

Synopsis on Special Education Regulations

In June 2005, New Jersey's Office of Special Education Programs sent out a guidance for Implementation of the Individuals with Disabilities Act of 2004 (IDEA). The guidance is intended to inform school districts and interested parties of the provisions of IDEA 2004 that the New Jersey Department of Education has determined supersede state regulation, or for which there is no state regulation and, therefore, becomes effective in New Jersey on July 1, 2005. In some areas, State regulations confer rights that are consistent with, or in excess of IDEA 2004. The State believes that in these areas, state regulations remain applicable.

The Department of Education plans to review New Jersey regulations in the fall to determine what changes may be necessary to bring them into compliance with the new federal law. Below is a synopsis of the guidelines issued by the New Jersey Department of Education.

Highly Qualified Teacher Requirements

The New Jersey Department of Education believes that collaborative teaching between a special education teacher and a teacher highly qualified in the area in which instruction is being provided is permitted, as is consultations by a special education teacher and a regular education teacher.

Special Education teachers are now subject to requirements which define highly qualified as a teacher who has obtained full state certification as a special education teacher, or passed the state special education teacher licensing examination, and holds a license to teach in the state as a special education teacher. A teacher must hold at least a bachelor's degree.

If a teacher is teaching to alternate achievement standards, highly qualified is defined as meeting the applicable requirements of Section 9101 of the Elementary and Secondary Education Act (ESEA) as amended by the No Child Left Behind Act for any elementary, middle or secondary school teacher who is new or not new to the profession, or has subject matter knowledge appropriate to the level of instruction being provided, as determined by the state, needed to effectively teach to those standards.

If a teacher is teaching multiple subjects, highly qualified is defined as meeting the applicable requirements of Section 9101 of ESEA for any elementary, middle or secondary school teacher who is new or not new to the profession. If the teacher is not new to the profession, the teacher must demonstrate competence in all the core academic subjects the teacher teaches.

Assistive Technology

IDEA 2004 altered the definition of “assistive technology” to specifically *exclude* medically implanted devices or the replacement of such a device.

Excusal from IEP Meetings

Currently New Jersey regulations do not permit excusal of team members from IEP meetings. However, IDEA 2004 provides that, for any team member whose area of the curriculum or related services is not being discussed, IEP team members will not be required to attend an IEP meeting, provided that the parent and local education agency (LEA) agree that the IEP team member need not attend the meeting. Since this is federally mandated, this supersedes state regulation as of July 1, 2005. IDEA does not indicate whether more than one IEP team member whose area is not being discussed may be excused from the same IEP meeting. New Jersey’s Department of Education recommends that districts not seek to excuse multiple participants from a meeting until clarification is given by the federal government.

IDEA 2004 also allows an IEP team member to be excused from an IEP meeting even if the team member’s area of the curriculum or related services is being discussed, if the parent and LEA consent to the excusal and the member provides written input with respect to his or her area.

NJ regulations do not allow for a team member to miss an IEP meeting. Federal law allows for excusal with parent and LEA consent. Since the new federal law is permissive in this area, state regulations, which exceed IDEA still controls and such excusals may not occur unless New Jersey’s regulations are amended to permit such excusals.

Benchmarks or Short-Term Objectives

IDEA 2004 eliminated the requirement that benchmarks and short-term objectives be included in an IEP, except for students participating in alternate assessments. However, New Jersey regulations exceed this requirement in IDEA 2004 and therefore, New Jersey can maintain short-term goals. Advocates believe these goals truly help a child’s IEP while those in favor of eliminating short-term goals argue that spending less time on short term goals will provide more time to focus on the bigger picture.

Amendment of an IEP Without a Meeting

New Jersey regulations permit amendment of IEPs only after a meeting of the full IEP team. IDEA 2004 permits amendment or modification of an IEP by agreement of the parent and LEA without the need for an IEP meeting. Because state regulation exceeds this provision of IDEA 2004, and this provision of IDEA 2004 is not mandatory, amendments to an IEP may only be made in a meeting of the team conducted pursuant to New Jersey regulations. Such amendments to IEPs would only become permissible if New Jersey regulations are changed to allow amendment without a meeting. Therefore, no change will occur to the procedures for amending an IEP on July 1, 2005.

Transition

IDEA provides that for transition, beginning at age 16 an IEP include “appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment and where appropriate, independent living skills.” Transition services needed to assist a student in achieving such goals must be provided to each student. This altered standard for provision of transition services becomes applicable for IEPs developed on or after July 1, 2005.

While IDEA 2004 changed the initial transition age to 16, New Jersey regulations provide for transition services beginning in the IEP for the year in which a student will turn 14 years of age. Because that provision exceeds the requirements of IDEA, the requirement to provide transitions planning and services will remain at age 14 in New Jersey on July 1, 2005.

Surrogate Parents and Wards of the State

IDEA 2004 ensures that a LEA take reasonable efforts to obtain parental consent for an initial evaluation. If after reasonable efforts, the parent can not be found, parental consent need not be obtained for an initial evaluation. However, a district must assign a surrogate parent for any student determined a ward of the state. If the district fails to appoint a ward of the state or fails to appoint a surrogate parent for a ward of the state, a judge may appoint a surrogate if necessary.

IDEA also altered the procedures for appointing surrogate parents. IDEA 2004 provides that when necessary to appoint a surrogate parent, a LEA must make reasonable efforts to do so within 30 days after the determination that a surrogate is needed. In addition, surrogates may be appointed by a judge.

Academic Achievement and Functional Performance

IDEA 2004 requires a description of the present levels of academic achievement and functional performances in students IEPs, rather than the current requirement in New Jersey regulations. In addition, measurable annual academic and functional goals are also required by IDEA 2004 in students IEPs. Both of these requirements are applicable to IEPs developed on or after July 1, 2005.

Students who Transfer from Another District

IDEA 2004 alters the requirements for students who transfer from in-state and from out-of-state school districts, and must be followed for students who transfer on or after July 1, 2005.

For students who transfer from another district within the state, the student must be provided, in consultation with parents, a program that is comparable to the program described in the previously held IEP, until the LEA adopts the previously held IEP as the student’s IEP, or develops and implements a new IEP in accordance with the law.

For out-of-state transfer students, implementation of the previously held IEP is no longer an option for the LEA, as IDEA 2004 mandates development of a new IEP for the student.

Assessment in Appropriate Language or Form, Rather than Native Language

Current New Jersey regulations require that all evaluation procedures be provided and administered in the student's native language or other mode of communication unless clearly unfeasible. IDEA 2004 provides that, when assessing a student, such assessments must be "administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally unless it is not feasible to do so, provide or administer." This requirement takes the place of the requirement in New Jersey code and is applicable for all assessments conducted on or after July 1, 2005.

Frequency of Reevaluation

IDEA 2004 provides that reevaluations may not occur not more frequently than once a year, unless the district and parent agree otherwise. This requirement supersedes state regulation for reevaluations after July 1, 2005. However, the state regulation requiring a reevaluation within 3 years of the previous evaluation will remain in effect.

Equitable Participation Services

IDEA 2004 altered the requirements for provision of equitable participation services to require that the district where a private school is located provide such services and adhere to the provisions for doing so. The department has determined the state will continue to have the district of residence of the student's parent provide equitable participation services through the 2005-2006 school year. For 2006-2007 school year, necessary data will be collected on December 1, 2005 and the district where the private school is located will provide equitable participation services in accordance with IDEA 2004.

Dispute Resolution

IDEA 2004 has many changes with respect to dispute resolution that are effective July 1, 2005. Because of the length and complexity of such provisions, and the need to fully develop procedures for implementing them, details concerning these provisions will be the subject of a separate guidance from the department. Among the new provisions governing dispute resolutions are:

- A provision setting forth a 2 year period in which to file for mediation or due process after the event giving rise to the dispute occurs;
- A provision setting forth a 90 day period for appealing final decisions in due process hearings;
- A requirement that the other party file an answer to due process petitions within 10 days of the filing of the petition;

- A provision requiring LEAs to provide prior written notice within 10 days of the filing of a petition for a due process hearing when the subject matter of the request for due process was not the subject of prior written notice;
- A provision allowing the responding party to object to the notice in the request for a due process hearing as inadequate within 15 days of the filing of the petition, and that an administrative law judge will determine whether the notice is adequate within 5 days of the filing of the objection;
- A provision prohibiting amendment of petitions for a due process hearing unless the other party consents or an ALJ permits the requested amendment;
- Except when a district files for a due process hearing or when an expedited due process hearing (involving discipline issues only) is filed, a provision calling for a “resolution session” or mediation during the first 30 days, unless waived by both parties;
- Provisions establishing parameters for resolutions sessions, including that they must be scheduled within 15 days and completed within 30 days, that attorneys can not attend such sessions unless the parent brings an attorney;
- A provision stating that due process may not be utilized to contest whether a teacher or other provider of services is highly qualified; and
- A provision allowing LEAs to seek attorney fees when the petition of a parent is frivolous or is filed to harass or cause delay.

Discipline

IDEA has made changes with respect to discipline which take effect on July 1, 2005. The provisions of IDEA 2004 superseded NJ provisions on July 1, 2005.

- *New authority for school personnel:* School personnel may consider any unique circumstances on a case-by-case basis when deciding to order a change in placement for a child with a disability who violates a student conduct code.
- *New standard for manifestation determinations:* Within 10 days of any decision to change the placement of a child with a disability because of a violation of a code for student conduct, the LEA, parent and relevant members of the IEP team shall review all relevant information in the student’s file, including the IEP, any teacher observations and any relevant information provided by the parents to determine if the conduct was caused by or was in direct and substantial relationship to the child’s disability or a direct result of the LEA’s failure to implement the IEP.
- *New provision when there is a determination that a behavior was a manifestation of the disability:* The IEP team shall conduct a functional behavioral assessment and implement a behavioral intervention plan for the child; if a behavioral intervention plan has been developed, review the existing plan and modify it as necessary to address the behavior. If the behavior is a manifestation of the child’s disability, the child is returned to the placement from which he or she was removed, unless the parent and LEA agree otherwise.
- *New standard for special circumstances:* A school is permitted to remove a child with a disability to an alternative educational setting for not more than 45 school days, without regard to whether the behavior is determined to be a manifestation of the child’s disability, in cases where a child: carries a weapon on school premises, knowingly

possesses or uses illegal drugs, or has inflicted serious bodily injury upon another person while at school.

- *New definition:* Serious bodily injury is defined to mean a bodily injury that involves a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ or faculty.
- *Authority of the Hearing Officer:* The hearing officer may return a child with a disability to the placement from which the child was removed or order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or others.
- *Placement during appeals:* When the appeal has been requested by either a parent or the LEA, the child shall remain in the interim alternative educational setting pending the decision of the hearing officer.
- *Standard for a basis of knowledge for children not yet eligible for special education and related services:* 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 occurred, a parent expressed concern in writing to an administrator or teacher, or requested an evaluation of the child, or the teacher or LEA personnel expressed specific concerns about a pattern of behavior demonstrated to the administrator.