of attending school, receiving an evaluation [under IDEA], or receiving services under [IDEA]" (§612(a)(25)).

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[52]See the definition of "universal design" above.

[53]The intent of this language apparently is explained in a floor statement by Rep. Woolsey: "The language makes it clear that Federal funds for IDEA go to schools to use for special education, not for States to use to get out of paying for their required funding or not for States to use to solve their general budget problems. That is something that my home State of California has been doing, and according to the American Association of School Administrators, this practice cost California and their schools $120 million in the year 2003 alone." *Congressional Record*, vol. 150, no. 134, Nov. 19, 2004, p. H10015.

Local Educational Agency Eligibility (§613)

Section 613 of IDEA provides requirements that LEAs must meet to qualify for assistance under Part B.[54] P.L. 108-446 maintains the general requirement that local "policies, procedures, and programs" are consistent with state policies and procedures laid out in §612 (§613(a)(1)). At the same time, P.L. 108-446 makes several important changes to the section, including changes to local maintenance of effort requirements and addition of permitted early intervention services.

Exceptions to Local Maintenance of Effort. Like many other federal education programs, IDEA requires states and LEAs to follow certain financial principles to ensure that federal funds add to, rather than substitute for, state and local educational funding. One of these principles is the maintenance of effort (MOE) requirement, which, generally in IDEA, requires that state and local spending on special education not be reduced from one year to the next (i.e., a 100% MOE). Prior law allowed certain exceptions to local MOE, one of which allowed LEAs to "treat as local funds" for the purpose of meeting the MOE requirement up to 20% of any annual increase in their IDEA grant.[55] ED regulations interpreted this provision to be non-cumulative, that is, the provision would be applied on a year-to-year basis. For example, if an LEA's grant increased by $10,000 from year 1 to year 2, it could have treated $2,000 (20%) of that increase as local funds to meet the MOE requirement. If the LEA's grant again rose by $10,000 from year 2 to year 3, it could again treat $2,000 as local funds — not $4,000.[56]

P.L. 108-446 makes major changes to this exception. First of all, LEAs may use up to **50%** of the increase in their IDEA grant to "reduce the level of expenditure" for special education (§613(a)(2)(C)(i)). The intent of this language appears to be that the reductions **would be cumulative**, that is the reduction for the current year would be taken from the reduced amount of local spending resulting from the reduction allowed for that year.[57] The prior law gave no indication of how the freed-up local funds could be used. P.L. 108-446 requires LEAs exercising this option to use the funds for "activities authorized under the Elementary and Secondary Education Act of 1965" (§613(a)(2)(C)(ii)) and for early intervention services discussed below. P.L. 108-446 continues to provide state authority to prohibit LEAs from using this authority, except that it modifies the criteria for exercising the prohibition and **requires** states (prior law **permitted** states) to exercise the prohibition if warranted.[58]

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[54]P.L. 108-446 makes comparable changes to the introductory language in §613 as it makes to the introductory language in §612 by changing the requirement that the LEA "demonstrates to the satisfaction of" to "submits a plan that provides assurances to" the SEA that requirements of §613 are met.

[55]P.L. 105-17 §613(a)(2)(C).

[56]According to ED's discussion accompanying final regulations on the MOE exception under P.L. 105-17, "there is no statutory authority to allow the provision to be applied on a cumulative basis." 66 *Federal Register*, Jan. 8, 2001, p. 1475.

[57]See report language in H.Rept. 779, 108th Cong., 2d Sess. 197 (2004).

[58]P.L. 105-17 provided that states could prohibit an LEA from using this option if the LEA (continued...)

Under the prior law, this exception applied only to LEAs, not to states. P.L. 108-446 extends this MOE exception to a state that "pays or reimburses all local educational agencies within the State from State revenue 100 percent of the non-Federal share of the costs of special education and related services" (§613(j)). The Secretary of Education would have similar obligations to deny this option to a state that the state has for LEAs. In addition, a state could not take advantage of this exception "if any local educational agency in the State would, as a result of such reduction, receive less than 100 percent of the amount necessary to ensure that all children with disabilities served by the local educational agency receive a free appropriate public education" based on the combined federal IDEA and state funds (§613(j)(5)).

Early Intervening Services. P.L. 108-446 permits LEAs to use up to 15% of their IDEA Part B funding for early intervening services for children who have not been identified as children with disabilities "but who need additional academic and behavioral support to succeed in a general education environment" (§613(f)). These services may be provided for students in kindergarten through 12th grade but should be concentrated on those in kindergarten through 3rd grade. Funds may be used for professional development for those serving this population as well as educational and behavioral services and support. These funds may be used to supplement early intervening services carried out under the ESEA (§613(f)(5)). If a LEA chooses to use funds for these purposes and takes advantage of the exception to the MOE requirement discussed above, those local funds that would have been used to maintain spending on special education must be used for early intervening services.[59]

Other Changes and Additions to §613. P.L. 108-446 makes additional changes and adds new provisions to local eligibility requirements, including:

- LEAs are permitted to use IDEA funds to implement funding mechanisms (such as cost- or risk-sharing funds) to help pay for high cost education and related services and for administrative case management technology.
- While P.L. 105-17 made special provisions for public charter schools serving children with disabilities, P.L. 108-446 modifies these provisions, including the requirement that supplementary and related services be provided at the charter school to the same extent that such services are provided at other public schools served by the LEA and that IDEA funds be provided to these

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[58](...continued)
did not meet "the requirements of this part" (P.L. 105-17 §613(a)(2)(C)(ii). P.L. 108-446 requires states to prohibit the use of this MOE exception for LEAs that are "unable to establish and maintain programs of free appropriate public education" (P.L. 108-446 §613(a)(2)C)(iii)) or for LEAs that do not meet targets in the state's performance plan (P.L. 108-446 §616(f)).

[59]P.L. 108-446 specifies that an LEA "may not use more than 15 percent of [its Part B funding], less any amount reduced by the agency pursuant to [the MOE exception]" (§613(f)(1)). This would appear to mean that local funds from the MOE reduction would first have to be used for the early intervening services (if the LEA decided to provide these services). If there are additional funds available from the MOE reduction, they would have to be used for ESEA authorized activities.

schools in proportion to their enrollment of children with disabilities, if this is the basis for distributing funds to other public schools in the LEA (§613(a)(5));
- P.L. 108-446 provides similar provisions to those for states for printed instructional material for blind persons and others with print disabilities (§613(a)(6)) (see the discussion above of the state provisions);
- P.L. 108-446 requires LEA cooperation with efforts to improve electronic transfer of health and educational records of migratory children with disabilities (§613(a)(9)).

Evaluations, Eligibility, and Individual Education Programs (§614)

Section 614 of IDEA contains many of the key provisions that undergird the special education and related services that are provided for children with disabilities. These include the processes of evaluation and reevaluation, which determine whether a child is eligible for special education, and inform the planning and provision of that child's services; the process of creating the individualized education program (IEP) and the requirements for the IEP; and the composition of the IEP team that creates and revises the IEP. P.L. 108-446 maintains the general structure of the evaluation, eligibility determination, and IEP but makes significant changes to these provisions — many of which aim to reduce paperwork and non-instructional activities.

Evaluation and Reevaluation. Subsections (a) through (c) of Section 614 of IDEA contain requirements for the initial evaluation, parental consent, reevaluation, and eligibility determination.

Initial Evaluation and Reevaluations. LEAs[60] are required to "conduct a full and individual initial evaluation" of a child before special education and related services are provided, and to conduct reevaluations as warranted to determine if the education and services provided require revisions or if the child no longer needs special education and related services. P.L. 108-446 adds language that clarifies that either the parent or the LEA may request an initial evaluation. If the LEA makes the request, the parent generally must provide consent for the evaluation to take place (§614(a)(1)(D)). P.L. 108-446 also establishes a timeframe after a parental request for an initial evaluation has been received by the LEA. Such evaluation must take place either within 60 days or within an alternative timeframe established by the state (§614(a)(1)(C)).[61]

Reevaluations are required if the child's teacher or parent makes a request or if the LEA determines that the child's educational and service needs, academic

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[60]Requirements discussed in this section also apply to the SEA or other state agencies if they provide direct services to children with disabilities.

[61]P.L. 108-446 provides two exceptions to the timeframe: if the child changes LEAs during the timeframe or if the child's parent "repeatedly fails or refuses to produce the child for the evaluation" (§614(a)(1)(C)(ii).

achievement, or functional performance warrants a reevaluation. (§614(a)(2)).[62] For example, a reevaluation might be warranted if the child's performance in school significantly improves, suggesting that he or she no longer requires special education and related services, or if the child is not making progress toward the goals set out in his or her IEP, indicating that changes are needed in the education or related services the LEA is providing. The prior version of IDEA required that reevaluations take place at least every three years.[63] P.L. 108-446 permits the parent and the LEA to override this requirement if they agree that a reevaluation is not necessary. In addition, P.L. 108-446 prohibits reevaluations more frequently than once a year, unless the parent and the LEA agree.

Parental Consent. If the LEA proposes to conduct an initial evaluation of a child to determine a child's eligibility for IDEA services, it must generally obtain consent from the parent of the child. Provision of parental consent for the evaluation does not commit the parent to consenting to special education and related services for the child (§614(a)(1)(i)(I)). Rather the LEA must seek "informed consent" from the parent before initiating IDEA services (§614(a)(1)(i)(II)).

P.L. 108-446 provides extensive new language to deal with situations in which the parent fails to provide consent or does not respond to the LEA's request for the initial evaluation. Under those circumstances, the LEA may use procedures described in §615 (dealing with procedural safeguards) to initiate the evaluation (§614(a)(1)(ii)(I)). If the parent refuses the provision of special education and related services for the child based on the initial evaluation, P.L. 108-446 directs the LEA **not** to "provide special education and related services to the child by utilizing the procedures described in section 615" (§614(a)(1)(ii)(II)). Under such circumstances, the LEA would not be considered to be violating its obligation to provide FAPE, nor would it be obligated to develop an IEP for the child (§614(a)(1)(ii)(III)).

P.L. 108-446 provides specific procedures dealing with parental consent for children who are wards of the state (§614(a)(1)(iii)). The LEA is to make "reasonable efforts" to obtain parental consent for the initial evaluation. However, parental consent is unnecessary if the LEA, after reasonable efforts, cannot locate the parent, the parent's rights have been terminated by state law, or a judge has subrogated the parent's right to make educational decisions for the child (§614(a)(1)(iii)(II)).

Evaluation Procedures and Eligibility Determination.[64] P.L. 108-446 continues many of the evaluation requirements of the prior version of IDEA: for example, multiple measures or assessments must be used to determine eligibility for IDEA services, and these measures or assessments must be technically sound. One notable change to these requirements deals with the language or mode of

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[62]P.L. 108-446 continues to require parental consent for reevaluations initiated by the LEA, unless the parent fails to respond after the LEA has "taken reasonable measures to obtain such consent" (§614(c)(3)).

[63]P.L. 105-17 §614(a)(2)(A).

[64]The Conference Report emphasizes that the evaluation process should "fully inform" the team developing the child's individualized education plan (IEP) (discussed below). See H.Rept. 779, 108th Cong., 2d Sess. 204 (2004).

communication used to administer assessments. Prior law required that "tests and other evaluation materials" be "provided and administered in the child's native language or other mode of communication, unless it is **clearly not feasible** [emphasis added] to do so...."[65] P.L. 108-446 rephrases this requirement as follows: "assessments and other evaluation materials" must be "provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is **not feasible** [emphasis added] to so provide or administer...." (§614(b)(3)(A)(ii)). P.L. 108-446 also addresses concerns about children with disabilities who transfer from one LEA to another during the school year by requiring coordination between "such children's prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations" (§614(b)(3)(D)).[66]

P.L. 108-446 continues to require that the eligibility for special education and related services be determined by "a team of qualified professionals" and the child's parent (§614(b)(4)(A)) and that eligibility not be predominantly based on the lack of appropriate reading or mathematics instruction or on limited English proficiency. P.L. 108-446 adds specific requirements regarding the determination of specific learning disabilities. In determining whether a child has a specific learning disability, an LEA "shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability ..." (§614(b)(6)(A)).[67]

P.L. 108-446 continues to require an evaluation before determining that a child no longer requires special education and related services. The Act adds new exceptions to this requirement making the change-in-eligibility evaluation

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[65]P.L. 105-17 §614(b)(3)(A)(ii).

[66]Report language recognizes that evaluations can be delayed for highly mobile children, such as children in state welfare systems and homeless children and notes:

> In order to minimize such delays, the Conferees intend that local education agencies ensure that assessments for these children and youth be completed expeditiously, taking into consideration the date on which such children and youth were first referred for assessment in any local educational agency. Such assessments shall be made in collaboration with parents (including foster parents) and, where applicable, surrogate parents, homeless liaisons designated under Section 723(g)(1)(j)(ii) of the McKinney-Vento Homeless Assistance Act, court appointed special advocates, a guardian ad litem, or a judge.

H.Rept. 779, 108th Cong., 2d Sess. 204 (2004).

[67]The Senate report explains the rationale for this provision:

> The committee believes that the IQ-achievement discrepancy formula, which considers whether a child has a severe discrepancy between achievement and intellectual ability, should not be a requirement for determining eligibility under the IDEA. There is no evidence that the IQ-achievement discrepancy formula can be applied in a consistent and educationally meaningful (i.e., reliable and valid) manner. In addition, this approach has been found to be particularly problematic for students living in poverty or culturally and linguistically different backgrounds, who may be erroneously viewed as having intrinsic intellectual limitations when their difficulties on such tests really reflect lack of experience or educational opportunity.

S.Rept. 185, 108th Cong., 2d Sess. 26 (2003).

unnecessary if the child graduates from high school with a regular diploma or reaches the age at which state law no longer provides for FAPE (§614(c)(5)(B)(i)). For children whose eligibility for IDEA services ends as a result of graduation or age termination, the LEA is required to provide a summary of his or her academic and functional performance, including "recommendations on how to assist the child in meeting the child's postsecondary goals" (§614(c)(5)(B)(ii)).

The Individualized Education Program (IEP). The IEP is the blueprint for the education and related services that the LEA provides for a child with a disability, together with the goals, academic assessment procedures, and placement of the child (§614(d)). P.L. 108-446 maintains the general requirements for the IEP but changes or deletes some requirements and adds some new requirements. P.L. 108-446 continues to require an articulation of the child's current academic and functional performance levels and a discussion of measurable annual goals. A notable change is the elimination of the requirement for "benchmarks and short-term objectives" for all children with disabilities[68] except those who are the most severely cognitively disabled[69] (§614(d)(1)(A)(i)(I)(cc)). The IEP is to detail any accommodations that the IEP team determines are necessary for measuring the child's achievement and functional performance on state and districtwide assessments (§614(d)(1)(A)(i)(VI)(aa)). If the IEP determines that the child is to take an alternative assessment rather than the regular state or districtwide assessments, the IEP must explain why an alternative assessment is necessary and why that assessment is appropriate (§614(d)(1)(A)(i)(VI)(bb)).[70]

Prior law required that the IEP contain a statement of "transition service needs" beginning at age 14 and annually updated to ease and support the transition from the IDEA program in public school to education, employment, and (when necessary) independent living after public schooling ended.[71] P.L. 108-446 changes the timing of this requirement to "not later than the first IEP to be in effect when the child is 16" and continues the requirement for annual updates (§614(d)(1)(A)(i)(VIII). P.L. 108-446 adds a transition-services requirement for postsecondary goals for appropriate education, training, employment, and independent living skills (§614(d)(1)(A)(i)(VIII)(aa)).

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[68]P.L. 105-17 §614(d)(1)(A)(ii).

[69]P.L. 108-446 refers to "children with disabilities who take alternate assessments aligned to alternate achievement standards." This provision presumably refers to those children with the most severe cognitive disabilities that ESEA regulations permit to be assessed based on alternative achievement standards for the purposes of determining adequate yearly progress (AYP). In general, this group is to account for no more than 1% of all students tested. All other children with disabilities are to be assessed on the same achievement standards as other children (a key principle of No Child Left Behind), although some may be assessed based on alternative assessments or based on assessments with accommodations.

[70]To follow ESEA requirements, these alternative assessments would still have to be aligned with the same challenging achievement standards on which other children are assessed.

[71]P.L. 105-17 §614(d)(1)(A)(vii).

Finally, P.L. 108-446 adds a rule of construction that no additional information is required for the IEP beyond that explicitly required in §614 and that information in one part of the IEP need not be contained in another part (§614(d)(1)(A)(ii)).

The IEP Team and the IEP Process. P.L. 108-446 maintains the general composition of the IEP team, including the parent, one or more special education teachers, one or more regular education teachers (if appropriate), and other LEA representatives (§614(d)(1)(B)).[72] P.L. 108-446 does make additions and alterations to the IEP team requirements aimed at reducing paperwork and other burdens of the IEP process and providing procedures for the IEPs of children with disabilities who change LEAs during the school year.

P.L. 108-446 permits members of the IEP team to be excused from IEP meetings if the parent and the LEA agree (§614(d)(1)(C)). If the meeting topic does not deal with the member's areas of concern, there are no further requirements. If the meeting deals with the excused member's areas, he or she must provide written input to the parent and to the team. In all cases, the parent's agreement or consent must be obtained in writing.

P.L. 108-446 continues to require that each LEA have an IEP for each child with a disability in place at the beginning of the school year (§614(d)(2)(A)). The Act adds requirements for children who transfer from one school district to another during the school year (§614(d)(2)(C)). For those children changing districts **within** a state, the new LEA must provide "services comparable to those described in the previous IEP" until it adopts the previous IEP or develops and implements a new IEP. For children transferring **between** states, the new LEA must also continue comparable services until it conducts an evaluation of the child (if the LEA determines it to be necessary) and "develops a new IEP, if appropriate, that is consistent with Federal and State law." (§614(d)(2)(C)(i)). Both the old and new schools are required to "take reasonable steps" to ensure that the child's IEP, supporting documentation, and other records are promptly transferred (§614(d)(2)(C)(ii)).

P.L. 108-446 makes certain revisions to expedite changes to the IEP. If the parent and the LEA agree, changes to the IEP after the annual IEP meeting may be made via a written document without holding an IEP meeting (§614(d)(3)(D)). In addition, LEAs are encouraged to consolidate reevaluation meetings with IEP meetings for other purposes if possible (§614(d)(3)(E)). Finally, changes to the IEP may be made by amending it, rather than completely redrafting it (§614(d)(3)(F)).

P.L. 108-446 authorizes a multi-year demonstration (§614(d)(5)). The Secretary of Education is authorized to approve demonstration proposals from up to 15 states. These demonstrations would allow parents and LEAs to adopt IEPs covering up to

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[72]For a child moving from the infants and toddlers program under Part C of IDEA, P.L. 108-446 provides that a representative of the Part C program (such as the program coordinator), at the parent's request, be invited to the initial IEP meeting "to assist with the smooth transition of services" (§614(d)(1)(D)).

three years that coincide with the child's "natural transition points."[73] The multi-year IEPs must be optional for parents and based on their informed consent. They must contain measurable annual goals linked to natural transition points. The IEP team must review the IEP at each transition point and annually to determine if progress is being made toward annual goals. More frequent reviews are required if sufficient progress is not being made. Beginning in 2006 and annually thereafter, the Secretary must report on the effectiveness of the demonstration programs.

Finally, P.L. 108-446 permits alternatives to physical meetings, such as video conferencing and conference telephone calls. These alternatives can take the place of physical IEP meetings and administrative meetings related to procedural safeguards under §615 (such as scheduling and exchange of witness lists) (§614(f)).

Procedural Safeguards (Section 615)

Section 615 provides procedural safeguards for children with disabilities and their parents. This section has been a continual source of controversy, especially the provisions relating to the discipline of children with disabilities. The House and Senate bills differed dramatically in their §615 language. The enacted version contains some provisions from both the House and Senate versions but most closely tracks the Senate version. The following is a brief discussion of the major changes made in §615 by the new law.

Homeless Children. The requirement, found in §615(a), that state educational agencies establish and maintain procedures to ensure procedural safeguards regarding a free appropriate public education (FAPE) is the same as previous law. Many of the types of procedures are also the same but several changes have been made; notably, more detailed procedures have been added regarding the appointment of an individual to act as a surrogate for parents in situations where the child is a ward of the state or is an unaccompanied homeless youth. The state is required to make reasonable efforts to ensure the assignment of a surrogate not more than thirty days after there is a determination by the agency that the child needs a surrogate (§615(b)).

Statute of Limitations Regarding Complaints. The types of procedural safeguards required by §615(b) include an opportunity for any party to present a complaint but provides that such complaint may only be presented concerning violations that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action. There are several exceptions to this statute of limitations. First, if state law has an explicit time limitation for presenting a complaint, that provision shall control. In addition, the time requirement does not apply to a parent if the parent was prevented from presenting the complaint due to specific misrepresentations by the LEA that it had

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[73]These transition points are defined to include: the transition "from preschool to elementary grades, from elementary grades to middle or junior high school grades, from middle or junior high school grades to secondary school grades, and from secondary school grades to post-secondary activities, but in no case a period longer than 3 years" §614(d)(5)(C).

resolved the problem or the local educational agency withheld information from the parent that was required to be provided under Part B (§615(b)(6)).

Due Process Complaint Notice. The due process procedures must require that either party or the attorney representing a party provide a due process complaint notice to the other party and forward a copy to the state educational agency (SEA). This notice, found at §615(b)(7), must include the name, home address, and school the child is attending as well as a description of the nature of the problem and a proposed resolution. New provisions are added allowing available contact information to be used for a homeless child. Another new provision requires that a party may not have a due process hearing until the notice is filed.

There are further requirements for the due process complaint notice contained in §615(c)(2). Generally, the due process complaint notice shall be deemed sufficient unless the party receiving the notice notifies in writing both the hearing officer and the other party that the receiving party believes the notice does not meet the requirements of §615(b)(7). This notice must be provided within fifteen days of receiving the complaint (§615(c)(2)(C)), and within five days of the receipt of this notification, the hearing officer shall make a determination of whether the notice meets the requirements of §615(b)(7) and immediately notify the parties in writing. There are detailed requirements concerning the response to the complaint at §615(c)(2)(B). The due process complaint may be amended only if the other party consents in writing and is given the opportunity to resolve the complaint through the resolution session or if the hearing officer grants permission not later than five days before a due process hearing occurs.

Procedural Safeguards Notice. The procedural safeguards notice requirements are amended to reduce the paperwork burden on schools. The new law requires that a copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents only one time a year except that a copy shall also be given upon initial referral or parental request for evaluation, upon the first occurrence of the filing of a complaint, and upon the request of a parent (§615(d)(1)). The description of the contents of the procedural safeguards notice generally tracks previous law except that there are additions relating to the opportunity to resolve complaints, including the time period in which to make a complaint, the opportunity for the agency to resolve the complaint, the availability of mediation, and the time period in which to file civil actions (§615(d)(2)).

Mediation. The 1997 reauthorization of IDEA added provisions relating to the mediation of disputes. The 2004 reauthorization kept much of the 1997 language while adding subheadings. Two more significant changes are made, however. Under the 1997 law, SEAs or LEAs could establish procedures to require a parent who chose not to use mediation to meet with a disinterested party who could explain and encourage the use of mediation. The new law does not allow the SEAs or LEAs to "require" such meetings; rather, the SEAs or LEAs may establish procedures "to offer" such meetings (§615(e)(2)(B)). Second, the 2004 law provides for a written, legally binding, agreement if resolution is reached during mediation. This document is (1) to state that all discussions are confidential and may not be used as evidence in any subsequent due process or civil proceeding, (2) to be signed by both the parent

and agency representative, and (3) to be enforceable in a state court of competent jurisdiction or in U.S. district court (§615(e)(2)(F)).

Impartial Due Process Hearing. The cornerstone of the procedural safeguards under IDEA is the impartial due process hearing which is available after a complaint has been filed. The new law adds several provisions to the requirement. For example, the opportunity for a due process hearing is extended not only to the parents of a child with a disability but also to the local educational agency (§615(f)(1)(A)).

Resolution Session. A new provision for a "resolution session" is added as a requirement prior to a due process hearing. This preliminary meeting involves the parents, the relevant members of the IEP team, and a representative of the local educational agency who has decision-making authority. The session must be convened within 15 days of receiving notice of the parent's complaint. During the resolution session, the parents of the child with a disability discuss their complaint and the LEA is provided the opportunity to resolve the complaint. The LEA may not include its attorney unless the parent is accompanied by an attorney. The resolution session may be waived by the LEA and the parents in writing or if they agree to use the mediation process. If the LEA has not resolved the problem within thirty days from the receipt of the parents' complaint, the due process hearing may occur and the applicable time lines shall commence. If an agreement is reached at the resolution session, the parties must execute a legally binding agreement signed by both parties and which is legally enforceable in any state court or U.S. district court. A party may void the agreement within three business days (§615(f)(1)(B)).

Hearing Officer Requirements. An IDEA hearing officer plays a key role in the protection of procedural rights and the new law adds to the requirements for this position. In addition to the previous requirement that the hearing officer not be an employee of the SEA or LEA involved in the education or care of the child, the new law adds that the hearing officer may not be a person who has a personal or professional interest that conflicts with the person's objectivity. The Senate report notes that the committee does not intend this provision to exclude members of professional associations or exclude special educators from other school districts from serving as hearing officers if they meet the other qualifications.[74] In addition, the new law provides that the hearing officer must possess knowledge of the IDEA statute, regulations and federal and state case law; possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice (§615(f)(3)(A)).

Subject Matter of Hearing. The new law specifically states that the party requesting the due process hearing is not allowed to raise issues at the due process hearing that were not raised in the due process complaint notice (§615(f)(3)(B)). In addition, the decision of the hearing officer must be made on substantive grounds based on a determination of whether the child with a disability received a free appropriate public education (FAPE). However, there is an exception to this

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[74]S.Rept. 185, 108th Cong., 1st Sess., 39 (2003).

requirement. A hearing officer may find that a child with a disability did not receive a free appropriate public education only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE, or caused a deprivation of educational benefits. In addition, a hearing officer may order a LEA to comply with the procedural safeguards of section 615 and, in addition, the limitations regarding procedural inadequacies do not prevent a parent from filing a complaint with the SEA.

The Senate report discussed this provision noting that there have been cases "in which a hearing officer has found that a school denied FAPE to a child with a disability based upon a mere procedural technicality, rather than an actual showing that the child's education was harmed by the procedural flaw.... The ramifications of this are great when considering that such a finding can subject a school district to the payment of attorneys' fees."[75] However, the Senate report also observed that there are procedural violations which can deny a child FAPE. "For example, a school's failure to give a parent access to initial evaluation information to make an informed and timely decision about their child's education can amount to a FAPE violation."[76] The 2004 reauthorization added exceptions to the requirement that decisions be made on substantive grounds to address these concerns.

Statute of Limitations Regarding Requests for a Hearing. The 2004 reauthorization includes statutes of limitations in various sections. As previously discussed Section 615(b) provides for a two-year statute of limitations regarding the filing of a complaint. There is also a two-year statute of limitations regarding requests for a hearing. The two years is from the date the parent or agency knew or should have known about the alleged action. In addition, if the state has an explicit time limitation for requesting a hearing, the state law on the subject shall prevail (§615(f)(3)(C)). However, the statute of limitations provisions in §615(f)(3)(C) shall not apply to a parent if the parent was prevented from requesting a hearing because of specific misrepresentations by the LEA that it had resolved the problem, or the LEA's withholding of information that was required to be provided to the parent (§615(f)(3)(D)).

Appeals. The 1997 reauthorization provided that if the due process hearing was conducted by an LEA, it could be appealed to the SEA. The 2004 reauthorization keeps this provision, adding subheadings (§615(g)).

Safeguards. Previous law contained a provision on safeguards that were available to parties to a hearing, including the right to be accompanied and advised by counsel, to present evidence and confront witnesses, and to a written or electronic record. This section was substantively unchanged by the 2004 reauthorization (§615(h)).

Administrative Procedures. The 1997 reauthorization contained a number of provisions relating to what happens after the due process hearing. Decisions made

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[75]Ibid., p. 40.

[76]Ibid., p. 41.

in the hearing were to be final except that they could be appealed to the SEA, in which case that decision would be final. However, any party had a right to bring a civil action in state court or U.S. district court. These provisions continue in the 2004 reauthorization.

Statute of Limitations to Appeal to Court. The new law adds another statute of limitations; the party bringing the action has ninety days from the date of the hearing officer's decision to appeal to a court, or if the state has an explicit time limitation for bring such actions, the state law on the subject shall prevail (§615(i)(2)(B)).

Attorneys' Fees. As under previous law, a court, in its discretion, may award reasonable attorneys' fees as part of the costs to a prevailing party who is the parent of a child with a disability (§615(i)(3)(B)). However, the 2004 reauthorization also allows for attorneys' fees against the attorney of a parent for a SEA or LEA who is a prevailing party where the complaint is frivolous, unreasonable, or without foundation or where the parents' attorney continues to litigate after the litigation clearly becomes frivolous, unreasonable, or without foundation (§615(i)(3)(B)(i)(II)). In addition, attorneys' fees may be awarded to a prevailing SEA or LEA against the attorney of a parent or against the parent if the parent's complaint or subsequent cause of action is presented for an improper purpose such as to harass, cause unnecessary delay or needlessly increase the cost of litigation (§615(i)(3)(B)(i)(III)). These provisions are not applicable to the limitations on attorneys' fees that affect the District of Columbia[77] (§615(i)(3)(B)(ii)).

The previous requirements for attorneys' fees to be based on rates prevailing in the community and the prohibition of the use of bonuses or multipliers are kept in the new law as is the prohibition of attorneys' fees and related costs if a written offer of settlement is made and certain conditions apply (§615(i)(3)(C) and (D)). The new law also retains the exception to the provision regarding settlement contained in the previous law allowing attorneys' fees and related costs to a parent who is a prevailing party and who was substantially justified in rejecting the settlement offer (§615(i)(3)(E)). The 2004 reauthorization adds a new provision essentially prohibiting attorneys' fees for the resolution session. Previous law provided for a reduction in the amount of attorneys' fees when the court finds that the parent unreasonably protracted the final resolution of the controversy, the amount unreasonably exceeds the hourly rate prevailing in the community, the time spent was excessive or the attorney did not provide the appropriate information in the notice of the complaint. The new law keeps these provisions and also allows a court to reduce attorneys' fees if the parents' attorney unreasonably protracts the final resolution of the controversy (§615(i)(3)(F)).

Stay Put. The 2004 reauthorization keeps the stay put provision at §615(j). This provision states that except as provided in §615(k)(4) (discussed below) or if the SEA or LEA and the parents agree, a child with a disability remains in his or her current education placement during the pendency of §615 proceedings.

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[77]See §327, District of Columbia Appropriations Act, 2005.

Disciplinary Procedures. Disciplinary provisions relating to children with disabilities were a contentious issue during the 1997 reauthorization, and they remained a contentious issue in the 2004 reauthorization. Schools have often argued that the discipline provisions for children with disabilities should be the same as those for children without disabilities, and that the provisions of IDEA regarding discipline created too much of a paperwork burden. Advocates for children with disabilities, on the other hand, often argued that IDEA was enacted in 1975, in part, to prevent schools from unilaterally denying services to children with disabilities when they misbehaved, that due process procedures are necessary to prevent this denial of education, and that children with disabilities should not be punished for behavior that was caused by their disability. Although the 2004 reauthorization made significant changes to §615(k), it did keep many of the provisions of the previous law, including the concept of a manifestation determination. A manifestation determination, as discussed in more detail below, is a procedure to determine whether or not the behavior of a child with a disability was caused by a child's disability.

Suspensions and Conduct That is Not a Manifestation of a Disability. New provisions were added by the 2004 reauthorization concerning the authority of school personnel. School personnel may consider, on a case-by-case basis, any unique circumstances when determining whether to order a change in placement for a child with a disability who violates a code of student conduct (§615(k)(1)(A)). The authority of school personnel to remove a child to another placement or suspension for not more than ten school days is retained from previous law (§615(k)(1)(B)). Also kept from previous law is the provision that allows school personnel to apply the same disciplinary procedures to children with disabilities as children without disabilities if the violation of a school code of conduct is not a manifestation of the child's disability, except that educational services may not cease (§615(k)(1)(C)).

Educational Services. The 2004 reauthorization adds a section on the services which must be provided when a child with a disability is removed from his or her current placement, whether or not the behavior that triggered the move is determined to be a manifestation of the child's disability. Under the new law, children with disabilities must continue to receive educational services that enable the child to continue to participate in the general education curriculum and to progress toward meeting his or her IEP goals. In addition, children with disabilities must receive, as appropriate, a functional behavior assessment, behavioral intervention services and modifications that are designed to address the behavior violation (§615(k)(1)(D)).

Manifestation Determination. The concept of a manifestation determination originated in policy interpretations of IDEA by the Department of Education.[78] The theory is that when behavior, even inappropriate behavior, is caused by a disability, the response of a school must be different that when the behavior is not related to the disability. The concept of a manifestation determination was placed in statutory language in the 1997 reauthorization. Although the House- passed bill would have

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[78]OSEP Memorandum 95-16, 22 *Individuals with Disabilities Education Law Report* (IDELR) 531 (Apr. 26, 1995).

deleted the concept, Congress kept the manifestation determination in the 2004 law but attempted to clarify its application.

The 2004 reauthorization provides that, within 10 days of a decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the IEP team shall review all relevant information in the student's file, including the IEP, teacher observations, and any relevant information provided by the parents to determine if the conduct in question was caused by or had a direct and substantial relationship to the child's disability or if the conduct in question was the direct result of the LEA's failure to implement the IEP. If the LEA, the parent and relevant members of the IEP team determine that the conduct in question was caused by or had a direct and substantial relationship to the child's disability or if the conduct in question was the direct result of the LEA's failure to implement the IEP, the conduct is determined to be a manifestation of the child's disability. This framework does not apply, however, to situations involving the school personnel's authority to remove a child with a disability for not more than ten school days (§615(k)(1)(E)).

This current manifestation determination differs from previous law, which had the manifestation determination review conducted by the IEP team and other qualified personnel. The previous law provided that the IEP team may determine that the behavior of the child was not a manifestation of the child's disability only if the IEP team considered certain listed factors and then determined that the child's IEP and placement were appropriate and special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement. In addition, under previous law, the IEP team had to determine that the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior and that the child's disability did not impair the ability of the child to control the behavior (P.L. 105-17, §615(k)(4)).

Under the 2004 reauthorization, if the LEA, the parent, and relevant members of the IEP team determine that the conduct was a manifestation of the child's disability, the IEP team must conduct a functional behavior assessment and implement a behavior intervention plan for the child if this has not been done before. If there was a behavioral intervention plan, it shall be reviewed and modified as necessary to address the behavior. Except for situations involving weapons, drugs, or serious bodily injury, when the conduct is a manifestation of the disability, the child shall return to the placement from which he or she was removed unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan (§615(k)(1)(F)).

Interim Alternative Educational Settings. As in previous law, school personnel may remove a student with a disability to an interim alternative education setting regardless of whether the behavior is a manifestation of the disability in certain circumstances and for a limited amount of time. Under previous law, the time limitation was not more than 45 days; under the new law the time limitation is for not more than 45 **school** days. The regulations promulgated under the 1997 reauthorization defined "day" as meaning calendar day unless otherwise indicated. "School day" is defined in the regulation as any day that students are in attendance

at school for instructional purposes.[79] Thus the new law would appear to add additional time to the limit on a child's placement in an interim alternative setting.

Both the old and new laws permitted this placement in an interim alternative educational setting if a child carries or possesses a weapon to or at school or at a school function, or if a child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or on school premises or at a school function. The 2004 reauthorization adds another situation to the school personnel's authority: where a child has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function (§615(k)(1)(G)).

P.L. 108-446 also adds a notification provision. Not later than the date on which the decision to take disciplinary action is made, the LEA must notify the parents of the decision and of the relevant procedural safeguards (§615(k)(1)(H)).

Both previous and new law provide that the determination of the interim alternative educational setting shall be determined by the IEP team. However, in the 1997 law, this applied only to situations involving weapons or drugs. The 2004 reauthorization includes situations where the child's behavior is determined not to be a manifestation of the child's disability and school personnel seek to change the child's placement, and situations involving the infliction of serious bodily injury (§615(k)(2)).

Appeals. The 2004 reauthorization allows a parent who disagrees with any decision regarding placement or the manifestation determination, or a LEA that believes that maintaining the current placement of the child is substantially likely to injure the child or others, to request a hearing (§615(k)(3)(A)). The new law specifically delineates the authority of a hearing officer. First, a hearing officer is to hear and make a determination regarding any hearings requested pursuant to §615(k)(3)(A). In making this determination, the hearing officer may order a change of placement which may include:

- returning a child with a disability to the placement from which he or she was removed, and
- ordering a change in placement to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or others.

The new law also changes the "stay put" provision in the appeals section. Under the 2004 reauthorization, when an appeal has been requested by either a parent or the LEA under §615(k)(3), the child is to remain in the interim alternative educational setting pending the decision of the hearing officer or until the time period for the disciplinary infraction ends. Under previous law, the child was to remain in the interim alternative educational setting for 45 days unless the school and the parents agreed or a hearing officer rendered a decision (P.L. 105-17, §615(k)(7)). The new law requires that the SEA or LEA must arrange for an expedited hearing that must

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[79] 34 C.F.R. §300.9 (2002).

occur within 20 school days from when the hearing is requested. The hearing determination must be made within ten school days after the hearing (§615(k)(4)).

Protections for Children Not Yet Eligible for Special Education and Related Services. The 2004 reauthorization keeps much of the previous law regarding the protections afforded children who have not yet been identified as eligible for special education. However, several changes were made regarding when a LEA is deemed to have knowledge that a child is a child with a disability. Generally, a LEA is deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action:

- the parent of the child expressed concern, in writing, to supervisory or administrative personnel of the LEA or the child's teacher that the child is in need of special education and related services,
- the parent has requested an evaluation, or
- the teacher of the child or other LEA personnel has expressed specific concerns about a pattern of behavior directly to the director of special education or other supervisory personnel (§615(k)(5)).

Under previous law, a LEA was deemed to have knowledge that a child is a child with a disability if the behavior or performance of the child demonstrated the need for such services. This section was deleted from P.L. 108-446. The Senate report stated that this provision was deleted because a teacher could make an isolated comment to another teacher expressing concern about behavior and that could trigger the protections.[80]

The 2004 reauthorization also contains a new exception stating that a LEA shall not be deemed to have knowledge that a child is a child with a disability if the parent of the child has not allowed an evaluation of the child, or has refused services, or the child has been evaluated and it was determined that the child was not a child with a disability (§615(k)(5)(C)).

The provisions of previous law regarding the conditions that apply if the LEA has no basis of knowledge that a child is a child with a disability were kept by the 2004 reauthorization. If a LEA does not have such knowledge, the child may be subjected to disciplinary measures that are applied to children without disabilities who engage in similar behaviors.

Referral to and Action by Law Enforcement and Judicial Authorities. The 2004 reauthorization keeps the previous requirements concerning referral to law enforcement authorities. Nothing in Part B is to be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities. Like previous law, an agency reporting a crime committed by a child with a disability shall ensure that copies of certain records are transmitted (§615(k)(6)).

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[80]S.Rept. 185, 108th Cong., 1st Sess., 45-46 (2003).

Definitions. The definitions of "controlled substance," "illegal drug," and "weapon" are the same as in the 1997 reauthorization. The previous definition of substantial evidence is deleted and a new definition of "serious bodily injury" is added. Serious bodily injury is defined as having the meaning given in 18 U.S.C. §1365 (h)(3), which states: "the term 'serious bodily injury' means bodily injury which involves — (A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty" (§615(k)(7)).

Rule of Construction. The 1997 reauthorization provided that nothing in this title shall be construed to restrict or limit rights under the Constitution, the Americans with Disabilities Act, title V of the Rehabilitation Act of 1973 or other federal laws protecting the rights of children with disabilities. The 2004 reauthorization kept this language except that instead of "nothing in this title," the new law reads "nothing in this part" (§615(l)).

Transfer of Parental Rights at the Age of Majority. P.L. 108-446 keeps the same language as in previous law. Generally, a state may provide that when a child with a disability reaches the state age of majority, the state may transfer certain rights to the child (§615(m)).

Electronic Mail. The 2004 reauthorization adds a new provision allowing a parent of a child with a disability to receive required notices by electronic mail if the agency makes such an option available (§615(n)).

Separate Complaint. The new law adds a provision stating that nothing in §615 shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed (§615(o)).

Monitoring, Technical Assistance, and Enforcement (Section 616)

Federal and State Monitoring. Major changes were made to Section 616 by P.L. 108-446. Generally, Congress determined that the previous law on monitoring focused too much on compliance with procedures and in the 2004 reauthorization, shifted the emphasis to focus on student performance.[81] Under the new law, the Secretary of Education is to monitor implementation of Part B by oversight of the general supervision by the states and by the state performance plans. The Secretary is to enforce Part B as described in §616(e) and to require states to monitor implementation by LEAs and to enforce Part B. Under P.L. 108-446, the primary focus of federal and state monitoring activities is to be on improving educational results and functional outcomes for children with disabilities and ensuring that states meet the program requirements (§616(a)(2)). The new law lists certain priority areas for monitoring which are to be monitored using quantifiable indicators. The priority areas are:

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[81] See S.Rept. 185, 108th Cong., 1st Sess., 46 (2003); H.Rept. 77, 108th Cong., 1st Sess., 120 (2003).

- the provision of a free appropriate public education in the least restrictive environment;
- state exercise of general supervisory authority, including child find, effective monitoring, the use of resolution sessions, mediation, voluntary binding arbitration,[82] and a system of transition services; and
- disproportionate representation of racial and ethnic groups in special education and related services to the extent the representation is the result of inappropriate identification (§616(a)(3)).

In addition to these priority areas, the Secretary of Education is also required to consider other relevant information and data (§616(a)(4)).

The conference report emphasizes the rigorous nature of the Secretary's monitoring. "The Secretary is directed to monitor states using rigorous targets and to request such information from states and stakeholders as is necessary to implement the purposes of IDEA, including the use of on-site monitoring visits and student file reviews, and to enforce the requirements of the IDEA." The Secretary is also strongly encouraged "to review all relevant and publicly available data, including the data gathered under Section 618, related to the targets and priority areas established for reviewing the efforts of States and local educational agencies to implement the requirements and purposes of IDEA. The Secretary is also authorized to use qualitative measures to inform his decision-making process in determining the efforts of the State or LEA in implementing IDEA."[83]

State Performance Plans. P.L. 108-446 requires that states have in place a performance plan evaluating the state's efforts to implement the requirements and purposes of Part B and stating how such implementation will be improved. This plan must be in place not later than one year after the date of enactment which was on December 3, 2004 (§616(b)(1)(A)). Each state must submit its performance plan to the Secretary of Education for approval (§616(b)(1)(B)). Each state is to review its performance plan at least once every six years and submit amendments to the Secretary of Education (§616(b)(1)(C)).

The 2004 reauthorization requires that as part of the state performance plan, states shall establish measurable and rigorous targets for indicators established under the priority areas described above (§616(b)(2)(A)). Each state is required to collect "valid and reliable" information as needed to report annually to the Secretary. However, nothing in the title is to be construed to authorize a nationwide database of personally identifiable information (§616(b)(2)(B)).

The new law requires the states to use the targets established in their performance plan and the priority areas to analyze the performance of each LEA (§616(b)(2)(C)(i)). The state is to report annually to the public on the LEAs' performance. In addition, the state's performance plan is to be made available through public means, including availability on the state educational agency's

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[82]The reference to "voluntary binding arbitration" appears to be a reference to a provision that had been in the House version of H.R. 1350 but was dropped in conference.

[83]H.Conf.Rept. 779, 108th Cong., 2d Sess., 232 (2004).

website, distribution to the media, and distribution through public agencies. The state is to report annually to the Secretary on its performance (§616(b)(2)(C)(ii)). However, the state shall not report to the Secretary, or the public, performance information that would result in the disclosure of personally identifiable information about individual children. In addition, if the available data are insufficient to yield statistically reliable information, they shall not be reported (§616(b)(2)(C)(iii)).

The conference report discussed the state performance plans. "The Conferees believe that accurate decision making with regard to enforcement of the IDEA is required in order to: (1) ensure that federal dollars are being spent productively on education, and, (2) to ensure that monitoring and enforcement is administered fairly. It is our expectation that state performance plans, indicators, and targets will be developed with broad stakeholder input and public dissemination."[84]

Approval Process. P.L. 108-446 provides that the Secretary of Education is to review each performance plan. The plan is considered to be approved unless the Secretary, within 120 days of receipt of the plan, makes a written determination that the plan does not meet the requirements of §616, including the specific provisions described as part of the state's performance plan (§616(c)(1)). The Secretary may not finally disapprove a plan until after the state is given notice and an opportunity for a hearing (§616(c)(2)). This notification must cite the specific provisions in the plan that do not meet the requirements and request additional information regarding the provisions in question (§616(c)(3)). If the state responds to this notification within 30 days after receipt and resubmits the plan with the requested information, the Secretary must approve or disapprove of the plan. This action by the Secretary may be either 30 days after the plan is resubmitted or after the original 120-day period, whichever is later (§616(c)(4)). If the state does not respond to the Secretary's notification within 30 days of receipt, the plan is considered disapproved (§616(c)(5)).

Secretary's Review and Determination. The 2004 reauthorization requires the Secretary of Education to annually review the state performance report. (§616(d)(1)) Based on this report, information from monitoring visits, or any other public information, the Secretary shall determine whether the state:

- meets the requirements and purposes of Part B;
- needs assistance in implementing the requirements of Part B;
- needs intervention in implementing the requirements of Part B; or
- needs substantial intervention in implementing the requirements of Part B.

If the Secretary makes a determination regarding intervention or substantial intervention, the Secretary must provide notice and the opportunity for a hearing (§616(d)(2)).

Enforcement. Under P.L. 108-446, if the Secretary makes a determination other than that the state meets the requirements and purposes of Part B, the Secretary is required to take certain actions (§616(e)). The conference report recommended

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[84] H.Conf.Rept. 779, 108th Cong., 2d Sess., 232 (2004).

"that the Secretary diligently investigate any root causes prior to selecting enforcement options, so that enforcement options are appropriately selected and have the greatest likelihood in yielding improvement in that state. However, investigations must not unduly delay the enforcement action."[85]

Assistance in Implementing Requirements. If the Secretary determines that the state needs assistance in implementing the requirements of Part B for two consecutive years, the Secretary must take one or more of the following actions:

- advise the state of available sources of technical assistance which may include several entities, such as the Office of Special Education Programs, and require the state to work with appropriate entities;
- direct the use of state-level funds under §611(e) where the state needs assistance;
- identify the state as a high-risk grantee and impose special conditions on the state's Part B grant (§616(e)(1)).

Needing Intervention. If the Secretary determines, for three or more consecutive years, that a state needs intervention in implementing the requirements of Part B, the Secretary may take any of the actions listed regarding assistance in implementing regulations. In addition, the Secretary shall take one or more of the following actions:

- requiring the state to prepare a corrective action plan or improvement plan if the Secretary determines that the state should be able to correct the problems within one year;
- requiring the state to enter into a compliance agreement under Section 457 of the General Education Provisions Act if the Secretary believes that the state cannot correct the problem within one year;
- withholding not less than 20% and not more than 50% of the state's funds under §611(e)[86] for each year the Secretary determines a state needs intervention until the Secretary determines the state has sufficiently addressed the areas needing intervention;
- seeking to recover funds under section 452 of the General Education Provisions Act;
- withholding any further payments to the state, in whole or in part; or
- referring the matter for appropriate enforcement action, which may include a referral to the Department of Justice (§616(e)(2)).

Needing Substantial Intervention. Any time the Secretary determines that a state needs substantial intervention in implementing the requirements of Part B or that there is a substantial failure to comply with any condition of eligibility for a SEA or LEA the Secretary shall take one or more that following actions:

- recovering funds under Section 452 of the General Education Provisions Act;

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[85]H.Conf.Rept. 779, 108th Cong., 2d Sess., 232 (2004).

[86]See the above discussion of funds reserved from states' grants for administration and other state-level activities.

- withholding any further payments to the state under part B, either in whole or in part; or
- referring the case to the Office of the Inspector General at the Department of Education;
- referring the matter for appropriate enforcement action, which may include a referral to the Department of Justice (§616(e)(3)).

Opportunity for a Hearing. Before any funds are withheld under section 616, the Secretary must provide reasonable notice and a opportunity for a hearing to the SEA involved. The Secretary may suspend payments, and/or suspend the authority of the recipient to obligate funds under Part B after the recipient has been given reasonable notice and an opportunity to show cause why future payments or obligation authority should not be suspended (§616(e)(4)).

Report to Congress. The Secretary of Education must report to the House Committee on Education and the Workforce and the Senate Committee on Health, Education, Labor, and Pensions within thirty days of taking enforcement action. The report must include the specific action taken and the reasons for the action (§616(e)(5)).

Nature of the Withholding. If the Secretary withholds further payments due to the need for intervention or substantial intervention, the Secretary may determine that the withholding will be limited to programs or projects, or portions of these programs or projects, or that the SEA shall not make further payments under part B to specified state agencies or LEAs. Until the Secretary is satisfied that the situation has been substantially rectified, payments to the state must be withheld in whole or in part and payments by the SEA shall be limited to state agencies and LEAs that did not cause or were not involved in the situation leading to the Secretary's determination (§616(e)(6)).

Public Attention. If a state receives notice from the Secretary that the state needs intervention or substantial intervention in implementing the requirements of the part, the state must take measures to bring this information to the attention of the public (§616(e)(7)).

Judicial Review. If a state is dissatisfied with the Secretary's action concerning the state's eligibility under §612, the state may, not later than sixty days after the notice of such action, file a petition for review with the U.S. court of appeals in the state's circuit. The clerk of the court must transmit a copy of the petition to the Secretary and the Secretary must file the record of the proceedings which formed the basis of the Secretary's action (§616(e)(8)(A)).

When a petition is filed, the court has jurisdiction to affirm or set aside the Secretary's actions in whole or in part. The court's judgment is subject to review by the Supreme Court (§616(e)(8)(B)). The Secretary's findings of fact, if supported by substantial evidence, shall be conclusive but the court may remand for further evidence. The Secretary may make new or modified findings of fact and may modify the previous action (§616(e)(8)(B)-(C)).

State Enforcement. P.L. 108-446 requires that if a state agency determines that a LEA is not meeting the requirements of Part B, the SEA shall prohibit the LEA from reducing the LEA's maintenance of effort under §613(a)(2)(C)[87] (§616(f)).

Rule of Construction. The 2004 reauthorization states that the provisions of §616 do not restrict the Secretary from utilizing authority under the General Education Provisions Act to monitor and enforce IDEA (§616(g)).

Divided State Agency Responsibility. In some states, when children with disabilities are incarcerated in adult prisons, the responsibility for complying with IDEA is assigned to a public agency other than the SEA. In this situation, P.L. 108-446 provides that where the Secretary finds that the failure to comply substantially with the provisions of this part is related to a failure by the public agency, the Secretary shall take appropriate corrective action. However, any reduction or withholding of payments to the state must be proportionate and any withholding must be limited to the specific agency responsible for the failure to comply (§616(h)).

Data Capacity and Technical Assistance Review. P.L. 108-466 requires the Secretary to review the data collection and analysis capacity of the state to ensure that the necessary data and information are collected, analyzed, and accurately reported to the Secretary. The Secretary is also required to provide technical assistance, where needed, to improve the capacity of states to meet the data collection requirements (§616(i)).

Administration (Section 617)

Secretary's Responsibilities. P.L. 108-446, like the 1997 reauthorization, provides that the Secretary shall cooperate with a state and furnish technical assistance to a state relating to the education of children with disabilities and carrying out Part B of IDEA (§617(a)).

Prohibition Against Federal Mandates, Direction, or Control. The 2004 reauthorization specifically states that nothing in IDEA is to be construed to authorize an officer or employee of the federal government to "mandate, direct, or control" a state, LEA or "school's specific instructional content, academic achievement standards and assessments, curriculum, or program of instruction" (§617(b)).[88]

Confidentiality. The provision on confidentiality is essentially the same in both the 1997 and 2004 reauthorizations. The Secretary must take appropriate action to ensure the protection of the confidentiality of any personally identifiable data, information and records collected or maintained by the Secretary, SEA or LEA (§617(c)).

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[87]For further information, see the above discussion on exceptions to local MOE under local educational agency eligibility.

[88]Similar prohibitions are contained in the Department of Education Organization Act (20 U.S.C. §3403(b)) and the General Education Provisions Act (GEPA, 20 U.S.C. §1232a).

Personnel. In both the old and new law the Secretary is authorized to hire qualified personnel (§617(d)).

Model Forms. P.L. 108-446 adds a provision relating to model forms. The Secretary is required to publish and disseminate widely to states, LEAs and parent and community training and information centers a model IEP form, a model individualized family service plan (IFSP) form, a model form of the notice of procedural safeguards described in §615(d), and a model form of the prior written notice requirement. These model forms are to be published and disseminated not later than the date that the Secretary publishes final regulations (§617(e)).

Program Information (Section 618)

The 2004 reauthorization, like the 1997 reauthorization, requires states receiving assistance and the Secretary of the Interior to provide certain data to the Secretary of Education. P.L. 108-446 adds that the data will also be made available to the public. In addition, the information required to be provided is expanded from previous law. Generally, the new law adds requirements for information on children who have limited English proficiency, and on gender, and increases the requirements for information relating to disciplinary procedures. A new provision is added requiring that these data shall be publicly reported in a manner that does not result in the disclosure of data identifiable to individual children. A new provision also is added allowing the Secretary to provide technical assistance (§618).

Preschool Grants (Section 619)

Section 619 of IDEA authorizes state grants to serve children with disabilities ages 3 to 5 (and in some cases younger children) if the state qualifies for the Part B grants-to-states program (discussed above) and makes FAPE available to all children with disabilities ages 3 to 5. Currently all states qualify for and receive IDEA preschool grants.

P.L. 108-446 makes very few changes to §619.[89] The only apparent substantive changes were to add two additional permitted state-level activities regarding early intervention services for children with disabilities who had received services under the Part C infants and toddlers program and are of an age that they are eligible for services under §619, and regarding "service coordination or case management for families who receive services under Part C" (§619(f)(5) and (6)).

Part C — Infants and Toddlers with Disabilities

Part C of IDEA authorizes grants to states to develop and maintain early intervention programs for infants and toddlers with disabilities. The IDEA infants

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[89]P.L. 108-446 removes a requirement to include transition funding for preschool programs for the outlying areas in their FY1998 allotment, since the 1997 IDEA amendments (P.L. 105-17, §619(c)(4)) eliminated the authority for them to participate in this grant programs. The removal of this provision would appear to have no impact.

and toddlers program has parallels with the provisions and requirements of Part B; however, these provisions and requirements differ in important respects from those of Part B because this disabled population differs in significant ways from the mainly school-aged population served under Part B. For example, while Part B eligibility is based on categories of disabilities (§602(3)), eligibility for Part C programs is often based on a diagnosis of "development delay" that requires early intervention services (§632(5). Instead of an IEP, Part C programs have individualized family service plans (IFSPs) (§636), in recognition that services must be provided to the family as well as to the infant or toddler. Because infants and toddlers are served in a variety of locations (including the home), Part C services are to be provided in "natural environments in which children without disabilities participate" (§632(4)(G)) "to the maximum extent appropriate" (§635(a)(16)(A)).

P.L. 108-446 maintains the overall purposes and structure of Part C with some additions and revisions. Arguably the most extensive addition is the option for states to adopt policies that would permit parents of children receiving Part C early intervention services to extend those services until they are eligible to enter kindergarten (§635(c)). Under previous law and in states that choose not to adopt such a policy, these children would likely transition into a preschool program under Section 619 (described above).

P.L. 108-446 has a series of requirements for a state policy to extend Part C services (§635(c)(2)), including:

- Informed written consent from parents that they choose this alternative;
- Annual notices to parents explaining the differences between the services received under the extended Part C program and services that would be received under Part B, and describing their rights under IDEA to move their child to a Part B program; and
- Program educational components promoting school readiness and providing pre-literacy, language, and numeracy skills.

P.L. 108-446 clarifies that services provided under extended Part C programs do not obligate the state to provide FAPE to children who are eligible for the preschool program under section 619 (for whom states **are** obligated to provide FAPE) (§635(c)(5)). In addition, the Act requires the Secretary of Education, once Part C appropriations exceed $460 million,[90] to reserve 15% of the appropriations for state incentive grants to states implementing extended Part C services (§643(e)).

P.L. 108-446 makes other changes and additions to Part C, including:

- The addition of registered dietitians[91] and vision specialists to the list of qualified personnel to provide Part C services (§632(4)(F)(viii and x));
- Addition of references to homeless infants and toddlers with disabilities and infants and toddlers with disabilities who are wards of the state, for example

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[90]FY2005 Part C appropriations are about $441 million.

[91]Nutritionists have been removed from the list.

regarding the state eligibility requirement that early intervention services be made available to all infants and toddlers with disabilities (§634(1)).

- Addition to the requirements for the state application requiring policies and procedures for referral for services for infants and toddlers "involved in a substantiated case of child abuse" or "affected by illegal substance abuse, or withdrawal symptoms resulting from prenatal drug exposure" (§637(a)(6)) and requiring state cooperation with Early Head Start programs and other child care and early education programs (§637(a)(10));
- Expansion of the requirement for an interagency agreement between the Part C lead agency and other relevant public agencies to ensure financing and provision of Part C services (§640(b));[92]
- Elimination of the Federal Interagency Coordinating Council (P.L. 105-17 §644);[93] and
- Authorization of "such sums as may be necessary" for FY2005-FY2010 for carrying out Part C.

Part D — National Activities to Improve Education of Children with Disabilities

Part D authorizes various activities aimed at improving the education of children with disabilities, including improved professional development, research and evaluation, technical assistance, demonstrations, and dissemination of information. P.L. 108-446 significantly changes and reorganizes Part D.[94] Among other things, P.L. 108-446 eliminates the authorization for state program improvement grants under the prior law.[95] P.L. 108-446 now authorizes state personnel development grants aimed at assisting SEAs to reform and improve their personnel preparation and professional development systems (Subpart 1). These grants are currently authorized to be competitive. Once appropriation for the program reaches $100 million, a formula grant will be initiated (§651(c) and (d)).[96]

Subpart 2 of Part D authorizes additional grant programs. In addition to SEAs, other entities, such as LEAs, charter schools, and institutions of higher education, may apply for grants. These grants deal with:

- Personnel development (§662),
- Technical assistance, demonstration projects, dissemination, and implementation of "scientifically based" research (§663),

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[92]P.L. 108-446 retains the requirement that the statewide system established under Part C include "formal interagency agreements that define the financial responsibility of each agency for paying for early intervention services" (§635(a)(10)(F)).

[93]See §304 of Title III (Miscellaneous Provisions) of P.L. 108-446.

[94]Since this report concentrates on changes made to Part B of IDEA, it provides only an overview of Part D changes.

[95]P.L. 105-17 Subpart 1 of Part D.

[96]FY2005 funding for Subpart 1 is about $51 million.

- Studies and evaluations (§664),[97] and
- Activities to "support safe learning environments" (§665).

Subpart 3 continues to authorize parent training and information centers (§671), community parent resource centers (§672), and technical assistance for the parent centers (§673). These programs help prepare parents to exercise their rights under IDEA.[98]

Section 674 deals with technology, media services, and instructional materials. It authorizes projects for technology development, demonstration, and use (§674(a)). P.L. 108-446 makes some changes in the Secretary's authority to support educational media services. Under the prior law, these services were to be "designed to be of educational value to children with disabilities" (P.L. 105-17 §687(c)(1)). P.L. 108-446 adds that these services are "designed to be of educational value **in the classroom setting** to children with disabilities" (§674(c)(1)(A), emphasis added). The prior law (after FY2001) permitted captioning of educational, news, and informational television, videos, or materials (P.L. 105-17 §687(c)(2)). P.L. 108-446 permits captioning of television, videos, and other materials that are "appropriate for use in the classroom setting" and permits such captioning for news only through September 30, 2006" (§674(c)(1)(B)).

Section 674(e) requires the Secretary of Education to create and support a national instructional materials access center through the American Printing House for the Blind. This center is to catalog "printed instructional material prepared in the National Instructional Materials Accessibility Standard" (which the Secretary is to establish), provide access to printed material for blind or other persons with print disabilities, and establish procedures to prevent against copyright infringement.

Subpart 4 contains general provisions for Part D. Among these is the requirement that the Secretary create a comprehensive plan for carrying out activities under Subparts 2 and 3 (§681).

Title II — National Center for Special Education Research

Title II of P.L. 108-446 amends the Education Sciences Reform Act of 2002 (20 U.S.C. §9501 et seq.)[99] to establish the National Center for Special Education Research. Headed by a commissioner of special education research (§176), the center is to sponsor research on the needs of infants and toddlers with disabilities and on

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[97]Under P.L. 105-17, these studies and evaluations were funded from funds set-aside from Part B appropriations. Under P.L. 108-446, appropriations for these activities will have to be made under a separate authority provided in §667.

[98]These activities were authorized under §682, §683, and §684 of P.L. 105-17.

[99]Among other things, the Education Sciences Reform Act created the National Institute of Education Sciences.

improving IDEA services as well as to evaluate the implementation and effectiveness of IDEA (§175).

Title III — Miscellaneous Provisions

Title III of P.L. 108-446 contains miscellaneous provisions, such as the effective dates, provisions for an orderly transition from the previous law to the new law, technical amendments to other laws, and an amendment to copyright law with respect to the National Instructional Materials Access Center (discussed above).

Section 302 provides for the effective dates of the Act. Most provisions of the Act (i.e., Parts A (except for parts of the definition of "Highly Qualified"), B, C and Subpart 1 of Part D) go into effect on July 1, 2005. The remaining subparts of Part D take effect on the date of enactment (December 3, 2004)