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

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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, 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. ED issued final regulations on August 14, 2006. Although many of the regulatory provisions simply track the statutory language, reflect comments in the conference report, or include provisions in prior IDEA regulations, there are places where the regulations provide more guidance. This report analyzes the regulations, with an emphasis on those areas where additional guidance is provided. The report also discusses provisions in P.L. 108-446 related to multi-year individualized education program (IEP) demonstration programs and the infants and toddlers with disabilities provisions under Part C of IDEA, for which ED has provided separate final notice or proposed regulations.

This report will be updated as appropriate.

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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 Originally enacted in 1975, the act responded to an increasing focus on the education of children with disabilities, including judicial decisions requiring that states provide an education for children with disabilities if they provide 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, 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]

Legislative action impacting IDEA could result in connection with consideration of the Elementary and Secondary Education Act (ESEA), which is authorized through FY2008. It is generally assumed that the 110th Congress will actively consider legislation to amend and extend the ESEA. Such legislation could impact IDEA—for example, regarding how adequate yearly progress (AYP) is assessed for children with disabilities and how special education teachers are determined to be highly qualified.

The U.S. Department of Education (ED) issued proposed regulations for P.L. 108-446[4] and issued final regulations on August 14, 2006.[5] Although many of the regulatory provisions simply track the statutory language, reflect comments in the conference report,[6] or include provisions in prior IDEA regulations, there are places where the regulations provide more guidance.[7] This report will

[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, *Individuals with Disabilities Education Act (IDEA): 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.

[5] 71 *Federal Register* 46540, August 14, 2006. Note: The U.S. Department of Education (ED) has also issued proposed IDEA regulations related to a National Instructional Materials Accessibility Standard (NIMAS). (70 *Federal Register* 37302-37306, June 29, 2005). NIMAS is published as Appendix C of the final regulations. (See 71 *Federal Register* 46814-46817, August 14, 2006). ED is maintaining a website on IDEA which contains topic briefs on various topics as well as the statute and regulations, at http://idea.ed.gov.

[6] H.Rept. 779, 108th Cong., 2nd sess. (2004).

[7] The definition of "limited English proficient," which P.L. 108-446 added to the Individuals with Disabilities Education Act (IDEA), is an example of a regulation that is nearly a verbatim wording from the statutory language (34.C.F.R. §300.27). An example of a wording change with no substantive impact is the definition of "core academic subjects" in the regulations. The definition in P.L. 108-446 cross-references the definition in the Elementary and Secondary Education Act (ESEA); the regulations contain the ESEA definition verbatim (34.C.F.R §300.10). More generally, the regulations 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 regulations incorporate verbatim or nearly verbatim language from prior regulations. For example, prior regulations required that, in providing free appropriate public education (FAPE), public agencies must ensure that hearing aids work properly (§300.303). This requirement is now contained in §300.113(a).

analyze the regulations with an emphasis on those areas where additional guidance is provided. The report also discusses provisions in P.L. 108-446 related to multi-year individualized education program (IEP) demonstration programs and the infants and toddlers with disabilities provisions under Part C of IDEA, for which ED has provided separate final notice[8] or proposed regulations.[9]

Overview of the Regulations

In its discussion of the proposed regulations, which presumably applies to the final rule, the Department of Education 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.[10]

The organization of the final regulations differs from the previous regulations, with the final regulations generally following the structure of P.L. 108-446.

- Subpart A of 34 C.F.R. Part 300 discusses the purpose and applicability of the 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 Department of Education procedures;
- Subpart C contains provisions for local educational agency eligibility;
- Subpart D contains provisions on evaluations, eligibility determinations, individualized education programs (IEPs), and educational placements;
- Subpart E contains the applicable procedural safeguards, including discipline procedures;
- 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.

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.[11] This subsection prohibits certain changes in the IDEA regulations

[8] 72 *Federal Register* 36985-36999, July 6, 2007.

[9] 72 *Federal Register* 26456-26531, May 9, 2007.

[10] 70 *Federal Register* 35783, June 21, 2005.

[11] 20 U.S.C. §1406(b); P.L. 108-446, §607(b).

> 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 evaluation 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.[12]

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 prior regulations are included due to the requirements of this section. In addition, in at least one situation, an argument by a commenter that a proposed section of the regulations would violate this statutory requirement led ED to remove the section.[13]

Highly Qualified Teachers

Statutory Overview

The Elementary and Secondary Education Act (ESEA), as amended by No Child Left Behind Act (NCLB),[14] requires that each state educational agency (SEA) receiving ESEA Title I, Part A funding (compensatory education of disadvantaged students)[15] must have a plan to ensure that all public-school teachers teaching in *core academic subjects*[16] within the state will meet the definition of a "highly qualified" teacher, by no later than the end of the 2005-2006 school year.[17]

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 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 teaching core subjects exclusively to children with disabilities who are assessed against alternative achievement standards under ESEA (i.e., the

[12] *Id.*

[13] See 71 *Federal Register* 46725-46726, August 14, 2006.

[14] P.L. 107-110; 20 U.S.C. §6301 *et seq*.

[15] All states currently receive ESEA Title I-A grants.

[16] 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). For further information on the highly qualified teacher definition, see CRS Report RL32913, *The Individuals with Disabilities Education Act (IDEA): Interactions with Selected Provisions of the No Child Left Behind Act (NCLB)*, by Richard N. Apling and Nancy Lee Jones (cited hereafter as *IDEA Interactions with NCLB*).

[17] The relevant sections of ESEA are §1119 (20 U.S.C. §6319) regarding qualifications for teachers and paraprofessionals, and §9101(23)(20 U.S.C. §7801(23)), the definition of "highly qualified."

most severely cognitively disabled)[18] can, of course, meet the definition of highly qualified by meeting their applicable ESEA standards.[19] 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).[20] 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 subjects.[21] 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)),[22] explicitly applied to special education teachers, for meeting the "highly qualified" definition under either IDEA or ESEA.

Final Regulations

The regulations regarding highly qualified teacher requirements repeat much of the statutory definition verbatim.[23] They 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.[24] For example, a teacher certified under this provision must demonstrate "satisfactory progress toward full certification as prescribed by the State."[25] The regulations include specific language (following clarifying language in Note 21 of the conference report[26]) that special

[18] 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.

[19] 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.

[20] Thus IDEA broadens the application of the HOUSSE option, which is available only for veteran teachers under ESEA (ESEA §9101(23)(C)(ii))(20 U.S.C. §7801(23)(C)(ii)).

[21] 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. 108-779, 108th Cong., 2nd sess., at 171 (2004).

[22] See P.L. 108-446, §612(a)(14)(C) (20 U.S.C. §1412(a)(14)(C)).

[23] 34 C.F.R. §300.18.

[24] According to ED discussion of comments on the proposed regulations, the standards for alternative certification are included in the IDEA regulations "to provide consistency with the requirements in 34 CFR 200.56(a)(2)(ii)(A) and the ESEA, regarding alternative route to certification programs" 71 *Federal Register* 46557, August 14, 2006.

[25] 34 C.F.R. §300.18(b)(2)(i)(D).

[26] H.Rept. 108-779, 108th Cong., 2nd sess., at 169 (2004).

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 regulations add explicit language that the highly qualified definition does not apply to teachers in private schools.[27]

The regulations permit states to develop separate HOUSSE procedures for special education teachers, including a single procedure assessing multiple core subject areas, "provided that any adaptations of the State's HOUSSE would not establish a lower standard for the content knowledge requirements for special education teachers and meets all the requirements for a HOUSSE for regular education teachers ..." (34 C.F.R. §300.18(e)).

The statute declares that there is no right of action based on an employee not meeting the highly qualified requirements of the act.[28] The regulations reiterate this provision. In addition, the regulation clarifies that parents still have the right to file a complaint related to staff qualifications under state complaint procedures under 34 C.F.R. §300.151 and §300.153.[29]

As noted above, the definition of a highly qualified teacher differs depending on whether the teacher is new to the profession or not. The regulations clarify a situation in which a regular teacher subsequently becomes certified as a special education teacher. Even though such a teacher is not new to the profession, he or she is considered a new special education teacher for the purposes of the highly qualified teacher definition as it applies to special education teachers.[30]

As suggested above, the IDEA 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:

> 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.[31]

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

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[27] The regulations at 34 C.F.R. §300.18(g) clarify that requirements for highly qualified teachers do not apply to private school teachers hired or contracted by LEAs to provide equitable services to parentally-placed private school children with disabilities under §300.138. This exception is also contained in §300.138(a)(1). Advocates for children with disabilities, such as the Council for Exceptional Children (CEC), oppose this exception:

> CEC is dismayed to report that the final regulations do not require private school teachers to be highly qualified. CEC believes all teachers should be highly qualified, and we will renew our efforts to ensure all students with disabilities, including those in private schools, receive instruction from teachers who meet highly qualified requirements. CEC, "CEC Pleased that IDEA Regulations Are Released, Urges Department of Education to Act on Missing Pieces," press release, August 7, 2006. Downloaded from http://www.cec.org.

[28] 20 U.S.C. §1402(10)(E).

[29] 34 C.F.R. §300.18(f).

[30] 34 C.F.R. §300.18(g)(2).

[31] P.L. 108-446 §602(10)(C)(ii).

> 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.[32]

§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 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.[33] ED's discussion accompanying the regulations paraphrases this conference report language and points to §300.156(a) in relation to the clarification in Note 21.[34]

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. The provisions relating to children placed in private schools by public agencies were not changed from previous law. 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 the private school provisions, and the 2004 reauthorization includes several changes to the provisions relating to children with disabilities who are placed in private school by their parents.[35]

Generally, children with disabilities enrolled by their parents in private schools are to be provided special education and related services based on where the private school is located, not on where the child resides.[36] This provision was changed from previous law, which made the LEA where the child resided responsible for providing services. Thus the LEA responsible for providing services to parentally placed children with disabilities has changed from the LEA of residence to the LEA of attendance. 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."[37] P.L. 108-446 adds requirements that the LEA consult with private school

[32] 34 C.F.R. §300.18(c)(2), emphasis added.

[33] H.Rept. 108-779, 108th Cong., 2nd sess., at 171 (2004).

[34] 71 *Federal Register* 46556, August 14, 2006.

[35] For further information, see CRS Report RL33368, *The Individuals with Disabilities Education Act (IDEA): Parentally Placed Children in Private Schools*, by Richard N. Apling and Nancy Lee Jones.

[36] 20 U.S.C. §1412(a)(10)(A)(i).

[37] S.Rept. 108-185, 108th Cong., 1st sess., at 15-16 (2003).

officials and representatives of the parents of parentally placed private school children with disabilities. In addition, the current 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.

Final Regulations

The final regulations track the statutory requirements and add provisions to address some issues raised by comments on the proposed regulations. The regulations reiterate that it is the LEA of attendance that is responsible for locating, identifying, and evaluating all parentally placed children in private schools within their geographic boundaries (the so called "child find" requirement). The regulations stipulate that the LEA of attendance is responsible for child find and proportional provision of services even if the child resides in another state.[38] The regulations clarify that children with disabilities ages three to five are considered to be "parentally placed" only if they attend private schools that meet the definition of "elementary school" contained in the act.[39] As noted above, the highly qualified teacher requirements do not apply to private school teachers providing services to parentally placed children with disabilities.[40]

The regulations follow the act in requiring that an LEA use a share of its IDEA grants in proportion to the number of parentally placed children with disabilities in private schools within the LEA to provide equitable services for these children. In addition, the regulations present a hypothetical example of how a proportional share of an LEA's IDEA grant is to be calculated.[41] Again, following the language of the statute, the regulations exclude the cost of child find from this proportional share. While requiring consultation on the child find process and the provision of services as the statute requires, the regulations specify that "[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school."[42] In addition, the LEA makes the final decisions about the nature of services, and the LEA is responsible for devising a service plan for every parentally placed child with a disability receiving special education or related services.

Some commenters proposed that "the LEA where the private school is located to provide [sic] the district of residence the results of an evaluation and eligibility determination of the parentally-placed private school child."[43] ED is concerned that the privacy rights of the child be protected and added the following requirement:

> If a child is enrolled, or is going to enroll in a private school that is not located in the LEA of the parent's residence, parental consent must be obtained before any personally identifiable

[38] 34 C.F.R. §300.130(f).

[39] See 20 U.S.C §1402(6).

[40] 34 C.F.R. §300.138(a)(1).

[41] See Appendix B to Part 300.

[42] 34 C.F.R. §300.137(a).

[43] 71 *Federal Register* 46592, August 14, 2006.

> information about the child is released between officials in the LEA where the private school is located and officials in the LEA of the parent's residence.[44]

Some public school advocates, who had hoped that ED might relax the statutory requirements, continue to express concerns. Reggie Felton, director of federal relations for the National School Boards Association, noted that "[i]t creates an additional burden for school districts that happen to have a higher number of private schools physically located in their district."[45] Mary Kunstler, assistant director of government relations for the American Association of School Administrators (AASA), argues that "[c]hild find costs can be extravagantly high, and local taxpayers are footing the bill to find students who aren't living in their area."[46] She notes that AASA "has every intention of going back to Congress with this."[47]

Procedural Safeguards and Discipline

Statutory Overview

Section 615 of IDEA provides procedural safeguards for children with disabilities and their parents.[48] Procedural safeguards are provisions protecting the rights of parents and children with disabilities regarding a free appropriate public education (FAPE) and include notice of rights, mediation, resolution sessions, and due process procedures. Section 615 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."[49] 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.

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[44] 34 C.F.R. 622(a)(3).

[45] "Child find requirements will be costly for districts," *Education Daily*, August 9, 2006, p. 2.

[46] *Id.*, p. 2.

[47] *Id.*, p. 1.

[48] 20 U.S.C. §1415.

[49] H.Rept. 108-77, 108th Cong., 1st sess., at 114 (2003).

Disciplinary issues relating to children with disabilities were a contentious issue during the 2004 reauthorization.[50] Although P.L. 108-446 made significant changes to §615(k), it did keep many of the provisions of the previous law. One of the changes was the addition of a provision allowing 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.

Another major change was in the language regarding manifestation determinations. The concept of a manifestation determination originated in policy interpretations of IDEA by the Department of Education. 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 and amended in 2004 by P.L. 108-446.

P.L. 108-446 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 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.[51]

Procedural Safeguards in the Regulations

Procedural Safeguards Notice

The majority of the regulatory language regarding procedural safeguards mirrors the statutory language in P.L. 108-446. However, the regulations do make several additions. For example, 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.[52] In addition, 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

[50] For a detailed discussion of the discipline provisions of P.L. 108-446 see CRS Report RL32753, *Individuals with Disabilities Education Act (IDEA): Discipline Provisions in P.L. 108-446*, by Nancy Lee Jones.

[51] 20 U.S.C. §1415(k)(1)(F).

[52] 34 C.F.R. §300.504.

of the procedures, the issues that may be raised, filing and decisional time lines and relevant procedures.[53] ED has provided a model procedural safeguards notice on its website.[54]

Mediation

Several changes were made by ED regarding the manner in which mediators are chosen. The previous regulations provided 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.[55] The new regulations keep the listed requirements but also require that the SEA must select mediators on a random, rotational or other impartial basis, and delete the language regarding involvement by the other party.[56] ED noted in its discussion of this section that "[t]hese provisions are sufficient to ensure that the selection of the mediator is not biased, while providing SEAs additional flexibility in selecting mediators. Selecting mediators on an impartial basis would include permitting the parties involved in a dispute to agree on a mediator."[57] The final regulations eliminate a provision relating to the signing of confidentiality pledges prior to the commencement of mediation. ED observed that this removal was "not intended to prevent States from allowing parties to sign a confidentiality pledge to ensure that discussions during the mediation process remain confidential, irrespective of whether the mediation results in a resolution."[58]

Non-Attorney Representation in Due Process Hearings

Several commenters on the proposed regulations suggested that the final regulations permit a party in a due process hearing to be represented by a non attorney advocate in order to "allow more uniform access to assistance across all socio-economic groups and decrease the formality of hearings."[59] ED responded by noting that this issue of non-attorney representation in due process hearings had been considered in light of state rules regarding the unauthorized practice of law. ED further commented that a notice of proposed rulemaking is anticipated "in the near future."[60]

Another issue raised by a commenter concerning non-attorney advocates was whether a court could award fees to a lay person who accompanied and advised the parents at a due process hearing. ED stated that "[l]ay advocates are, by definition, not attorneys and are not entitled to compensation as if they were attorneys."[61] ED also noted that the Supreme Court's recent decision in *Arlington Central School District Board of Education v. Murphy*[62] held that if

[53] 34 C.F.R.§300.504(c)(5).

[54] See http://www.ed.gov/policy/speced/guid/idea/idea2004.html. ED has also published model forms concerning the IEP, and prior written notice at the same website. The introduction to the model forms indicates that although states are required to comply with the statutory and regulatory requirements, they do not have to use the specific language of the model forms, and may add their own content as long as it does not conflict with the law or regulations.

[55] 34 C.F.R. §300.506(b)(2) (2004).

[56] 34 C.F.R. §300.506(b).

[57] 71 *Federal Register* 46695, August 14, 2006.

[58] 72 *Federal Register* 46696, August 14, 2006.

[59] 72 *Federal Register* 46699, August 14, 2006.

[60] *Id.*

[61] 71 *Federal Register* 45708, August 14, 2006.

[62] 126 S.Ct. 2455, 165 L.Ed. 526, 2006 U.S. LEXIS 5162 (June 26, 2006). For a more detailed discussion of this case see CRS Report RS22465, *The Individuals with Disabilities Education Act (IDEA): The Supreme Court Denies Expert* (continued...)

Congress wishes to allow recovery of experts' fees by prevailing parents, it must include explicit language authorizing such a recovery. Such explicit language was not added in the 2004 reauthorization of IDEA. The Supreme Court's rationale was found by ED to be controlling concerning the fees of non-attorney experts and the Department of Education declined to add a regulatory provision on the subject.[63]

Resolution Session

ED provides guidance regarding the new statutory requirement for a resolution session in its regulations. For example, the regulations state that unless the parties have jointly agreed to waive the resolution process or to use mediation, the failure of the parent filing the due process complaint to participate in the resolution session will delay the timeline for the resolution session and due process hearing until the resolution session is held.[64] If the parent refuses to participate in the resolution session, the regulations provide that the LEA may request that the hearing officer dismiss the parent's due process complaint.[65] Similarly, a parent may seek intervention by a hearing officer if the LEA fails to hold the resolution meeting within 15 days of receiving notice or fails to participate in the resolution session.[66] The regulations also specifically discuss when the timeline for the due process hearing starts.[67] One of the issues commenters on the proposed regulations had raised concerning the resolution session was whether the discussions were confidential. ED declined to discuss this issue in the regulations since the statute is silent but noted that "nothing in the Act or these regulations ... would prohibit the parties from entering into a confidentiality agreement as part of their resolution agreement. A State could not, however, require that the participants in a resolution meeting keep the discussions confidential or make a confidentiality agreement a condition of a parent's participation in the resolution meeting."[68]

Discipline Provisions in the Regulations

The previous regulatory provisions regarding the discipline of children with disabilities are significantly changed in the 2006 regulations, generally reflecting the changes in the statute and comments in the conference report. However, the new regulations do provide some additional guidance not found in the statute or conference report.

Consideration of Unique Circumstances on a Case-by-Case Basis

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.[69] The regulations require that this consideration be "consistent with the other requirements of this

(...continued)

Fees in Arlington Central School District v. Murphy, by Nancy Lee Jones.

[63] 71 *Federal Register* 45708, August 14, 2006.

[64] 34 C.F.R. §510(b)(3).

[65] 34 C.F.R. §510(b)(4).

[66] 34 C.F.R. §510(b)(5).

[67] 34 C.F.R. §510(c).

[68] 71 *Federal Register* 46704, August 14, 2006.

[69] 20 U.S.C. §1415(k)(1).

section."[70] These unique circumstances, ED noted, were "best determined at the local level by school personnel who know the individual child and all the facts and circumstances regarding a child's behavior" and, therefore, ED did not include more detailed discussion in the regulations.[71] However, in the comments to the regulations, ED did observe that certain factors, such as a child's disciplinary history, ability to understand consequences, expression of remorse, and supports provided to the child prior to the violation, could be unique circumstances.[72] The 2006 regulation also 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" and as long as the removals do not constitute a change in placement.[73]

Ten Day Suspensions

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 2006 regulations make several changes from the previous regulations. The 2006 regulations add a subsection stating that where a child has been removed for more than 10 school days in the same school year, and the current removal is for not more than 10 consecutive school days and is not a change of placement, school personnel, in consultation with the child's teacher or teachers, determine the extent to which services are needed so as to enable the child to continue to participate in the general education curriculum.[74] The regulations also provide that a child subject to this removal must continue to receive educational services "as provided in §300.101(a)," which is the regulatory provision guaranteeing FAPE.[75] ED commented:

> while children with disabilities removed for more than 10 school days in a school year for disciplinary reasons must continue to receive FAPE, we believe the Act modifies the concept of FAPE in these circumstances to encompass those services necessary to enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child's IEP. An LEA is not required to provide children suspended for more than 10 school days in a school year for disciplinary reasons, exactly the same services in exactly the same settings as they were receiving prior to the imposition of discipline. However, the special education and related services the child does receive must enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child's IEP.[76]

Interim Alternative Educational Setting

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 or drugs, or where the student has inflicted serious bodily injury on another person.[77] In addition, an LEA that

[70] 34 C.F.R. §300.530(a).

[71] 71 *Federal Register* 46714, August 14, 2006.

[72] *Id.*

[73] 34 C.F.R. §300.530(b)(1).

[74] 34 C.F.R. §300.530(d)(4). ED noted in comments the requirement to continue to participate in the curriculum does not mean that every aspect of the child's services must be continued. 71 *Federal Register* 46716, August 14, 2006.

[75] 34 C.F.R. §300.530(d)(1)(i).

[76] 71 *Federal Register* 46716, August 14, 2006.

[77] 20 U.S.C. §615(k)(1)(G).

believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others may request a hearing.[78]

Numerous commenters on the proposed regulations suggested that the final regulations clarify that the public agency has the burden of proof in arguing that removing a child is necessary because maintaining the current placement is substantially likely to result in injury to self or others.[79] The IDEA statute is silent on this issue and ED declined to address it in the regulations. However, ED did observe that the burden of proof in IDEA proceedings was at issue in *Schaffer v. Weast*,[80] a recent Supreme Court decision. The Court held there that the burden of persuasion in a hearing challenging the validity of an IEP is on the party seeking relief. Noting the Supreme Court's decision, ED stated that "[w]here the public agency has requested that a hearing officer remove a child to an interim alternative educational setting, the burden of persuasion is on the public agency."[81]

The 2006 regulations 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 school district believes that returning the child to the original placement is substantially likely to result in injury to the child or others.[82]

Expedited Timelines

P.L. 108-446 provides for expedited timelines for hearings under the disciplinary procedures.[83] The regulations reflect the statutory language and also shorten time lines for the resolution session process when expedited hearings are involved.[84] ED stated that the timeline was shortened in order to ensure that the resolution meeting does not delay the expedited hearing if an agreement is not reached.[85]

Appeals Requests and the Stay Put Provision

P.L. 108-446 also changed 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),[86] 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.[87] Under previous law, the child was to remain in the interim alternative educational setting for 45 days

[78] 20 U.S.C. §615(k)(3).

[79] 71 *Federal Register* 46723, August 14, 2006.

[80] 126 S.Ct. 528, 163 L.Ed.2d 387, 2005 LEXIS 8554 (November 14, 2005). For a more detailed discussion of this case see CRS Report RS22353, *The Individuals with Disabilities Education Act (IDEA): Schaffer v. Weast Determines Party Seeking Relief Bears the Burden of Proof*, by Nancy Lee Jones.

[81] 71 *Federal Register* 46723, August 14, 2006.

[82] 34 C.F.R. §300.532(b)(3).

[83] 20 U.S.C. §1415(k)(4)(B).

[84] 34 C.F.R. §300.532(c)(3).

[85] 71 *Federal Register* 46725, August 14, 2006.

[86] 20 U.S.C. §1415(k)(3).

[87] 20 U.S.C. §1415(k)(4).

unless the school and the parents agreed or a hearing officer rendered a decision.[88] The current law requires that the SEA or LEA must arrange for an expedited hearing that must occur within 20 school days from when the hearing is requested. The hearing determination must be made within 10 school days after the hearing.[89]

Although it was suggested in a comment to the proposed regulations that ED retain the previous stay-put requirement, ED noted that P.L. 108-446 changed the stay-put requirements and the regulations reflect that change. For example, ED observed:

> if a child's parents oppose a proposed change in placement at the end of a 45-day interim alternative educational placement, during the pendency of the proceeding to challenge the change in placement, the child remains in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period for the disciplinary action, whichever occurs first, unless the parent and the public agency agree otherwise.[90]

Protections for Children Who Have Not Yet Been Determined Eligible for Special Education

P.L. 108-446, like the previous version of IDEA, provides for protections for children who have not yet been determined to be eligible for special education and related services and who have engaged in behavior that violates a code of student conduct. However, several changes are made regarding when an LEA is deemed to have knowledge that a child is a child with a disability. Generally, an 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.[91]

Although the proposed regulations had required that the teacher or other LEA personnel must express concerns regarding a child's pattern of behavior in accordance with the agency's established child find or special education referral system, the final regulations deleted this requirement since not all states and LEA's have child find or referral processes that permit teachers to express concerns directly to the director of special education or other supervisory personnel. ED encouraged states that do not permit this direct referral by teachers "to change these processes to meet this requirement."[92]

[88] P.L. 105-17, §615(k)(7).

[89] 20 U.S.C. §1415(k)(4).

[90] 71 *Federal Register* 46726, August 14, 2006.

[91] 20 U.S.C. §1415(k)(5).

[92] 71 *Federal Register* 46727, August 14, 2006.

IDEA and Medicaid

Statutory Overview

IDEA requires that children with disabilities be provided with special education and related services so that they can benefit from their guaranteed public education. For some children, benefitting from, or even attending, school depends on health-related services. For example, a child dependent on a ventilator for life support could require in-school staff to ensure the proper operation of the equipment in order to attend school. For such a child, IDEA requires that necessary staff and services be provided.

While IDEA mandates special education and related services, it is not intended to pay for the total cost of this education and these services. One approach Congress has taken to ease the burden on states and school districts of fulfilling the requirements of IDEA is to allow the use of funds available under Medicaid, a federal-state entitlement program providing medical assistance to certain low-income individuals, to finance health services delivered to special education students who are enrolled in Medicaid.

Prior to 1988, Medicaid did not pay for coverable services that were listed in a child's IEP since special education funds were available to pay for these services, and because generally (with a few explicit exceptions) Medicaid is always the payer of last resort. Congress changed this connection between IDEA and Medicaid in 1988. Section 411(k)(13) of the Medicare Catastrophic Coverage Act of 1988 (P.L. 100-360) amended Medicaid (Title XIX of the Social Security Act) at Section 1903 as follows:

> c) Nothing in this title shall be construed as prohibiting or restricting, or authorizing the Secretary to prohibit or restrict, payment under subsection (a) for medical assistance for covered services furnished to a child with a disability because such services are included in the child's individualized education program established pursuant to part B of the Individuals with Disabilities Education Act or furnished to an infant or toddler with a disability because such services are included in the child's individualized family service plan adopted pursuant to part H of such Act.[93]

Section 612(a)(12) of IDEA reflects this provision as follows:

> If any public agency other than an educational agency is otherwise obligated under Federal or State law, or assigned responsibility under State policy pursuant to subparagraph (A), to provide or pay for any services that are also considered special education or related services ... that are necessary for ensuring a free appropriate public education to children with disabilities within the State, such public agency shall fulfill that obligation or responsibility, either directly or through contract or other arrangement....[94]

[93] The 1997 IDEA Amendments (P.L. 105-17) redesignated Part H as Part C, the Infants and Toddlers with Disabilities program.

[94] 20 U.S.C 1412(a)(12)(B)(i). There is not universal agreement about the interpretation of the 1988 legislative changes. For additional information, see CRS Report RS22397, *Medicaid and Schools*, by Elicia J. Herz. In addition, CRS Report RS22397, *Medicaid and Schools* discusses recent regulations and action by Congress concerning possible improper Medicaid payments to schools.

Final Regulations

The final regulations authorize schools to "use the Medicaid or other public benefits or insurance programs in which a child participates to provide or pay for services required under this part, as permitted under the public benefits or insurance program" (§300.154(d)(1)) based on certain requirements. Although the current IDEA provisions related to public insurance such as Medicaid are virtually the same as those in the 1997 IDEA amendments and although the 2006 final IDEA regulations track the 1999 regulations implementing the 1997 amendments, the final regulations add a requirement that has raised some concerns: Parental consent must be obtained "each time that access to public benefits or insurance is sought" (§300.154(d)(2)(iv)(A)).[95]

ED justifies this new provision, which was added to the final regulations, based on maintaining the confidentiality of personally identifiable data as required by the Family Educational Rights and Privacy Act of 1974 (FERPA - Section 444 of the General Education Provisions Act (GEPA)) and by Section 617(c) of IDEA. According to ED's discussion of comments on the proposed regulations:

> In order for a public agency to use the Medicaid or other public benefits or insurance program in which a child participates to provide or pay for services required under the Act, the public agency must provide the benefits or insurance program with information from the child's education records (e.g., services provided, length of the services). Information from a child's education records is protected under the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232(g) (FERPA), and section 617(c) of the Act. Under FERPA and section 617(c) of the Act, a child's education records cannot be released to a State Medicaid agency without parental consent, except for a few specified exceptions that do not include the release of education records for insurance billing purposes....
>
> We believe obtaining parental consent each time the public agency seeks to use a parent's *public* insurance or other public benefits to provide or pay for a service is important to protect the privacy rights of the parent and to ensure that the parent is fully informed of a public agency's access to his or her public benefits or insurance and the services paid by the public benefits or insurance program.[96]

Some observers have expressed concern that this provision will result in undue paperwork and basically bring the Medicaid claiming process to a halt. According to Cathy Griffin, president of the National Alliance for Medicaid in Education, "If we have to get consent each time you send a claim in, that would be a nightmare."[97] Alexa Posny, former director of ED's Office of Special Education Programs, noted that "parental consent must be obtained every time public benefits or insurance is sought whether it be within the same year or month.[98] According to Posny, "[t]he intent is to inform parents of the number of times their benefits are being accessed." More recently Posny clarified the intent of the requirement, which, she claims, is not to create "a deluge of paperwork. If a child is supposed to receive three hours of occupational therapy each week for

[95] According to the discussion of comments on the proposed regulations, ED added this requirement based on one comment. See 71 *Federal Register* 46608, August 14, 2006.

[96] 71 *Federal Register* 46608, August 14, 2006, emphasis in the original.

[97] "Final regs add significant paperwork to Medicaid claims," *Education Daily,* August 11, 2006, p. 5.

[98] *Id.*, p. 5.

36 weeks, 'that doesn't mean we want 108 consent forms.'"[99] Presumably program advocates and school officials will seek further clarification of the parental consent requirement.

Other Selected Regulations

Definition of "a Child with a Disability"

The IDEA statute defines "a child with a disability" based on various disability categories, such as specific learning disability, emotional disturbance, and mental retardation, and stipulates that the child must require special education and related services. In addition to specified disability categories, the definition also includes "other health impairments." Regulations have included examples of chronic or acute health impairments, such as attention deficit disorder or attention deficit hyperactivity disorder. ED points out that these are examples of other health impairment and are not meant to be all inclusive.[100] Commenters on the proposed regulations have argued that other disabilities should be included in the definition of other health impairments. ED has denied these requests with one exception: Tourette syndrome. ED declined to include various neurological disorders, such as bipolar disorders in the definition

> because these conditions are commonly understood to be health impairments. However, we do believe that Tourette syndrome is commonly misunderstood to be a behavioral or emotional condition, rather than a neurological condition. Therefore, including Tourette syndrome in the definition of other health impairment may help correct the misperception of Tourette syndrome as a behavioral or conduct disorder and prevent the misdiagnosis of their needs.[101]

Definition of "Parent"[102]

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 regulations add language to clarify situations in which there are multiple candidates for a child's parent. In general, the biological or adoptive parent is presumed to act for the child "unless the biological or adoptive parent does not have legal authority to make educational decisions for the child." In addition, "[i]f a judicial decree or order identifies a specific person or persons ... to act as the 'parent' of a child or to make educational decisions on behalf of a child," that person is deemed to be the "parent" of the child.

Definition of "Related Services"[103]

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 education program of the

[99] "Posny: Consent rules not meant to overburden districts," *Education Daily*, August 31, 2006, p. 3.

[100] See discussion of comments on proposed regulations at 71 *Federal Register* 46550, August 14, 2006.

[101] 71 *Federal Register* 46550, August 14, 2006.

[102] 34 C.F.R. §300.30.

[103] 34 C.F.R. §300.34.

child."[104] 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."[105] The regulations elaborate on this exception by specifically referring to cochlear implants and expand the exception to include "the optimization of that device's functioning (e.g., mapping), maintenance of that device, or the replacement of that device."[106] With respect to implant mapping, ED notes that

> [a]lthough the cochlear implant must be properly mapped in order for the child to hear well in school, the mapping does not have to be done in school or during the school day in order for it to be effective. The exclusion of mapping from the definition of related services reflects the language in [S.Rept. 108-185], p. 8, which states that the Senate committee did not intend that mapping a cochlear implant, or even the costs associated with mapping, such as transportation costs and insurance co-payments, be the responsibility of a school district.[107]

At the same time, the regulations do not free LEAs from all responsibilities related to surgically implanted devices. For example, the regulations do not prevent "the routine checking of an external component of a surgically implanted device to make sure it is functioning properly."[108]

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 prior IDEA regulations (following report language accompanying P.L. 105-17)[109] elaborated on the statutory language. For example, the prior regulations required that the departing staff are to be "replaced by qualified, lower-salaried staff."[110] In addition, the LEA had to ensure that the departures conform with school policies, collective bargaining agreements, and state law.[111] The current IDEA regulations keep these exceptions but eliminate the elaborating language in the prior regulation.[112] According to the commentary accompanying the proposed regulations:

[104] P.L. 108-446 §602(26).

[105] P.L. 108-446 §602(26)(B).

[106] 34 C.F.R. §300.34(b)(1).

[107] 71 *Federal Register* 46569-46570, August 14, 2006.

[108] 34 C.F.R. §300.34(b)(2)(iii).

[109] S.Rept. 105-17, 105th Cong. 1st sess., at 16 (1997).

[110] 34 C.F.R. §300.232(a)(1).

[111] 34 C.F.R. §300.232(a)(2).

[112] See 34 C.F.R. §300.204.

> 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.[113]

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."[114] The regulations incorporate this language, except the regulations use the phrase "clearly not feasible."[115] This was the language used in prior law (see P.L. 105-17 §614(b)(3)(A)(ii) 111 Stat. 82). ED provides no justification for returning to prior-law language.

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 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..."[116] (§614(b)(6)(A)). 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."[117] The regulations (§§300.307-300.311) require states to adopt criteria for the determination of specific learning disabilities, and in doing so states "must not require the use of a severe discrepancy between intellectual ability and achievement."[118] Apparently this language does not rule out some use of the discrepancy model by LEAs. ED removed a statement in the proposed regulations that would have explicitly permitted states to prohibit the use of this identification procedure[119] in response to "[n]umerous commenters [who] stated that

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[113] 70 *Federal Register* 35795, June 21, 2005.

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

[115] 34 C.F.R. §300.304(c)(1)(ii).

[116] 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. 108-185, 108th Cong., 2nd sess., at 26 (2003).

[117] P.L. 108-446 §614(b)(6)(B).

[118] ED notes that it has removed §300.541, which *required* the use of the discrepancy model because that requirement is now "inconsistent with the Act." 71 *Federal Register* 46647, August 14, 2006.

[119] See 70 *Federal Register* 35864, June 21, 2005, §300.307(a)(1).

§300.307(a)(1) exceeds statutory authority and ... that Congress did not intend to prohibit LEAs from using discrepancy models."[120]

The regulations lay out requirements for states in adopting their criteria. The determination of whether a child has a specific learning disability must be determined "based on the child's response to scientific, research-based intervention ... by the child's parents and a team of qualified professionals" including the child's "regular teacher, or ... [i]f the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age." Determination is to be based on the child's achievement relative to his or her age or relative to the state's approved grade-level standards when the child is provided with age-appropriate instruction. Determination cannot be primarily the result of "a visual, hearing, or motor disability; mental retardation; emotional disturbance; cultural factors; environmental or economic disadvantage; or limited English proficiency." The child's performance and behavior must be observed and documented "in the child's learning environment (including the regular classroom setting)."[121]

Individualized Education Program (IEP)

The regulations deal with implementing the IEP process in §§300.320-300.328. In most respects, they incorporate language from the act, and in several cases, model language on provisions in prior regulations. For example, §300.321(c) concerning the determination of IEP team members' expertise and knowledge use the same language as §300.344(c) in prior regulations. In a few cases, the regulations modify 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 regulations add the requirement that the parent's consent must be *in writing*; the act simply says that the parent and the LEA must consent.[122]

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.[123] Under the new law, the Secretary of Education monitors implementation of IDEA 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

[120] 71 *Federal Register* 46646, August 14, 2006. Elsewhere in the discussion of comments, ED note that "Discrepancy models are not essential for identifying children with SLD who are gifted. However, the regulations clearly allow discrepancies in achievement domains, typical of children with SLD who are gifted, to be used to identify children with SLD." 71 *Federal Register* 46647, August 14, 2006.

[121] 34 C.F.R. §300.310(a).

[122] See 34 C.F.R. §300.321(e)(2)(i) and P.L. 108-446 §614(d)(1)(C)(ii)(I). Note: ED has issued a model IEP form, available at http://www.ed.gov/policy/speced/guid/idea/idea2004.html.

[123] See S.Rept. 108-185, 108th Cong., 1st sess., at 46 (2003); H.Rept. 108-77, 108th Cong., 1st sess., at 120 (2003).

determination.[124] The regulations describe this hearing as an opportunity to meet with the Assistant Secretary for the Office of Special Education and Rehabilitative Services.[125]

April 2007 Revisions to the IDEA Amendments

On April 9, 2007, ED published final regulations regarding flexibility for determining adequate yearly progress (AYP) under NCLB.[126] These regulations amend the regulations related to the Elementary and Secondary Education Act (ESEA) as amended by NCLB as well as amending IDEA regulations. The added provisions allow states to develop modified achievement standards for "a small group of students whose disability has precluded them from achieving grade-level proficiency and whose progress is such that they will not reach grade-level achievement standards in the same time frame as other students."[127] Because only 2% of students tested can be considered to achieve AYP under this rule, it is sometimes termed the "2% rule."[128]

In addition to amendments to the ESEA regulations, the *Federal Register* of April 9, 2007, also amends the IDEA regulations.[129] In addition to reiterating several requirements added to the Title I regulations, a new paragraph adds several requirements, including the following:

- That states must ensure the participation of all children with disabilities in state and district-wide assessments, including those required under ESEA as amended by NCLB;
- that states must provide guidelines on testing accommodations so that accommodations do not invalidate assessment results;[130]
- that states and LEAs (with respect to district-wide assessments) must report the number of children with disabilities assessed under the various alternatives assessment alternatives; and
- that states and LEAs (with respect to district-wide assessments) must use principles of "universal design," to the extent possible, in the development and administration of assessments.[131]

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[124] 20 U.S.C. §1416(d)(2)(B).

[125] 34 C.F.R. §300.603(b)(2)(ii).

[126] 72 *Federal Register*, April 9, 2007. For further information, see *IDEA Interactions with NCLB.*

[127] 72 *Federal Register*, 17748, April 9, 2007.

[128] These provisions follow earlier regulatory flexibility that allows states to include in AYP calculations test scores based on alternate achievement standards for students with the most significant cognitive disabilities, as long as the percentage of these students at the school district or state level who are counted as "proficient" or "advanced" does not exceed 1% of all students assessed. See 68 *Federal Register*, December 9, 2003.

[129] A new paragraph is added to the IDEA regulations (34 CFR §300.160) at 72 *Federal Register* 17781, April 9, 2007.

[130] According to draft non-regulatory guidance,

> If a student uses an accommodation that results in an invalid score, the student is considered to be a nonparticipant under both Title I and the IDEA. If a student takes an assessment with an accommodation that invalidates the score, the assessment is no longer measuring the concepts it was intended to measure. Therefore, the score does not accurately reflect the student's academic achievement. U.S. Department of Education. *Modified Academic Achievement Standards Non-regulatory Guidance*, Draft, April 2007, p. 32.

[131] The general principle of universal design is that products and services (in this case assessments of academic (continued...)

Selected P.L. 108-446 Provisions Not Addressed in the August 2006 Final Regulations

Multi-Year IEP

The act authorizes the Secretary of Education to approve demonstration proposals from up to 15 states for implementing the multi-year IEP pilot demonstration that P.L. 108-446 authorizes (§614(d)(5)). These demonstrations would allow parents and LEAs to adopt IEPs covering up to three years that coincide with the child's "natural transition points."[132] 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 determine if progress is being made toward annual goals. More frequent reviews are required if sufficient progress is not being made. The Secretary is required to report on the effectiveness of the demonstration programs.

In December 2005, ED released proposed requirements and selection criteria for the multi-year IEP demonstration.[133] The August 2006 final regulations provide no further guidance on this demonstration. On July 6, 2007, the Secretary issued a notice of final additional requirements and selection criteria for the demonstration.[134] The additional requirements note that states requiring assistance or intervention, as determined by the Secretary under Section 616(d), could have their participation in the demonstration terminated or be denied participation. The additional requirements also provide materials and information that a state must provide in its proposal to participate in the demonstration. These include provisions for implementing requirements of the act, such as assurances that participating LEAs will inform parents in writing and in their native language about the differences between the multi-year and IEP and a standard IEP and the parents' right to revoke their consent for the multi-year IEP at any time.

The notice also included criteria for evaluating state proposals to participate in the demonstration. (The notice does not solicit state proposals; a separate *Federal Register* note will invite the submission of proposals "for a single one-time only competition."[135]) These criteria include the significance of the proposal, the quality of the project design, and the quality of the management plan.

(...continued)

achievement) be devised so that they may be used by as many people (regardless of circumstance) as possible.

[132] 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" P.L. 108-446, §614(d)(5)(C).

[133] 70 *Federal Register* 75158-75161, December 19, 2005.

[134] 72 *Federal Register* 36985-36999, July 6, 2007.

[135] 72 *Federal Register* 36985, July 6, 2007.

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 the demands of the Act while reducing the paperwork burden so school personnel can focus on educating children with disabilities.[136]

In December 2005, ED released proposed requirements and selection criteria for the paperwork reduction demonstration.[137] At the time of the release of the final IDEA regulations, final requirements for the demonstration had not been released.

IDEA Part C Proposed Regulations

Statutory Overview

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

The 2004 reauthorization of IDEA (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 a child receiving Part C early intervention services to extend those services until the child is 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, which authorizes funding for services for pre-school children with disabilities.

[136] H.Rept. 108-77, 108th Cong., 1st sess., at 122 (2003).

[137] 70 *Federal Register* 75161-75165, December 19, 2005.

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

- 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 providing services under extended Part C programs does not obligate the state to provide FAPE to children when they become eligible for the preschool program under Section 619 (states are obligated to provide FAPE under §619) (§635(c)(5)). In addition, the act requires the Secretary of Education, once Part C appropriations exceed $460 million,[138] 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[139] 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 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)).

Proposed Regulations

On May 9, 2007, the Secretary published proposed regulations for Part C of IDEA, which authorizes grants to support programs for infants and toddlers with disabilities and their families.[140] The following discusses selected provisions of the proposed regulations.

Definitions

The proposed regulations would add some definitions not currently included in the Part C regulations and would modify certain current definitions. The proposed regulations would add

[138] FY2007 Part C appropriations are about $436.4 million.

[139] Nutritionists have been removed from the list.

[140] 72 *Federal Register* 26456-26531, May 9, 2007.

certain definitions that are currently included in Part B regulations. Examples include definitions of "elementary school," "free appropriate public education (FAPE)," "local educational agency (LEA)," and "state educational agency (SEA)." These are examples of a general strategy to include in Part C regulations provisions currently in other parts of the statute and other IDEA regulations that also apply to the Part C program.

In addition, the proposed regulations add and modify definitions to reflect changes and modifications in the statute resulting from P.L. 108-446. For example, a definition of a "ward of the state" would be added to reflect the addition of that definition to the act (§602(36)). Examples of modifications to existing definitions include the following:

- adding provisions related to cochlear implants in the definition of health services;
- adding to the definition of an infant or toddler with a disability a child previously served under Part C who is eligible for services under the preschool program but who, at the state's discretion, continues to be served under Part C until he or she enters kindergarten or elementary school to reflect the provision added by P.L. 108-446;
- adding registered dieticians and vision specialists to the list of qualified personnel in the definition of early intervention services and eliminating the terms "nutritionist" and "nurses" from the definition; and
- adding clarifying language to the definition of a parent, which was expanded by P.L. 108-446, to specify that the biological/natural parent is considered the parent unless a judicial order or decree identifies some other individual. This clarification is similar to that in the Part B final regulations (34 C.F.R. §300.30).

Services for Children three Years Old and Older

As noted above, an important change resulting from the 2004 IDEA amendments was to authorize states to adopt policies that would permit parents of a child receiving Part C early intervention services to extend those services until the child is eligible to enter kindergarten (§635(c)). The proposed regulations would provide requirements for implementing this state option. In many cases, the proposed regulations repeat language in the act. In addition, they would add further requirements. For example, §303.211(a)(2) would require state plans to specify the age range to which these services will be made available: whether it is ages 3 to 5 inclusive or a shorter time span, such as "from age three until the beginning of the school year following the child's fourth birthday" (§303.211(a)(2)(ii)).

Financial Requirements

In addition to standard requirements against commingling funds and against supplanting state and local funding that are in the statute (§635(a)(5)), the proposed regulations would add exceptions to prohibitions against reducing the level of expenditure that the act provides for LEAs under Part B.[141] For example, if the number of infants and toddlers with disabilities decreases (§303.225(b)(2)(i) through(iv)), a state could reduce its level of expenditure without violating the

[141] Note that these exceptions under Part B apply to LEAs, not to states. See 20 U.S.C. 1413(a)(2)(B) and 34 CFR 300.204(a) through (d).

maintenance of effort requirement. There appears to be no parallel provision in this regard in Part C of the act.

§303.225(c) of the proposed regulations would add language that would prohibit Part C lead agencies[142] from charging indirect costs unless approved by the agency's "cognizant Federal agency" or by the Secretary of Education.[143] In addition, the proposed regulations state that "the lead agency may not charge rent, occupancy, or space maintenance costs directly to the Part C grant, unless those costs are specifically approved in advance by the Secretary." (§303.225(c)(3))

Parental Rights

The proposed regulations provide for procedural safeguards for parents and their infants and toddlers. These include confidentiality provisions (§§303.401-303.417), provisions for parental consent, notice and surrogate parents (§§303.420-303.422), and dispute resolution options (§§303.430-303.439).

The confidentiality provisions incorporate the provisions in part B in order to make it easier for parents to access information.[144] The provisions relating to parental consent and notice and those relating to surrogate parents are largely unchanged from existing regulations. The proposed regulations contain requirements for ensuring that parental consent is obtained before administering screening procedures, providing an evaluation and assessment, providing early intervention services, using public or private insurance, and exchanging personally identifiable information among agencies (§303.420). If parental consent is not obtained, the proposed regulations provide that the lead agency may use the due process hearing procedures to challenge the parent's refusal for an evaluation and assessment but may not use these procedures to challenge the parent's refusal to consent to the provision of an early intervention service or the use of insurance (§303.420(c)).

The proposed regulations contain various dispute resolution options, including mediation, state complaints, and due process hearing procedures. The mediation requirements are largely unchanged; however, the proposed regulations add that if mediation resolves a complaint, the parties must execute a legally binding agreement that is signed by the parent and an agency representative who has authority to bind the agency. In addition, the agreement is to be enforceable in state or federal court (§303.431).

ED Procedures

§§303.230 through 303.236 of the proposed regulations add detailed departmental procedures, which parallel those in Part B regulations (§§300.179-300.183) regarding the Secretary disapproving a state's application, including requirements for notice and hearing before initial and final disapproval decisions are made.

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[142] Part C requires that the governor of a state select a lead state agency to oversee and carry out the Part C program (§1435(a)(10)). This agency may be the SEA, but it can also be other state agencies, such as the state public health agency or the agency overseeing children's programs.

[143] The proposed regulations make reference to indirect cost requirements under Education Department General Administrative Regulations (EDGAR) at 34 CFR Part 76.

[144] 72 FED. REG. 26475 (May 9, 2007).

Following the requirement that applies provisions of in Sections 616, 617, and 618 of Part B dealing with certain federal administrative requirements to Part C (§642), the proposed regulations would include extensive requirements that parallel Part B regulations §§300.601-300.608 and §§300.640-300.645 dealing with federal monitoring and enforcement related to state performance standards and reporting requirements (§§303.700 through 303.708 and §§303.720 through 303.724).

Public and Private Insurance

§303.520 would add extensive requirements about use of public and private insurance to pay for services provided under Part C. For example, the state would be required to obtain parental consent to use public insurance or program benefits of a parent or child enrolled or participating in a public insurance or public benefit program. Similarly, states would be able to use private insurance if parental consent is provided. Parental consent would not be required if the state has enacted certain statutes related to the use of private insurance for Part C services (e.g., that the use of such insurance "cannot . . . be the basis for increasing the health insurance premiums of the infant or toddler with a disability or the child's family." (§303.520(b)(2)(iii))

Permitted Fees

Part C permits states to charge fees for some Part C services under certain circumstances. §303.521 would add requirements on the system of fees and payments that the state could charge parents. For example, states would not be able to charge parents who are unable to pay (as defined by the state). Fees could not be charged for certain Part C services, such as child find and evaluation. States that provide FAPE below the age of 3 or that use Part B funds to provide services for infants and toddlers with disabilities could not charge fees for services provided as part of FAPE.

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