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The Individuals with Disabilities Education Act (IDEA): Proposed Regulations for P.L. 108-446

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The Individuals with Disabilities Education Act (IDEA): Proposed Regulations for P.L. 108-446

Summary

The 108th Congress passed P.L. 108-446, which reauthorized and revised the Individuals with Disabilities Education Act (IDEA). IDEA is the major federal statute authorizing funds for special education and related services for children with disabilities and providing detailed due process provisions to ensure that these children receive a free appropriate public education (FAPE). Although much of the basic structure of IDEA has been retained, P.L. 108-446 does make a number of significant changes. Among these are the definition of “highly qualified” teachers, calculation of maximum state grants, funding for high-need children with disabilities, revised state performance goals and requirements for children’s participation in state and local assessments, changes in the private school provisions, exceptions to certain financial requirements, changes in procedural safeguards, and changes in compliance monitoring to focus on student performance.

On June 21, 2005, the Department of Education (ED) issued proposed regulations for P.L. 108-446. Comments on the proposal are due by September 6, 2005, and ED expects to issue final regulations by December 2005. Although many of the regulatory provisions simply track the statutory language, reflect comments in the conference report, or include provisions in current IDEA regulations, there are places where the regulations provide more guidance. This report analyzes the proposed regulations with an emphasis on those areas where additional guidance is provided. The report also notes provisions in P.L. 108-446 for which ED has not provided guidance.

This report will not be updated.

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The Individuals with Disabilities Education Act (IDEA): Proposed Regulations for P.L. 108-446

Introduction and Background

The Individuals with Disabilities Education Act (IDEA)¹ 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.²

The 108th Congress passed major IDEA legislation (P.L. 108-446), which reauthorized and revised IDEA. Although much of the basic structure of IDEA has been retained, P.L. 108-446 does make a number of significant changes. Among these are the definition of “highly qualified” teachers, calculation of maximum state grants, funding for high-need children with disabilities, revised state performance goals and requirements for children’s participation in state and local assessments, changes in the private school provisions, exceptions to certain financial requirements, changes in procedural safeguards, and changes in compliance monitoring to focus on student performance.³

The U.S. Department of Education (ED) has recently issued proposed regulations for P.L. 108-446 and comments on the proposal are due by September 6, 2005.⁴ ED expects to issue final regulations by December 2005.⁵ Although many of the regulatory provisions simply track the statutory language, reflect comments in the

¹ 20 U.S.C. §1400 *et seq.*

² For a more detailed discussion of the congressional intent behind the enactment of the 1975 law (P.L. 94-142), see CRS Report 95-669, *The Individuals with Disabilities Education Act: Congressional Intent*, by Nancy Lee Jones.

³ For a more detailed discussion of the statutory provisions see CRS Report RL32716, *The Individuals with Disabilities Education Act: Analysis of Changes Made by P.L. 108-446*, by Richard N. Apling and Nancy Lee Jones.

⁴ 70 *Federal Register* 35782, June 21, 2005. Note that ED has also issued proposed IDEA regulations related to a National Instructional Materials Accessibility Standard. (70 *Federal Register*, 37302-37306, June 29, 2005).

⁵ “Hager: Expect Final Rules Around December,” *Education Daily*, June 28, 2005, p. 4.

conference report, or include provisions in current IDEA regulations,⁶ there are places where the regulations provide more guidance. This report will analyze the proposed regulations with an emphasis on those areas where additional guidance is provided. The report will also note several places where ED has declined to provide guidance.

Overview of the Proposed Regulations

In its discussion of the proposed regulations ED stated that

we have elected to construct one comprehensive, freestanding document that incorporates virtually all requirements from the new law along with the applicable regulations, rather than publishing a regulation that does not include statutory provisions. The rationale for doing this is to create a single reference document for parents, State personnel, school personnel, and others to use, rather than being forced to shift between one document for regulations and a separate document for the statute.⁷

The organization of the proposed regulations differs from the existing regulations with the proposed regulations generally following the structure of P.L. 108-446.

- Subpart A of proposed 34 C.F.R. Part 300 discusses the purpose and applicability of the proposed regulations and includes definitions;
- Subpart B contains provisions relating to state eligibility and includes requirements for FAPE, the least restrictive environment, private schools, state complaint procedures and ED procedures;
- Subpart C contains provisions for local educational agency eligibility;
- Subpart D contains provisions on evaluations, eligibility determinations, IEPs, and educational placements;
- Subpart E contains the applicable procedural safeguards, including discipline procedures;

⁶ H.Rept. 779, 108th Cong., 2nd sess., 171 (2004). The definition of “limited English proficient,” which P.L. 108-446 added to IDEA, is an example of a proposed regulation that would include nearly a verbatim wording from the statutory language. An example of a wording change with no substantive impact is the definition of “core academic subjects” in the proposed regulations. The definition in P.L. 108-446 cross-references the definition in the Elementary and Secondary Education Act (ESEA); the proposed regulations contain the ESEA definition verbatim. In addition, the proposed regulations would appear to consistently change the verb “shall,” which the act uses to indicate required actions of states, school districts, the Secretary of Education, etc., to “must.” In some instances, P.L. 108-446 language is not tracked. Rather the proposed regulations would incorporate verbatim or nearly verbatim language from current regulations. For example, current regulations require that, in providing FAPE, public agencies must ensure that hearing aids work properly (§300.303) and that required assistive technology be made available (§300.308). These requirements would be combined in proposed §300.105.

⁷ 70 *Federal Register* 35783, June 21, 2005.

- Subpart F contains provisions on monitoring and enforcement, confidentiality and program information;
- Subpart G contains provisions on the grants, allotment, use of funds and authorization of appropriations; and
- Subpart H contains provisions on preschool grants for children with disabilities.

The proposed regulations for infants and toddlers would be found at 34 C.F.R. Part 301 and the proposed regulations for service obligations and personnel development would be found at 34 C.F.R. Part 304.

P.L. 108-446 includes a provision relating to regulations that was added to IDEA by P.L. 98-199 in 1983 in response to attempts at regulatory reform by the Reagan Administration.⁸ This subsection prohibits certain changes in the IDEA regulations

which would procedurally or substantively lessen the protections provided to children with disabilities under this Act, as embodied in regulations in effect on July 20, 1983 (particularly as such protections related to parental consent to initial evaluation or initial placement in special education, least restrictive environment, related services, timelines, attendance of evaluations personnel at individualized education program meetings, or qualifications of personnel) except to the extent that such regulation reflects the clear and unequivocal intent of Congress in legislation.⁹

This listing of areas in the statute is helpful in determining what changes Congress might have interpreted as lessening the protections available to children with disabilities but it is not determinative as the list is illustrative, not limiting. It is worth noting as the regulations are examined, that some of the provisions carried over from the existing regulations are included due to the requirements of this section.

Highly Qualified Teachers

Statutory Overview

The Elementary and Secondary Education Act (ESEA), as amended by No Child Left Behind Act (NCLBA),¹⁰ requires that each state educational agency (SEA) receiving ESEA Title I, Part A funding (compensatory education of disadvantaged students)¹¹ must have a plan to ensure that all public-school teachers teaching in *core*

⁸ 20 U.S.C. §1406(b); P.L. 108-446, §607(b).

⁹ Ibid.

¹⁰ P.L. 107-110.

¹¹ All states currently receive ESEA Title I-A grants.

*academic subjects*¹² within the state will meet the definition of a “highly qualified” teacher, by no later than the end of the 2005-2006 school year.¹³

IDEA, as amended by P.L. 108-446, cross-references the ESEA “highly qualified” definition but makes several additions to the definition as it applies to special education teachers. The new IDEA definition requires that *all* special education teachers — not just those who teach core subjects — must meet certain requirements. 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*.

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 (i.e., the most severely cognitively disabled)¹⁴ can, of course, meet the definition of highly qualified by meeting their applicable ESEA standards.¹⁵ Alternatively, new, as well as veteran, teachers of these students at *the elementary level* may meet the highly qualified definition by demonstrating “competence in all the academic subjects in which the teacher teaches based on a high objective uniform State standard of evaluation” (HOUSSE).¹⁶ 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)).

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

¹² Core subjects are defined as “English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography.” ESEA §9101(11).

¹³ The relevant sections of ESEA are §1119 regarding qualifications for teachers and paraprofessionals, and §9101(23), the definition of “highly qualified.”

¹⁴ The ESEA requires that nearly all students must be held to the same high state achievement standards. One exception with respect to children with disabilities is that those who are the most severely cognitively disabled can be held to alternative achievement standards.

¹⁵ That is, special education teachers at the elementary level can meet the standards by passing a rigorous state subject matter and teaching skills test, and special education teachers at the middle school and high school level can pass such a test or earn a degree or take a minimum number of courses in the relevant core subject or subjects.

¹⁶ Under ESEA, the HOUSSE option is available only for veteran teachers (ESEA §9101(23)(C)(ii)).

subjects.¹⁷ Finally, *newly hired special education teachers* teaching two or more core 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. This could occur through the HOUSSE option (§602(10)(D)(iii)). This two-year window is the only exception to the 2005-2006 deadline (ESEA, §1119(a)(2)),¹⁸ explicitly applied to special education teachers, for meeting the “highly qualified” definition under either IDEA or ESEA.

Proposed Regulations

The proposed regulations repeat much of the statutory definition verbatim.¹⁹ They would add language related to alternative routes to certification (which the statute includes as a permissible means for special education teachers to satisfy the requirement of full state certification) by including requirements that alternative certification programs must meet.²⁰ For example, a teacher certified under this provision must demonstrate “satisfactory progress toward full certification as prescribed by the State.”²¹ The proposed regulations include specific language (following clarifying language in Note 21 of the conference report²²) that special education teachers who do not provide instruction in core academic subjects need only meet the requirements of a baccalaureate degree and a full special education certification to meet the highly qualified definition. In addition, the proposed regulations add explicit language that the highly qualified definition does not apply to teachers in private schools.

As suggested above, the P.L. 108-446 definition of highly qualified with respect to special education teachers for the most severely cognitively disabled children appears to differentiate between such teachers at the elementary level and those teaching students “above the elementary level.” For the former teachers (whether they are new or veteran teachers), the statute cross-references the HOUSSE alternative in the ESEA definition. For the latter teachers, the statutory language does not explicitly reference the ESEA HOUSSE alternative but states the following:

¹⁷ The Conference Report notes that the use of options, such as a single evaluation of multiple 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).

¹⁸ See P.L. 108-446, §612(a)(14)(C).

¹⁹ Proposed 34 C.F.R. §300.18.

²⁰ According to ED discussion accompanying the proposed regulations, the standards for alternative certification are the same as those in the regulations for Title I ESEA (CFR §200.56(a)(2)(ii)) 70 *Federal Register* 35784, June 21, 2005.

²¹ Proposed 34 C.F.R. §300.18(b)(2)(i)(D).

²² H.Rept. 779, 108th Cong., 2nd sess., 169 (2004).

or, in the case of instruction above the elementary level, has subject matter knowledge appropriate to the level of instruction being provided, as determined by the State, needed to effectively teach to those standards.²³

For this second group of special education teachers, the proposed regulations **do** reference the ESEA HOUSSE alternative as follows:

or, in the case of instruction above the elementary level, meet the requirements of subparagraph (B) or (C) of section 9101(23) of the ESEA as applied to an elementary school teacher *and* have subject matter knowledge appropriate to the level of instruction being provided, as determined by the State, needed to effectively teach to those standards.²⁴

Proposed §300.156(a) contains the general requirement that states must have personnel qualifications to ensure that teachers, paraprofessionals, providers of related services, and other personnel carrying out the purposes of part 300 “are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities.” Note 21 of the conference report (H.Rept. 108-779) accompanying H.R. 1350 clarifies that the statute is not intended to prevent highly qualified general education teachers who lack certification in special education from providing children with disabilities with instruction in core subjects.²⁵ ED’s discussion accompanying the proposed regulations paraphrases this conference report language and points to §300.156(a) in relation to the clarification in Note 21.²⁶

Private School Placement

Statutory Overview

P.L. 108-446 provides that 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 local education agency (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 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.

²³ P.L. 108-446 §602(10)(C)(ii).

²⁴ Proposed 34 C.F.R. §300.18(c)(2), emphasis added.

²⁵ H.Rept. 779, 108th Cong., 2nd sess. 171 (2004).

²⁶ 70 *Federal Register* 35791, June 21, 2005.

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.²⁷ 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.”²⁸ 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. In addition, the new law adds compliance procedures which allow a private school official to submit a complaint to the SEA about the consultation and, if the private school official is dissatisfied with the SEA’s response, he or she may submit a complaint to the Secretary of Education.

Proposed Regulations

There are numerous changes in the proposed regulations regarding private schools which generally reflect the statutory changes. One of the statutory changes, as noted above, is that 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.²⁹ Although the intent was to protect LEAs from working with private schools in multiple jurisdictions, questions have been raised concerning whether this is applicable to students whose IEP determines their placement in a private school. This placement could have significant financial repercussions for the school district which contains the private school. The regulations do not address this issue. The Council for Exceptional Children (CEC) has requested that the regulations “provide clarification on who is responsible for the costs of providing services to parentally placed ‘non-resident’ students with disabilities, paying for the evaluation of parentally placed ‘nonresident’ students, and the provision of Part B federal funding for parentally placed ‘non-resident’ students.”³⁰ CEC specifically asked: “Is the local education agency where the private school is located responsible for these activities, or is the local education agency where the student resides responsible for paying for them?”³¹

²⁷ 20 U.S.C. §1412(a)(10)(A)(i).

²⁸ S.Rept. 185, 108th Cong., 1st sess., 15-16 (2003).

²⁹ 20 U.S.C. §1412(a)(10)(A)(i).

³⁰ [<http://www.cec.sped.org/>].

³¹ Ibid.

Procedural Safeguards and Discipline

Statutory Overview

Section 615 of IDEA 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 changes made by P.L. 108-446 include adding provisions relating to homeless children, adding a two-year statute of limitations for the filing of a complaint and a two-year statute of limitations regarding requests for a hearing, adding additional requirements for hearing officers, changing the mediation provision, and specifically allowing the local educational agency, not just the parents, to file for a due process hearing. The discussion of the provisions of P.L. 108-446 in this report regarding procedural safeguards and discipline is not comprehensive. There were significant changes made by the new law in areas such as attorneys' fees which are not discussed here as the regulations do not make significant additions to the statutory language.

One of the major changes was the addition of a "resolution session." This is a preliminary meeting between the parents and the LEA and IEP team held within 15 days of receiving the parent's complaint. The reason for this addition was to attempt to resolve disputes prior to the more adversarial due process hearing. The House report noted that the resolution session "is intended to improve the communication between parents and school officials, and to help foster greater efforts to resolve disputes in a timely manner so that the child's interests are best served."³² If an agreement is reached during the resolution session, the parties must execute a legally binding agreement signed by both parties and which is enforceable in court.

Disciplinary issues relating to children with disabilities were a contentious issue during the 2004 reauthorization. Although P.L. 108-446 made significant changes to §615(k), it did keep many of the provisions of the previous law. For example, the new law allows school personnel to 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.

One of the major changes was in the language regarding manifestation determinations. 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 appropriate 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

³² H.Rept. 77, 108th Congress, at 114, Apr. 29, 2003.

be a manifestation of the child's disability. 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.³³

Procedural Safeguards in the Proposed Regulations

The majority of the proposed regulatory language regarding procedural safeguards mirrors the statutory language in P.L. 108-446. However, the proposed regulations do make several additions. For example, in proposed §300.504 regarding the procedural safeguards notice, ED clarifies that a procedural safeguards notice must be provided upon receipt of the first filing of a state complaint or request for a due process hearing in a school year, not just the first request at any point in the child's education. In addition, in proposed §300.504(c), ED attempts to reduce the confusion about the distinctions between a due process complaint and a complaint under the state complaint procedures by requiring that the procedural safeguards notice explain the differences between the two procedures, including the jurisdiction of the procedures, the issues that may be raised, filing and decisional time lines and relevant procedures.

Several changes were made by ED regarding the manner in which mediators are chosen. The current regulations provide that the states shall maintain a list of individuals who are qualified mediators and knowledgeable about special education and that if the mediator is not selected on a rotational basis from the list, both parties must be involved in selecting the mediator.³⁴ The proposed regulations would keep the listed requirements but require that the SEA select mediators on a random, rotational or other impartial basis and would delete the language regarding involvement by the other party.³⁵ The rationale for this change was to "provide SEAs additional flexibility in selecting mediators, while ensuring that mediators are impartial."³⁶ The proposed regulations would also eliminate the current section providing that parents be advised of the availability of mediation whenever a hearing is initiated.³⁷ ED noted that mediation must be available to resolve any dispute, not just when a hearing is requested and that there are new additional opportunities to resolve disputes, such as the new resolution session.³⁸

Discipline Provisions

The current regulatory provisions regarding the discipline of children with disabilities would be significantly changed in the proposed regulations, generally

³³ 20 U.S.C. §1415(k)(1)(F).

³⁴ 34 C.F.R. §300.506(b)(2) (2004).

³⁵ Proposed 34 C.F.R. §300.506(b).

³⁶ 70 *Federal Register* 35808, June 21, 2005.

³⁷ Proposed 34 C.F.R. §300.507(a)(2) (2004).

³⁸ 70 *Federal Register* 35808, June 21, 2005.

reflecting the changes in the statute and comments in the conference report. However, the regulations do make some additions.

P.L. 108-446 allows school personnel to consider unique circumstances on a case-by-case basis when deciding whether a change in placement would be appropriate for a particular child.³⁹ The proposed regulations would require that this consideration be “consistent with the requirements of this section.”⁴⁰ The section states in part that the ability of school personnel to remove a child with a disability is to be applied “to the extent those alternatives are applied to children without disabilities.”⁴¹

Although the statutory language giving school personnel the authority to suspend a child with a disability for not more than 10 school days is similar in both the 1997 IDEA and P.L. 108-446, the proposed regulations would make several changes from the existing regulations. The proposed regulations would add a subsection stating that where a child has been removed for more than 10 school days in the same school year, but not for more than 10 consecutive school days and the change is not a change of placement, school personnel, in consultation with the child’s teacher or teachers, are to determine the extent to which services are needed and the location in which they are to be provided.⁴² ED commented that this requirement was needed “to ensure that children with disabilities in this situation receive appropriate services, while preserving the flexibility of school personnel to move quickly to remove a child when needed and determine how best to address the child’s needs during these relatively brief periods of removal.”⁴³ Another new subsection would provide that the child’s IEP team determine the appropriate services when a child is removed for more than 10 consecutive school days or the removal is a change in placement.⁴⁴

P.L. 108-446 provides that school personnel may remove a student to an interim alternative educational setting for not more than 45 school days in situations involving weapons, drugs or where the student has inflicted serious bodily injury on another person.⁴⁵ The proposed regulations generally track the statutory authority but would add a new section specifically allowing a school district to seek a subsequent hearing to continue the child in an interim alternative educational placement if the

³⁹ 20 U.S.C. §1415(k)(1).

⁴⁰ Proposed 34 C.F.R. §300.530(a).

⁴¹ Proposed 34 C.F.R. §300.530(b)(1). See comments made by the CEC regarding the need for regulatory guidance on the case-by-case authority to ensure that such determinations “provide all students with fair and consistent opportunities when those determinations are made.” [<http://www.cec.sped.org/>].

⁴² Proposed 34 C.F.R. §300.530(d)(4).

⁴³ 70 *Federal Register* 35810, June 21, 2005.

⁴⁴ Proposed 34 C.F.R. §300.530(d)(5).

⁴⁵ 20 U.S.C. §615(k)(1)(G).

school district believes that the child would be dangerous if returned to his or her original placement.⁴⁶

P.L. 108-446 provides for expedited time lines for hearings under the disciplinary procedures.⁴⁷ The proposed regulations reflect the statutory language and also propose shortened time lines for the resolution session process when expedited hearings are involved.⁴⁸

P.L. 108-446 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 occur within twenty school days from when the hearing is requested. The hearing determination must be made within ten school days after the hearing.⁴⁹

The proposed regulations track the statutory language except that a reference is also made to proposed §300.530(g) which concerns placement in an interim alternative educational setting for students involved in situations concerning drugs, weapons or serious bodily injury. The Department’s discussion of the proposed regulations describes the language tracking the statutory provisions and then states: “We would add, however, in proposed §300.530(g), that this provision also would apply to removals of up to 45 school days.”⁵⁰ This statement is somewhat confusing as proposed §300.530(g) simply discusses the interim alternative education settings, not placement during appeals. However, proposed §300.533 discussing placements during appeals provides that the child must remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in §300.530(c) or (g). Proposed §300.530(c) provides that children whose behavior is not a manifestation of their disability may be subject to disciplinary procedures applied in the same manner and for the same duration as children without disabilities. Proposed §300.530(g), in contrast, provides for a placement for a child with a disability, whose behavior has been determined to be a manifestation of his or her disability, in an interim alternative educational setting for not more than forty five school days. ED seems to be making a distinction in the length of time a student may be placed in an interim alternative educational setting when an appeal has been filed based on whether the behavior is a manifestation of the child’s disability.

⁴⁶ Proposed 34 C.F.R. §300.532(b)(3).

⁴⁷ 20 U.S.C. §1415(k)(4)(B).

⁴⁸ Proposed 34 C.F.R. §300.532(c)(3).

⁴⁹ 20 U.S.C. §615(k)(4).

⁵⁰ 70 *Federal Register* 35811, June 21, 2005.

Monitoring and Enforcement

In P.L. 108-446, Congress determined that the previous law on monitoring focused too much on compliance with procedures and shifted the emphasis to focus on student performance.⁵¹ Under the new law, the Secretary of Education monitors implementation of Part B by oversight of the general supervision by the states and by the state performance plans. The Secretary enforces Part B as described in §616(e) and requires states to monitor implementation by LEAs and to enforce Part B. If the Secretary makes certain determinations regarding state performance, the Secretary must provide reasonable notice and an opportunity for a hearing on the determination.⁵² The proposed regulations describe this hearing as an opportunity to meet with the Assistant Secretary for the Office of Special Education and Rehabilitative Services.⁵³ ED stated that “the Department has determined that this type of hearing would provide the appropriate amount of process due a State prior to one of these determinations. Should specific enforcement action subsequently be contemplated, as provided for in section 616(e) of the act, other hearing procedures may apply,....”⁵⁴

Other Selected Proposed Regulations

Definition of “Parent”⁵⁵

P.L. 108-446 elaborated on the definition of “parent” to include other individuals beside the natural parents, such as guardians (under certain circumstances), who may act as parents of a child with a disability. The proposed regulations would add language to clarify situations in which there are multiple candidates for a child’s parent. In general, the natural or adoptive parent would be presumed to act for the child “unless that person does not have legal authority to make educational decisions for the child, or there is a judicial order or decree specifying some other person to act as the parent under Part B of the Act.”

Definition of “Related Services”⁵⁶

In general, related services are “designed to enable a child with a disability to receive a free appropriate public education as described in the individualized

⁵¹ See S.Rept. 185, 108th Cong., 1st sess. 46 (2003); H.Rept. 77, 108th Cong., 1st sess. 120 (2003).

⁵² 20 U.S.C. §1416(d)(2)(B).

⁵³ Proposed 34 C.F.R. §300.603(b)(2)(ii).

⁵⁴ 70 *Federal Register* 35812, June 21, 2005.

⁵⁵ Proposed 34 C.F.R. §300.30.

⁵⁶ Proposed 34 C.F.R. §300.34.

education program of the child.”⁵⁷ Under IDEA, public agencies are required to provide such services if the IEP team determines that these services are necessary for the child to benefit from the public education provided. P.L. 108-446 provided an explicit exception: The definition “does not include a medical device that is surgically implanted, or the replacement of such device.”⁵⁸ The proposed regulations would expand this exception to include “the optimization of [surgically implanted] device functioning” and “maintenance of such device.”⁵⁹ ED comments on this proposed addition stating that “school districts should not be required to bear these costs, which are integral to the functioning of the implanted device.”⁶⁰

Exceptions to Local Maintenance of Effort

Maintenance of effort (MOE) is a financial principle in many federal educational statutes that penalizes state and local grant recipients if they reduce their non-federal spending on the program or activity that the particular statute supports — in this case state and local spending on special education. The 1997 IDEA amendments (P.L. 105-17) recognized that there are circumstances in which LEAs may legitimately reduce local spending and not be penalized under the local MOE requirement. One of these exceptions may occur if senior special education personnel retire or otherwise leave the LEA and are replaced by more junior (and lower paid) personnel. P.L. 108-446 continues this and other local exceptions to MOE. The current IDEA regulations (following report language accompanying P.L. 105-17)⁶¹ elaborate on the statutory language. For example, the regulations require that the departing staff are to be “replaced by qualified, lower-salaried staff.”⁶² In addition, the LEA must ensure that the departures conform with school policies, collective bargaining agreements, and state law.⁶³ The proposed regulations would keep these exceptions but would eliminate the elaborating language in current regulation. According to the commentary accompanying the proposed regulations:

These changes would reduce regulatory burden on school districts and provide increased flexibility in funding decisions. However, the basic requirement that LEAs must ensure the provision of FAPE to eligible children, regardless of the costs, would remain the same.⁶⁴

⁵⁷ P.L. 108-446 §602(26).

⁵⁸ P.L. 108-446 §602(26)(B).

⁵⁹ Proposed 34 C.F.R. §300.34(b).

⁶⁰ 70 *Federal Register* 35785, June 21, 2005.

⁶¹ S.Rept. 17, 105th Cong. 1st sess. 16 (1997).

⁶² 34 C.F.R. §300.232(a)(1).

⁶³ 34 C.F.R. §300.232(a)(2).

⁶⁴ 70 *Federal Register* 35795, June 21, 2005.

Evaluation of Children Who Are Limited English Proficient

IDEA has extensive requirements on assessments to be used to evaluate whether a child is a child with a disability under the act and therefore is eligible for special education and related services. One such requirement relates to evaluating children who are limited English proficient (LEP). Current law requires that LEAs “ensure that assessments and other evaluation materials used to assess a child ... are provided and administered in the language and form most likely to yield accurate information ... unless it is *not feasible* to so provide and administer.”⁶⁵ The proposed regulations would incorporate this language, except it would use the phrase “*clearly not feasible*.”⁶⁶ This was the language used in prior law (see P.L. 105-17 §614(b)(3)(A)(ii) 111Stat. 82).

Evaluation of Children with Specific Learning Disabilities

Because of concerns that children may be “over-identified” as learning disabled, in part because of evaluation procedures that depend on severe discrepancies between achievement scores and IQ tests, P.L. 108-446 provides that LEAs “shall not be required to take into consideration” such discrepancies “when determining whether a child has a specific learning disability.”⁶⁷ In addition, the act states that LEAs “may use a process that determines if a child responds to scientific, research-based intervention as a part of the evaluation procedures.”⁶⁸ The proposed regulations would use somewhat different language in implementing these procedures. The state “may prohibit the use of a severe discrepancy.” It “may not require the use of a severe discrepancy.” It “must permit the use of a process that determines if the child responds to scientific, research-based intervention...”⁶⁹

Individualized Education Program (IEP)

The proposed regulations deal with implementing the IEP process in proposed §§300.320-300.328. In most respects, they would incorporate language from the act, and in several cases, model proposed language on provisions in current regulations. For example, proposed §300.321(c) concerning the determination of IEP team members’ expertise and knowledge would use the same language as §300.344(c) in current regulations. In a few cases, the proposed regulations would alter language in the act. For example, members of the IEP team can be excused from attending an IEP meeting even if the meeting deals with the curriculum or related service in which they are involved if both the parent and the LEA agree. The proposed regulations

⁶⁵ P.L. 108-446 §614(b)(3)(A)(ii), emphasis added.

⁶⁶ Proposed 34 C.F.R. §300.304(c)(1)(ii).

⁶⁷ P.L. 108-446, §614(b)(6)(A).

⁶⁸ P.L. 108-446 §614(b)(6)(B).

⁶⁹ Proposed 34 C.F.R. §300.307(a).

would add the requirement that the parent's consent must be *in writing*; the act simply says that the parent and the LEA must consent.⁷⁰

Selected P.L. 108-446 Provisions with No Proposed Regulations

Multi-Year IEP

The proposed regulations provide no guidance for implementing the multi-year IEP pilot demonstration that P.L. 108-446 authorizes (§614(d)(5)). The act authorizes the Secretary of Education to approve demonstration proposals from up to 15 states. These demonstrations would allow parents and LEAs to adopt IEPs covering up to three years that coincide with the child's "natural transition points."⁷¹ 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.

Paperwork Reduction

P.L. 108-446 authorizes a paperwork reduction pilot program (§609), which permits the Secretary 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 non-instructional burdens. The report accompanying the House bill explained the rationale for such a pilot:

Reducing the paperwork burden of the Act is one of the Committee's top priorities for the reauthorization of the Act. Studies from the Department show that the Nation is facing a significant shortage of special education teachers, and many special educators leaving the field cite the burden of unnecessary paperwork as one of the primary reasons for their departure. The bill includes a pilot program to allow States to demonstrate innovative and creative measures to reduce the paperwork burden. This program is not meant to decrease any of the rights children have under the Act, but is intended to allow those States who choose to participate to think creatively and innovatively about how to best meet

⁷⁰ See proposed 34 C.F.R. §300.320(e)(2)(i) and P.L. 108-446 §614(d)(1)(C)(ii)(I).

⁷¹ 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 three years" P.L. 108-446, §614(d)(5)(C).

the demands of the Act while reducing the paperwork burden so school personnel can focus on educating children with disabilities.⁷²

The proposed regulations contain no implementing language regarding this pilot program.

⁷² H.Rept. 77, 108th Cong., 1st sess., 122 (2003).