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CRS Report for Congress

Proposed Amendments to the Regulations Under the Individuals with Disabilities Education Act (IDEA)

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Summary

The Individuals with Disabilities Education Act (IDEA)[1] 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. On May 13, 2008, the Department of Education (ED) issued a notice of proposed rule making (NPRM) regarding proposed amendments to the regulations promulgated under the Individuals with Disabilities Education Act (IDEA).[2] The areas covered by the proposed regulations include (1) parental revocation of consent after consenting to the initial provision of services; (2) a state's or local educational agency's (LEA's) obligation to make positive efforts to employ qualified individuals with disabilities; (3) representation of parents by non-attorneys in due process hearings; (4) state monitoring, technical assistance, and enforcement of the Part B program; and (5) the allocation of funds, under Sections 611 and 619 of the act, to LEAs that are not serving any children with disabilities. Comments must be received on the proposed regulations on or before July 28, 2008. This report will briefly discuss the issues raised by these proposed changes.[3]

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[1] 20 U.S.C. §1400 et seq.

[2] 73 FED. REG. 27690 et seq. (May 13, 2008).

[3] For a discussion of IDEA generally see CRS Report RS22590,*The Individuals with Disabilities Education Act (IDEA): Overview and Selected Issues,* by Richard N. Apling, and Nancy Lee Jones. For a discussion of the current IDEA regulations see CRS Report RL33649, *The Individuals with Disabilities Education Act (IDEA): Final Regulations for P.L. 108-446,* by Richard N. Apling, and Nancy Lee Jones.

Parental Revocation of Consent

IDEA currently contains statutory provisions requiring that parental consent be obtained prior to providing special education or related services to a child with a disability.[4] However, the statute does not specifically address the issue of what responsibilities the LEA has when a child has been receiving special education services and a parent wishes to revoke consent for such services. Previously, ED had interpreted the statute and regulations to prohibit the unilateral withdrawal of a child from special education in most circumstances.[5]

The proposed changes to the regulations would reverse this interpretation to allow parents to unilaterally withdraw their child from the receipt of special education services, and would not allow a LEA to use mediation or due process procedures to override a parent's decision to refuse to consent to further services.[6] Under the proposed regulations, the LEA would not be considered in violation of the FAPE requirement if the child was not provided with special education or related services because of the parent's revocation of consent. In addition, the proposed regulations would specifically provide that if the parents revoke consent, the LEA is not required to amend the child's records to remove references to the child's receipt of special education services. ED described the rationale for these proposed changes as a continuation of the parents' right to consent.

> Just as, under section 614(a)(1)(D)(ii)(II), parents have the authority to consent to the initial provision of special education and related services, we believe that parents also should have the authority to revoke that consent, thereby ending the provision of special education and related services to their child. This change is also consistent with the IDEA's emphasis on the role of parents in protecting their child's rights and the Department's goal of enhancing parent involvement and choice in their child's education.[7]

The proposed regulations differ from the current regulations regarding consent to initial services. Although the current regulations, like the proposed regulations, require parental consent to services and prohibit the use of mediation and due process procedures to force that consent, the current regulations on consent to initial services require a public agency to make reasonable efforts to obtain informed consent from the parent.[8] There is no such requirement in the proposed regulations regarding revocation of consent.

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[4] 20 U.S.C. §1414(a)(1)(D).

[5] 73 FED. REG. 27691 (May 13, 2008).

[6] Proposed 34 C.F.R. §300.300, 73 FED. REG. 27699 (May 13, 2008).

[7] *Id.*

[8] 34 C.F.R. §300.300(b)(2).

Employment of Qualified Individuals with Disabilities

The statutory language of IDEA abrogates state sovereign immunity and requires that the Secretary of Education ensure that each recipient of assistance under IDEA make positive efforts to employ, and advance in employment, qualified individuals with disabilities.[9] The proposed regulations would amend the regulatory section on sovereign immunity to add a new section requiring that recipients of assistance under IDEA must "make positive efforts to employ, and advance in employment, qualified individuals with disabilities in programs assisted under Part B of IDEA."[10]

Representation by Non-Attorneys in Due Process Hearings

One of the most controversial changes in the proposed regulations is the provision relating to lay advocates. Currently, IDEA provides that any party to a hearing under Part B of IDEA has "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities."[11] However, neither the act nor current regulations addresses the issue of whether individuals with special knowledge, but who are not attorneys, may represent parties at due process hearings. In a 1981 letter from Theodore Sky, Acting General Counsel of the Department of Education, to the Honorable Frank B. Brouillet, the Department had previously interpreted Section 615(h) of the act and implementing regulations as allowing both attorneys and non-attorneys to perform the same functions at due process hearings.[12]

In 2000, a decision by the Delaware Supreme Court in *In the Matter of Arons*,[13] held that a lay advocate who represented families of children with disabilities in due process hearings had engaged in the unauthorized practice of law. A 2006 survey found that ten states, like Delaware, prohibit lay advocates from representing parents, twelve states permit lay advocates, twenty one states have no official policy, and eight states leave the matter to the hearing officer.[14] This survey also noted a shortage of "readily affordable attorneys"to represent parents, and that the "availability of specialized lay advocates has not been nearly sufficient to close the gap."[15] The issue regarding representation by lay advocates had prompted attempts to add statutory language authorizing lay advocates

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[9] 20 U.S.C. §§1403, 1405.

[10] Proposed 34 C.F.R. §300.177, 73 FED. REG. 27699 (May 13, 2008). Part B of IDEA is the core of the act, and provides for FAPE and procedural protections for preschool and school age children.

[11] 20 U.S.C. §1415(h).

[12] 73 FED. REG. 27692 (May 13, 2008).

[13] 756 A.2d 867 (Sup.Ct. Del. 2000); *cert*. denied, 532 U.S. 1065 (2001).

[14] Perry A. Zirkel,"Lay Advocates and Parent Experts under the IDEA," 217 ED. LAW REP. 19 (May 3, 2007). The jurisdictions surveyed include the District of Columbia.

[15] *Id.*

during the last IDEA reauthorization (culminating in P.L. 108-446), but language in the House bill (H.R. 1350, 108th Cong.) was deleted in conference.[16]

The proposed regulations would change the previous interpretation by ED which allowed the use of lay advocates at due process hearings. The proposal would allow the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities, but would add an exception stating that "whether parents have the right to be represented by non-attorneys at due process hearings is determined under State law."[17] The Department stated that this proposed change is consistent with ED's general view regarding state flexibility where IDEA is silent. In addition, ED noted that this change would not prevent parents from representing themselves regarding their own IDEA claims as allowed under *Winkelman v. Parma City School District.*[18] School officials and parents' groups have both predicted activity in the states if the proposed rule becomes final.[19] The issue may come up at the federal level again when Congress begins the reauthorization process for IDEA.[20]

State Monitoring, Technical Assistance, and Enforcement

Section 616 of IDEA[21] provides for federal and state monitoring and enforcement of state implementation of Part B of IDEA. The proposed regulations would "clarify that a State must annually review and make determinations concerning the performance of each LEA in the State...."[22] The specific enforcement mechanisms that a state must use are also identified.[23]

Section 616(b)(2)(C)(ii)(I) of IDEA requires a state to report annually to the public on the performance of each LEA and to make the state's performance plan available through public means, including posting on the website of the state educational agency.[24] However, IDEA does not specify when the state must provide this report. The proposed

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[16] H.Rept. 108-779, at 218, note 227. The use of lay advocates was made more problematic by the Supreme Court's decision in *Arlington Central School District v. Murphy*, 548 U.S. 291 (2006),which held that IDEA does not authorize prevailing parents to recover fees they have paid to experts.

[17] Proposed 34 C.F.R. §300.512, 73 FED. REG. 27699 (May 13, 2008).

[18] 550 U.S. __, 127 S.Ct. 1994, 167 L.Ed.2d 904 (2007). For a discussion of this case and other IDEA Supreme Court decisions see CRS Report RL33444, *The Individuals with Disabilities Education Act (IDEA): Supreme Court Decisions*, by Nancy Lee Jones.

[19] Mark W. Sherman, "State Battles Foreseen Over Non-Attorney Representation," 41 EDUCATION DAILY 5 (May 20, 2008).

[20] Legal Watch, "Non-Attorney Rule Prompts Strong Reactions on Both Sides," 41 EDUCATION DAILY 5 (May 20, 2008).

[21] 20 U.S.C. §1416.

[22] 73 FED. REG. 27693 (May 13, 2008).

[23] Proposed 34 C.F.R. §300.600, 73 FED. REG. 27699 (May 13, 2008).

[24] 20 U.S.C. §1416(b)(2)(C)(ii)(I).

regulations would require this public report "no later than 60 days following the State's submission of its annual performance report to the Secretary...."[25] In addition, although IDEA requires the posting of the state's performance plan, it does not specify whether other materials, such as the annual report on each LEA must also be made available. The proposed regulations would require the state's performance plan, the state's annual performance report (APR), and the state's annual reports on the performance of each LEA to be made available through public means.[26]

Section 616(e)(7) of IDEA requires states that have received a determination from the Secretary that the state needs intervention to make such information available to the public. However, the statute does not specify when this information is to be made available. The proposed regulations would "clarify the circumstances under which public notice is required"[27] by requiring public notice "whenever a State receives notice that the Secretary is proposing to take or is taking an enforcement action...."[28]

The Allocation of Funds to LEAs That Are Not Serving Any Children with Disabilities[29]

IDEA currently contains statutory provisions requiring states to distribute IDEA Part B funds not reserved for state activities to local education agencies (LEAs), including public charter schools that operate as LEAs.[30] States first allocate a base amount to each LEA based on its FY1999 grant amount. Then, 85% of the remainder is allocated based on public and private school enrollment within the LEA compared to all such enrollment in the state and 15% of the remainder is based on the number of children living in poverty compared to the number in all LEAs.

The Department of Education's (ED) Office of Inspector General (OIG) found that neither that statute nor the IDEA regulations addresses whether a state is required to allocate funds to a charter school in its first year of operation if the school has no students with disabilities enrolled.[31] The proposed regulations would clarify that states are required to allocate some funds to LEAs, including public charter schools that operate as

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[25] Proposed 34 C.F.R. §300.602(b)(1)(A), 73 FED. REG. 27699 (May 13, 2008).

[26] Proposed 34 C.F.R. §300.602(b)(1)(B), 73 FED. REG. 27699 (May 13, 2008).

[27] 73 FED. REG. 27694 (May 13, 2008).

[28] Proposed 34 C.F.R. §300.606, 73 FED. REG. 27700 (May 13, 2008).

[29] This discussion concerns IDEA Section 611, which pertains mainly to the education of school aged children. The proposed regulations contain similar provisions relating to Section 619, which pertains to the education of preschool children.

[30] 20 U.S.C. §1416 (f)(1). In addition, states must comply with the general requirements on allocating funds to charter schools in subpart H of 34 CFR part 76.

[31] Office of Inspector General, U.S. Department of Education, "Charter School's Access to Title I and IDEA Part B Funds in the State of Arizona." Final Audit Report, ED_OIG/A09-D0033, August 2004, p.17. Hereafter: cited as Office of Inspector General, *Charter Schools.*

LEAs, even if an LEA is not serving any children with disabilities.[32] The proposed regulations imply that such LEAs would receive a base grant of zero and some funds based on enrollment and poverty. The rationale for this proposed rule is that allocating funds to all LEAs "would ensure that LEAs have Part B funds available if they are needed to conduct child find activities [i.e, identifying and evaluating children in need of special education] or to serve children with disabilities who subsequently enroll or are identified during the year."[33]

The OIG also found that neither the statute nor the IDEA regulations addresses whether a charter school LEA that received a base payment of zero in its first year of operation because it was serving no children with disabilities and subsequently provided special education to children with disabilities is entitled to a base payment in subsequent years if it does enroll students with disabilities.[34] The proposed regulations would require that a base payment adjustment be made for these LEAs, including a public charter school that operates as an LEA, for the fiscal year after the first annual child count in which the LEA reports that it is serving any children with disabilities.[35] The state would be required to divide the base allocation for the LEAs that would have been responsible for serving children with disabilities now being served by the new LEA, among the new LEA and affected LEAs based on the relative numbers of children with disabilities currently provided special education by each of the LEAs.[36] Finally, the proposed regulations would modify the procedures for the reallocation of LEA funds.[37]

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[32] This requirement would be effective with funds that become available on the first July 1 following the effective date of the regulations. Proposed 34 C.F.R. §300.705(a), 73 FED. REG. 27700 (May 13, 2008).

[33] 73 FED. REG. 27695 (May 13, 2008).

[34] Office of Inspector General, *Charter Schools*, p. 17.

[35] This requirement would be effective with funds that become available on the first July 1 following the effective date of the regulations. Proposed 34 C.F.R. §300.705(b(2)(iv), 73 FED. REG. 27700 (May 13, 2008).

[36] Proposed 34 C.F.R. §300.705(b)(2)(iv), 73 FED. REG. 27700 (May 13, 2008). This method for making the base payment adjustment is the same as that required in current regulations (34 C.F.R. §300.705(b)(2)(i)) for any new LEA.

[37] Proposed 34 C.F.R. §300.705(c), 73 FED. REG. 27700 (May 13, 2008).