I. THE MERGER OF IDEA AND NCLB: A SEISMIC SHIFT IN THE PROVISION OF SPECIAL EDUCATION SERVICES

The highly anticipated IDEA 2004 implementing regulations were released by the U.S. Department of Education on August 3, 2006. These new regulations clarify and expand the statutory provisions of the Act, and were effective on October 13, 2006. Everyone working in, or associated with, the field of special education must understand this new law and regulations. This outline focuses on the changes made to the IDEA as enacted by Congress in 2004, and includes the most current clarifications and additions to the law from the 2006 implementing regulations.

II. PURPOSE OF THE IDEA

A. Findings: Congress has made it clear that students with disabilities are expected to reach the same academic goals and meet the same academic standards as their age-appropriate, nondisabled peers.
B. **Purpose Statement**: “[The purpose of the IDEA is] to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1401(d)(1).

III. **DEFINITIONS**

There are several significant changes/additions to the definition section of the IDEA:

A. **Assistive Technology Device**

An exception has been added to the previous definition of an “assistive technology device”:

**EXCEPTION.**— The term does not include a medical device that is surgically implanted, or the replacement of such device. 20 U.S.C. §1401(1)(B).

2006 IDEA Regs: The 2006 regulations contain this same language. 34 C.F.R. §300.5. In addition, the following new section has been added to the IDEA regulations:

Each public agency must ensure that assistive technology devices or assistive technology services, or both, as those terms are defined in § 300.5 and 300.6, respectively, are made available to a child with a disability if required as a part of the child’s—

1. Special education under § 300.36;
2. Related services under § 300.34; or
3. Supplementary aids and services under §§ 300.38 and 300.114(a)(2)(ii). 34 C.F.R. § 300.105(a).

On a case-by-case basis, the use of school-purchased assistive technology devices in a child’s home or in other settings is required if the child’s IEP Team determines that the child needs access to those devices in order to receive FAPE. 34 C.F.R. § 300105(b).
B. Core Academic Subjects:

“Core academic subjects means English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography.”

34 C.F.R. §300.10.

C. Parent: Both the IDEA 2004 and the 2006 implementing regulations modify the previous definition of “parent”:

The term ‘parent’ means: (A) a natural, adoptive, or foster parent (unless a foster parent is prohibited by State law from serving as a parent); (B) a guardian (but not the State if the child is a ward of the State); (C) an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child’s welfare; or …an individual who is assigned…to be a surrogate parent.”


2006 Regulations:

i. Replaces “natural” with “biological.” 34 C.F.R. §300.30(a)(1) and (4); 300.30(b)(1).

ii. Clarifies that a “guardian” must be “generally authorized to act as the child’s parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State).” 34 C.F.R. §300.30(a)(3).

iii. Clarify that (1) The biological or adoptive parent, when attempting to act as the parent, and when more than one party is qualified to act as a parent, must be presumed to be the parent for purposes of this section, unless the natural or adoptive parent does not have legal authority to make educational decisions for the child,” and (2) If 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, then such person(s) shall be determined to be the “parent” for purposes of this section, except that a public agency that provides education or care for the child may not act as the parent.” 34 C.F.R. §300.30(b)(1).
D. **Related Services:**

i. The definition of related services includes, school health services and school nurse services….” 34 C.F.R. §300.34(a).

1. “School health services” is defined as “services that may be provided by either a qualified school nurse or other qualified person.” 34 C.F.R. §300.34(c)(13).

2. “School nurse services” is defined as “services provided by a qualified school nurse.” 34 C.F.R. §300.34(c)(13).

ii. **Exception:** services that apply to children with surgically implanted devices, including cochlear implants.

1. Related services do not include a medical device that is surgically implanted, the optimization of that device’s functioning (e.g., mapping), maintenance of that device, or the replacement of that device;

2. School personnel are required to “appropriately monitor” medical devices, and to provide “routine checking” of the external components of surgically implanted devices. 34 C.F.R. § 300.113(b). 34 C.F.R. §300.34(b)

E. **Scientifically based research:** has the meaning given the term in section 9101(37) of the Elementary and Secondary Education Act. 34 C.F.R. §300.35

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**IV. FREE APPROPRIATE PUBLIC EDUCATION**

A. **Statutory Definition of FAPE:** The statute retains the previous definition of a “free appropriate public education.” 20 U.S.C. 1412(a)(1)(A).
B. Regulatory Definition of FAPE: The regulations add the following subsection to the definition of FAPE:

“Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.”

34 C.F.R. §300.101(c)(1)(Emphasis added).

C. Exception to FAPE: The obligation to make FAPE available to all children with disabilities does not apply to students who have graduated with a regular high school diploma. But, students who “graduate” with other types of certificates (such as Certificate of Attendance or Special Education Diploma), or who earn a GED, remain entitled to receive FAPE through the age of 21 yrs. 34 C.F.R. § 300.102 and 300.103(a)(3).

V. LEAST RESTRICTIVE ENVIRONMENT – Students with disabilities must be placed, to the maximum extent appropriate, in classes or settings with non-disabled, age-appropriate peers. This includes ensuring that all children with disabilities be provided with supplementary aids and services that are determined necessary for the child to participate in nonacademic settings. 34 C.F.R. § 300.117.

VI. NONACADEMIC SERVICES

The State must ensure the following:

A. Each public agency must take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child’s IEP Team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities.

B. Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public
agency and assistance in making outside employment available. 34 C.F.R. § 300.107.

VII. CHILD FIND

Homeless/Ward of the State - The new law adds a phrase regarding homeless children or ward of the State: “All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.” 20 U.S.C. 1412(a)(1)(C).

VIII. CHILDREN ENROLLED IN PRIVATE SCHOOLS BY THEIR PARENTS

A. Definition of parentally-placed private school children with disabilities. This means children with disabilities enrolled by their parents in non-profit private, including religious, schools or facilities that meet the definition of elementary school in § 300.13 or secondary school in § 300.36, other than children with disabilities covered under §§ 300.145 through 300.147 (children with disabilities enrolled in private schools by an LEA or by their parents when FAPE is at issue). 34 C.F.R. § 300.130 (Emphasis added).

B. Child find for parentally-placed private school children with disabilities. Each LEA must locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district serviced by the LEA....

C. Out-of-State children. Each LEA in which private, including religious, elementary schools and secondary schools are located must, in carrying out the child find requirements in this section,
include parentally-placed private school children who reside in a State other than the State in which the private schools that they attend are located. 34 C.F.R. § 300.131.

D. Provision of services for parentally-placed private school children with disabilities – basic requirement. To the extent consistent with the number and location of children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA, provision is made for the participation of those children in the program assisted or carried out under Part B of the Act by providing them with special education and related services, including direct services determined in accordance with § 300.137, unless the Secretary has arranged for services to those children under the by-pass provisions in §§ 300.190 through 300.198.

E. Services plan for parentally-placed private school children with disabilities. In accordance with paragraph (a) of this section and §§ 300.137 through 300.139, a services plan must be developed and implemented for each private school child with a disability who has been designated by the LEA in which the private school is located to receive special education and related services under this part.

F. Calculating Proportionate Amount. In calculating the proportionate amount of Federal funds to be provided for parentally-placed private school children with disabilities, the LEA, after timely and meaningful consultation with representatives of private schools under § 300.134, must conduct a thorough and complete child find process to determine the number of parentally-placed private school children with disabilities attending private schools located in the LEA. (See Appendix B for an example of how proportionate share is calculated).

G. Annual count of the number of parentally-placed private school children with disabilities. Each LEA must engage in “timely and meaningful consultation” throughout the school year with representatives of parentally-placed private school children with disabilities to determine the number of parentally-placed private
school children with disabilities attending private schools located in the LEA; and

H. Provision of special education and related services. Public school systems must discuss with private school representatives how, where, and by whom special education and related services will be provided for parentally-placed private school children with disabilities, including a discussion of –

i. The types of services, including direct services and alternate service delivery mechanisms; and

ii. How special education and related services will be apportioned if funds are insufficient to serve all parentally-placed private school children; and

ii. How and when those decisions will be made.

I. Written explanation by LEA regarding services. If the LEA disagrees with the views of the private school officials on the provision of services or the types of services (whether provided directly or through a contract), the LEA will provide to the private school officials a written explanation of the reasons why the LEA chose not to provide services directly or through a contract. 34 C.F.R. § 300.134.

J. Written Affirmation.

When timely and meaningful consultation, as required by §300.134, has occurred, the LEA must obtain a written affirmation signed by the representatives of participating private schools. If the representatives do not provide the affirmation within a reasonable period of time, the LEA must forward the documentation of the consultation process to the SEA. 34 C.F.R. § 300.135.

K. Compliance.

i. General. A private school official has the right to submit a complaint to the SEA that the LEA –

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a. Did not engage in consultation that was meaningful and timely; or

b. Did not give due consideration to the views of the private school official.

ii. **Procedures.**

   a. If the private school official wishes to submit a complaint, the official must provide to the SEA the basis of the noncompliance by the LEA with the applicable private school provisions in this part; and

   b. The LEA must forward to the appropriate documentation to the SEA.

iii. If the private school official is dissatisfied with the decision of the SEA, the official may submit a complaint to the Secretary by providing the information on noncompliance…; and the SEA must forward the appropriate documentation to the Secretary. 34 C.F.R. § 300.136.

L. **Equitable services determined.**

   i. **No individual right to special education and related services.** No 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.

   ii. **Decisions.**

      a. Decisions about the services that will be provided to parentally-placed private school children with disabilities under §§ 300.130 through 300.144 must be made in accordance with paragraph © of this section and § 300.134(c).

      b. The LEA must make the final decisions with respect to the services to be provided to eligible parentally-placed private school children with disabilities.
c. Services plan for each child served under §§ 300.1 through 300.144. If a child with a disability is enrolled in a religious or other private school by the child’s parents and will receive special education or related services from an LEA, the LEA must –

1. Initiate and conduct meetings to develop, review, and revise a services plan for the child, in accordance with § 300.138(b); and

2. Ensure that a representative of the religious or other private school attends each meeting. If the representative cannot attend, the LEA shall use other methods to ensure participation by the religious or other private school, including individual or conference telephone calls. 34 C.F.R. § 300.137.

M. Equitable services provided.

General. The services provided to parentally-placed private school children with disabilities must be provided by personnel meeting the same standards as personnel providing services in the public school, except that private elementary school and secondary school teachers who are providing equitable services to parentally-placed private school children with disabilities do not have to meet the highly qualified special education teacher requirements of § 300.18. (Emphasis added)

Parentally-placed private school children with disabilities may receive a different amount of services than children with disabilities in public schools.

A. Services provided in accordance with a services plan.

i. Each parentally-placed private school child with a disability who has been designated to receive services under § 300.132 must have a services plan that describes the specific special education and related services that the LEA will provide to the child in light of the services that the LEA has determined, through the process described in
§§ 300.134 and 300.137, it will make available to parentally-placed private school children with disabilities.

ii. The services plan must, to the extent appropriate –

1. Meet the requirements of § 300.320, or for a child ages three through five, meet the requirements of § 300.323(b) with respect to the services provided; and

2. Be developed, reviewed, and revised consistent with §§ 300.321 through 300.324. (Emphasis added).

N. Provision of equitable services.

The provision of services pursuant to this section and §§ 300.139 through 300.143 must be provided:

i. By employees of a public agency; or

ii. Through contract by the public agency with an individual, association, agency, organization, or other entity.

iii. Special education and related services provided to parentally-placed private school children with disabilities, including materials and equipment, must be secular, neutral, and non-ideological. 34 C.F.R. § 300.138.

O. Location of services and transportation.

i. Services on private school premises. Services to parentally-placed private school children with disabilities may be provided on the premises of private, including religious, schools, to extent consistent with law.

ii. Transportation – If necessary for the child to benefit from or participate in the services provided under this part, a parentally-placed private school child with a disability must be provided transportation –
1. From the child’s school or the child’s home to a site other than the private school; and

2. From the service site to the private school, or to the child’s home, depending on the timing of the services.

3. LEAs are not required to provide transportation from the child’s home to the private school. 34 C.F.R. § 300.139.

IX. CHILDREN WITH DISABILITIES ENROLLED BY THEIR PARENTS IN PRIVATE SCHOOLS WHEN FAPE IS AT ISSUE.

The 2006 IDEA regulations add the following subpart:

Disagreements about FAPE. Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures in §§ 300.504 through 300.520.

34 C.F.R. § 300.148(b).

X. Early Intervening Services – A school district may use up to 15 percent of its Part B funds “to develop and implement coordinated, early intervening services, which may include interagency financing structures, for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade 3) who have not been identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment.” 20 U.S.C. 1413(f) (Emphasis added).

Use of Early Intervening Funds - These funds may be used for “professional development (which may be provided by entities other than local educational agencies) for teachers and other school staff to enable such personnel to deliver scientifically based academic instruction and behavioral interventions, including scientifically based literacy instruction, and, where appropriate,
instruction on the use of adaptive and instructional software; and providing educational and behavioral evaluations, services, and supports, including scientifically based literacy instruction. 20 U.S.C. § 1413(f)(2).

XI. PERSONNEL QUALIFICATIONS AND HIGHLY QUALIFIED STAFF

A. Related Services Personnel and Paraprofessionals – These personnel are “appropriately and adequately prepared and trained” if they have “any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services. States must ensure that related services personnel “have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis.” States must also “allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulation, or written policy…to be used to assist in the provision of special education and related services…to children with disabilities.” 20 U.S.C. 1412(a)(14)(B).

B. No Private Right of Action - 2006 IDEA Regulations add:

Rule of construction. Notwithstanding any other individual right of action that a parent or student may maintain under this part, nothing in this part shall be construed to create a right of action on behalf of an individual student or a class of students for the failure of a particular SEA or LEA employee to be highly qualified, or to prevent a parent from filing a complaint about staff qualifications with the SEA as provided for under this part. 34 C.F.R. § 300.156(e (Emphasis added).

C. Highly Qualified Special Education Teachers – 2006 IDEA Regs:

Alternative Route to Certification Exception. The regulations clarify that a special education teacher meets the “highly qualified” requirements “if that teacher is participating in an alternative route to certification program under which the teacher:
i. Receives high-quality professional development that is sustained, intensive, and classroom-focused in order to have a positive and lasting impact on classroom instruction, before and while teaching;

ii. Participates in a program of intensive supervision that consists of structured guidance and regular ongoing support for teachers or a teacher mentoring program;

iii. Assumes functions as a teacher only for a specified period of time not to exceed three years; and

iv. Demonstrates satisfactory progress toward full certification as prescribed by the State; and

v. The State ensures, through its certification and licensure process, that these provisions are met. 34 C.F.R. § 300.18.

Separate HOUSSE standards for special education teachers. 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 –

i. A State may develop a separate HOUSSE for special education teachers; and

ii. A single HOUSSE evaluation may cover multiple subjects. 34 C.F.R. § 300.18(e).

Applicability of definition to ESEA; and clarification of new special education teacher.

i. A teacher who is highly qualified under this section is considered highly qualified for purposes of the ESEA.
ii. For purposes of this section, a fully certified regular education teacher, who subsequently becomes fully certified or licensed as a special education teacher is a new special education teacher when first hired as a special education teacher. 34 C.F.R. § 300.18Ig).

Private school teachers not covered. The requirements in this section do not apply to teachers hired by private elementary schools and secondary schools, including private school teachers hired or contracted by LEAs to provide equitable services to parentally-placed private school children with disabilities 34 C.F.R. § 300.18(h).

D. Special Education Teachers Teaching Core Academic Subjects Exclusively to Children Who Are Assessed Against Alternate Achievement Standards

Requirements for special education teachers teaching to alternative achievement standards. When used with respect to a special education teacher who teaches core academic subjects exclusively to children who are assessed against alternate achievement standards, highly qualified means the teacher, whether new or not new to the profession, may either:

i. Meet the applicable requirements of [NCLB] for any elementary, middle, or secondary school teacher who is new or not new to the profession; or

ii. Meet the requirements of [NCLB] as applied to an elementary school teacher, or, in the case of instruction above the elementary level, meet the requirements of [NCLB] as applied to an elementary school teacher and have subject matter knowledge appropriate to the level of instruction being provided and needed to effectively teach to those standards, as determined by the State.
E. Special Education Teachers Teaching Multiple Subjects - Special education teachers who teach 2 or more “core academic subjects” exclusively to children with disabilities are “highly qualified” if:

i. The teacher meets the applicable requirements of the NLCB for any elementary, middle, or secondary school teacher who is new or not new to the profession; or

ii. In the case of a teacher who is not new to the profession, demonstrates competence in all the core academic subjects in which the teacher teaches in the same manner as is required for an elementary, middle, or secondary school teacher who is not new to the profession under NCLB, which may include a single, high objective uniform State standard of evaluation covering multiple subjects; or

iii. In the case of a new special education teacher who teaches multiple subjects and who is “highly qualified” in mathematics, language arts, or science, demonstrate competence in the other core academic subjects in which the teacher teaches in the same manner as is required for an elementary, middle, or secondary school teacher under NCLB, which may include a single, high objective uniform State standard of evaluation covering multiple subjects, not later than 2 years after the date of employment. 20 U.S.C. 1412(10)(D).

XII. PROHIBITION OF MANDATORY MEDICATION

Educators are prohibited “from requiring a child to obtain a prescription for a substance covered by the Controlled Substances Act (21 U.S.C. 801 et seq.) as a condition of attending school, receiving an evaluation..., or receiving services....”

However, teachers and other school personnel are not prohibited from “consulting or sharing classroom-based observations with parents or guardians regarding a student’s academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services....” 20 U.S.C. 1412(a)(25).
XIII. **ASSESSMENT OF STUDENTS WITH DISABILITIES**

A. **Performance Goals and Indicators** – States must establish goals for the performance of children with disabilities that (1) are the same as the State’s definition of adequate yearly progress; (2) address graduation rates and dropout rates; and (3) are consistent with any other goals and standards for children without disabilities. 20 U.S.C. 1412(15).

B. **Participation in Assessments** – All children with disabilities must be included in all State and district-wide assessment program, including assessments under NCLB, with “appropriate accommodations” and alternate assessments where necessary and as indicated in their respective IEPs. 20 U.S.C. 1412(16).

C. **Requirements for Alternate Assessments** – Alternate assessments must (1) be aligned with the State’s challenging academic content standards and challenging student academic achievement standards; and (2) measure the achievement of children with disabilities against any alternate academic achievement standards promulgated pursuant to NCLB. 20 U.S.C. 1412(16)(ii).

XIV. **EVALUATIONS AND ELIGIBILITY**

**Initial Evaluations**

A. **Request for Initial Evaluation** – “Either a parent of a child, or a State educational agency other State agency, or local educational agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.” 20 U.S.C. 1414(a)(1)(B).

B. **Timeline for Initial Evaluation** – The eligibility determination must be completed within 60 days of receiving parental consent for the evaluation (or pursuant to any applicable State law). 20 U.S.C. 1414(a)(1)(C)(i)(I).

This timeframe does not apply if:
i. A child enrolls in the LEA after an evaluation has been initiated but not completed in another school district;

ii. The receiving school district is making “sufficient progress to ensure a prompt completion of the evaluation; and

iii. The parent and the receiving school district agree to a specific time when the evaluation will be completed. The timeframe also does not apply if the parent of the child repeatedly fails or refuses to produce the child for the evaluation. 20 U.S.C. 1414(a)(1)(C)(ii).


i. Parental consent for initial evaluation must not be construed as consent for initial provision of special education and related services.

ii. The public agency must make reasonable efforts to obtain the informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability.

iii. If the parent of a child enrolled in public school or seeking to be enrolled in public school does not provide consent for initial evaluation under paragraph (a)(1) of this section, or the parent fails to respond to a request to provide consent, the public agency may, but is not required to, pursue the initial evaluation of the child by utilizing the procedural safeguards in subpart E of this part (including the mediation procedures….or the due process hearing procedures…), if appropriate, except to the extent inconsistent with State law relating to such parental consent.

iv. The public agency does not violate its obligation under § 300.111 and §§ 300.301 through 300.311 if it declines to pursue the evaluation.

v. If a parent of a child who is home schooled or placed in a private school by the parents at their own expense does not provide consent for the initial evaluation or the reevaluation, or the parents fails to respond to a request to provide consent, the public agency may not use the consent override procedures…; and the public
agency is not required to consider the child as eligible for services…. 34 C.F.R. § 300.300.

vi. If the parent refuses to provide consent, or fails to respond to a request for consent, the LEA may pursue due process procedures (including mediation), except to the extent inconsistent with State law. 20 U.S.C. 1414(a)(1)(D)(i)(I).

vii. Consent for Wards of the State – If a child is a ward of the State and is not residing with the child’s parent, the school district shall make “reasonable efforts” to obtain the informed consent from the parent of the child for an initial evaluation. 20 U.S.C. 1414(a)(1)(D)(iii). However, the school district is not required to obtain consent from the parent if: (1) despite reasonable efforts to do so, the district cannot discover the whereabouts of the parent of the child; (2) the rights of the parents of the child have been terminated; or (3) the parental right to make educational decisions has been subrogated by a judge and given to an individual appointed by the judge to represent the child. 20 U.S.C. 1414(a)(1)(D)(iii)(II).

viii. Consent for Services – A school district shall “seek to obtain” informed parental consent before providing special education and related services to a child. 20 U.S.C. 1414(a)(1)(D)(i)(II).

ix. Refusal to Consent for Services – If the parent of a child with disabilities refuses to consent to the initial provision of special education and related services, the school district “shall not provide special education and related services to the child…. 20 U.S.C. 1414(a)(1)(D)(ii)(II); 34 C.F.R. § 300.300.(b)(1).

x. Effect of Refusal to Consent for Services - If the parent refuses to consent for services, or fails to respond to a request for consent for services, the school district “shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide such child with the special education and related services for which the [school district] requests such consent. 20 U.S.C. 1414(a)(1)(D)(ii)(III)(aa). In addition, the school district “shall not be required to convene an IEP meeting or develop an IEP….for the child…. 20 U.S.C. 1414(a)(1)(D)(ii)(II)(bb).
xi. **Parent’s Refusal to Consent to One Service.** A public agency may not use a parent’s refusal to consent to one service or activity to deny the parent or child any other service, benefit, or activity. 34 C.F.R. § 300.300(d)(1).

xii. **Screening** – The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services. 20 U.S.C. 1414(a)(1)(E).

2006 IDEA Regs: The regulations clarify that “parental consent is not required before (1) reviewing existing data as part of an evaluation or a reevaluation, or (2) administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children.” 300.300.(d(2)).

D. **Summary of Performance** – For a child whose eligibility terminates for either of the reasons listed in (i) above, the school district must provide the child with **a summary of the child’s academic achievement and functional performance, including recommendations on how to assist the child in meeting the child’s postsecondary goals.** 20 U.S.C. 1414(c)(5)(B)(ii).
XV. SPECIAL RULE FOR ELIGIBILITY DETERMINATION

A. A child shall not be determined to be a child with a disability if the determinant factor is:

   i. Lack of appropriate instruction in reading, including in the essential components of reading instruction (as defined in 1208(3) of the Elementary and Secondary Education Act of 1965);

   [Note: This refers to the definition of “Essential Components of Reading Instruction” in NCLB, which states:

   “The term ‘essential components of reading instruction’ means explicit and systematic instruction in –

   1. phonemic awareness
   2. phonics;
   3. vocabulary development
   4. reading fluency, including oral reading skills; and
   5. reading comprehension.

   ii. Lack of instruction in math; or

   iii. Limited English proficiency. 20 U.S.C. 1414(a)(5).]
B. **2006 IDEA Regs:**

A child must not be determined to be a child with a disability under this part if the determinant factor for that determination is –

i. Lack of appropriate instruction in reading, including the essential components of reading instruction [as defined in ESEA];

ii. Lack of appropriate instruction in math; or

iii. Limited English proficiency; and

iv. If the child does not otherwise meet the eligibility criteria in the IDEA. 34 C.F.R. § 300.306(b)(Emphasis added).

XVI. **SPECIFIC LEARNING DISABILITIES**

A. **Eligibility Criteria**

**General.** A State must adopt, consistent with § 300.309, criteria for determining whether a child has a specific learning disability as defined in § 300.8(c)(10). In addition, the criteria adopted by the State –

i. Must not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disability, as defined in § 300.8(c)(10).

ii. Must permit the use of a process based on the child’s response to scientific, research-based intervention; and

iii. May permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability, as defined in § 300.8(c)(10).

**Consistency with State criteria.** A public agency must use the State criteria adopted pursuant to paragraph (a) of this section in determining whether a child has a specific learning disability. 34 C.F.R. § 300.307.
Question: What is “scientific, research-based intervention?”

Answer: The definition is found in the No Child Left Behind Act, and is as follows:

“The term “scientifically based research” means “research that involves the application of rigorous, systematic, and objective procedures to obtain reliable and valid knowledge relevant to education activities and programs, and includes research that:

1. Employs systematic, empirical methods that draw on observation or experiment,
2. Involves rigorous data analyses that are adequate to test the stated hypotheses and justify the general conclusions drawn,
3. Relies on measurements or observational methods that provide reliable and valid data across evaluators and observers, across multiple measurements and observations, and across studies by the same or different investigators,
4. Is evaluated using experimental or quasi-experimental designs,
5. Ensures that experimental studies are presented in sufficient detail and clarity to allow for replication, and
6. Has been accepted by a peer-reviewed journal or approved by a panel of independent experts through a comparably rigorous, objective, and scientific review.”

NCLB, 20 USC 7707(b)(37).

B. RESPONSE TO INTERVENTION

IDEA 2004: In determining whether a child has a specific learning disability, a school district may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedures. 20 U.S.C. 1414(b)(6)(B).
C. DETERMINATION OF ELIGIBILITY FOR SLD

i. General. Upon completion of the administration of assessments and other evaluation measures –

1. A group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in § 300.8, in accordance with paragraph (b) of this section and the educational needs of the child; and

2. The public agency provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent.

34 C.F.R. § 300.306.

ii. Additional group members. The determination of whether a child suspected of having a specific learning disability is a child with a disability as defined in § 300.8, must be made by the child’s parents and a team of qualified professionals, which must include –

1. The child’s regular teacher; or

2. If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or

3. For a child of less than school age, an individual qualified by the SEA to teach a child of his or her age; and

4. At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher. 34 C.F.R. § 300.308.
iii. Determining the existence of a specific learning disability.

1. The group described in § 300.306 may determine that a child has a specific learning disability, as defined in § 300.8(c)(10), if –

   a. The child does not achieve adequately for the child’s age or to meet State-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child’s age or State-approved grade-level standards: oral expression; listening comprehension; written expression; basic reading skills; reading fluency skills; reading comprehension; mathematics calculation; mathematics problem solving;

   b. The child does not make sufficient progress to meet age or State-approved grade-level standards in one or more of the area identified in paragraph (a)(1) of this section when using a process based on the child’s response to scientific, research-based intervention; or the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, of intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with §§ 300.304 and 300.305; and

   c. The group determines that its findings under paragraphs (i) and (ii) of this section are not primarily the result of –

      i. A visual, hearing, or motor disability;
      ii. Mental retardation;
      iii. Emotional disturbance;
      iv. Cultural factors; Environmental or economic disadvantage; or
      v. Limited English proficiency.
2. To ensure that underachievement in a child suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, the group must consider, as part of the evaluation described in §§ 300.304 through 300.306 –

   a. Data that demonstrate that prior to, or as a part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel; and

   b. Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child’s parents.

3. The public agency must promptly request parental consent to evaluate the child to determine if the child needs special education and related services, and must adhere to the timeframes described in §§ 300.301 and 300.303, unless extended by mutual written agreement of the child’s parents and a group of qualified professionals, as described in § 300.306(a)(1) –

   a. If, prior to a referral, a child has not made adequate progress after an appropriate period of time when provided instruction, as described in paragraphs (b)(1) and (b)(2) of this section; and

   b. Whenever a child is referred for an evaluation.

34 C.F.R. § 300.309 (Emphasis added).

4. Observation.

   a. The public agency must ensure that the child is observed in the child’s learning environment (including the regular classroom setting) to document the child’s academic performance and behavior in the areas of difficulty.
b. The group described in § 300.306(a)(1), in determining whether a child has a specific learning disability must decide to –

1. Use information from an observation in routine classroom instruction and monitoring of the child’s performance that was done before the child was referred for an evaluation; or

2. Have at least one member of the group described in § 300.306(a)(1) conduct an observation of the child’s academic performance in the regular classroom after the child has been referred for an evaluation and parental consent, consistent with § 300.300(a), is obtained.

3. In the case of a child of less than school age or out of school, a group member must observe the child in an environment appropriate for a child of that age. 34 C.F.R. § 300.310.

XVII. INDIVIDUALIZED EDUCATION PLANS (IEPS)

The IDEA 2004 revolutionizes the process of IEP development, and provides opportunities to streamline the administrative and paperwork burdens inherent in previous versions of the law. The following enumerates the changes contained in the new law:

A. IEP CONTENT AND DEVELOPMENT:

i. A statement of the child’s present levels of academic achievement and functional performance, including how the child’s disability affects the child’s involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) 34 C.F.R. § 300.320(a)(1)(i); or; For preschool children, as appropriate, how the disability affects the child’s participation in appropriate activities;

ii. For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of
benchmarks or short-term objectives; 34 C.F.R. § 300.320(a)(2)(ii).

iii. A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child –

1. to advance appropriately toward attaining the annual goals;

2. to be involved in and make progress in the general education curriculum and to participate in extracurricular and other non-extracurricular activities; and

3. to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph.

iv. An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in other activities.

v. Beginning not later than the first IEP to be in effect when the child is 16, or younger if determined appropriate by the IEP Team, and updated annually thereafter, the IEP must include –

1. Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;

2. The transition services (including courses of study) needed to assist the child in reaching those goals; and

3. Beginning not later than 1 year before the child reaches the age of majority under State law, a statement that the child has been informed of the child’s rights under the IDEA, if any, that will transfer to the child on reaching the age of majority.
vi. **Rule of Construction** – “Nothing in [the IEP section] shall be construed to require (1) that additional information be included in a child’s IEP beyond what is explicitly required in this section; and (2) the IEP Team to include information under 1 component of a child’s IEP that is already contained in another component of such IEP.” 20 U.S.C. 1414(d)(1)(A)(ii).

vii. **IEP Amendments** – “Changes to the IEP may be made either by the entire IEP Team or … by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent shall be provided with a revised copy of the IEP with the amendments incorporated.” 20 U.S.C. 1414(d)(3)(F).

viii. **Consideration of special factors.** In conducting a review of the child’s IEP, the IEP Team must consider special factors (behavior that impedes the child’s learning or that of others; limited English proficiency; blindness or visual impairment; communication needs of child who is deaf or hard of hearing; need for assistive technology devices and services). 34 C.F.R. § 300.324(b)(2).

B. **CONDUCT OF THE IEP TEAM**

i. **IEP Attendance** – “A member of the IEP Team shall not be required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the local educational agency agree that the attendance of such member is not necessary because the member’s area of the curriculum or related services is not being modified or discussed in the meeting.” The parent’s agreement must be in writing. 20 U.S.C. 1414(d)(1)(C)(i) and (iii).

ii. **IEP Excusal** – A member of the IEP Team may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to or discussion of the member’s area of the curriculum or related services, if:
1. the parent and the local educational agency consent to the excusal. (The parent’s consent must be in writing), and;

2. the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting. 20 U.S.C. 1414(d)(1)(C)(ii) and (iii).

iii. Conducting an IEP Team meeting without a parent in attendance. A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as –

1. Detailed records of telephone calls made or attempted and the results of those calls;

2. Copies of correspondence sent to the parents and any responses received; and

3. Detailed records of visits made to the parent’s home or place of employment and the results of those visits.

34 C.F.R. § 300.322(d).

iv. Use of interpreters or other action, as appropriate. The public agency must take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting, including arranging for an interpret for parents with deafness or whose native language is other than English. 34 C.F.R. § 300.322(e).

v. IEP Team Transition – For an IEP meeting for a child transitioning from Part C to Part B, an invitation to the IEP meeting must, at the parents’ request, be sent to the Part C service coordinator or other representatives of the Part C system. 20 U.S.C. 1414(d)(1)(D).

vi. Consolidation of IEP Team Meetings – “To the extent possible, the local educational agency shall encourage the consolidation of

vii. **Agreement Not to Convene IEP Team:** In making changes to a child’s IEP after the annual IEP meeting for a school year, the parent of a child with a disability and the local educational agency may agree not to convene an IEP meeting for the purposes of making such changes, and instead may develop a written document to amend or modify the child’s current IEP. 20 U.S.C. 1414(d)(3)(D).

If changes are made to the child’s IEP in accordance with the above, the public agency must ensure that the child’s IEP Team is informed of those changes. 34 C.F.R. § 300.324(a)(4).

viii. **Informal Meetings by School Personnel:** The proposed regulations clarify that “a meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision if those issues are not addressed in the child’s IEP. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.” C.F.R. § 300.501.

ix. **Accessibility of child’s IEP to teachers and others.** Each public agency must ensure that –

1. The child’s IEP is accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation; and

2. Each teacher and provider described above is informed of –

   a. His or her specific responsibilities related to implementing the child’s IEP; and

   b. The specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP. 34 C.F.R.§ 300.323(d).
x. Transition services participants. To the extent appropriate, with the consent of the parents or a child who has reached the age of majority, ...the public agency must invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services. 34 C.F.R. § 300.321(b)(3).

XVIII. PROCEDURAL SAFEGUARDS

A. Procedures to Protect Homeless and Wards of the State – States must ensure that procedures are in place that will protect the rights of unaccompanied homeless children with disabilities and children with disabilities who are wards of the State. 20 U.S.C. 1415(b)(2)(i) and (ii), (B).

B. Transfer of Parental Rights at Age of Majority – Special Rule. A State must establish procedures for appointing the parent of a child with a disability, or, if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of the child’s eligibility under Part B of the Act if, under State law, a child who has reached the age of majority, but has not been determined to be incompetent, can be determined not to have the ability to provide informed consent with respect to the child’s educational program. 34 C.F.R. § 300.520(b).

C. Procedural Safeguards Notice: A copy of the procedural safeguards must be given to parents:

i. Upon receipt of the first State complaint and upon receipt of the first due process complaint in a school year; and

ii. In accordance with the discipline procedures (on the day of a determination to remove a child from his or her current placement for disciplinary reasons). 34 C.F.R. § 300.504(a)(2) and (a)(3).
D  **Independent Educational Evaluation:**

i. A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.

ii. If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation—

1. Must be considered by the public agency, if it meets agency criteria. In any decision made with respect to the provision of FAPE to the child; and

2. May be presented by any party as evidence at a hearing on a due process complaint...regarding that child. 34 C.F.R. § 300.502(c).

E.  **Consent for release of educational records.**

i. Parental consent, or the consent of an eligible child who has reached the age of majority under State law, must be obtained before personally identifiable information is released to officials of participating agencies providing or paying for transition services.

ii. 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 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.

iii. Except for the above, parental consent is not required before personally identifiable information is released to officials or participating agencies for purposes of meeting a requirement of Part B. 34 C.F.R. § 300.622(b)
F. **Mediation:**

If a resolution is reached in mediation, the parties shall execute a “**legally binding agreement**” listing the terms of the agreement. This written agreement must:

i. State that all discussions during mediation are confidential and may not be used as evidence in any subsequent legal proceeding;

ii. Be signed by both the parent and a representative of the school district with authority to bind the district, and


**2006 IDEA Regs** – Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any Federal court or State court of a State receiving assistance under this part. 34 C.F.R. § 300.506(b)(7).

G. **Statute of Limitations** – Parents and school districts may initiate a request for due process hearing based on alleged violations that occurred **not more than 2 years before the date the parent or public agency “knew or should have known”** about the alleged violation (or according to any applicable State law setting an explicit time limitation). 20 U.S.C. 1415(b)(6)(B); (f)(3)(C).

**Exceptions:** The statute of limitations does not apply to a parent if the parent was prevented from requesting a due process hearing due to: (1) specific misrepresentations by the school district that it had resolved the problem(s) raised in the complaint, or (2) the school district’s withholding of information from the parent that was required to be provided to the parent. 20 U.S.C. 1415(f)(3)(D).
XIX. DUE PROCESS HEARINGS

A. School Districts’ Right to Request Due Process Hearing – The new law clarifies that both parents and school districts have the right to initiate due process proceedings. 20 U.S.C. 1415(b)(7).

B. Non-attorney Representation in Due Process Hearings. The USDOE will publish a NPRM soon on the issue of whether a non-attorney advocate can represent parents in a due process hearing, in light of State laws prohibiting the unauthorized practice of law. 71 F.R. 46699.

C. Due Process Complaint Notice. The party initiating a due process hearing must provide the other party with a written notice including the name of the child, address of the child, and name of the school the child is attending; available contact information for homeless children; a description of the nature of the problem; a proposed resolution of the problem; and “a requirement that a party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the requirements [for the written notice].” 20 U.S.C. 1415(b)(7).

D. Sufficiency of the Complaint. The due process complaint notice shall be deemed to be sufficient unless, within 15 days of receiving the complaint, the party receiving the notice notifies the hearing officer and the other party in writing that the receiving party believes the notice has not met the requirements [for a due process complaint notice]. 20 U.S.C. 1415(b)(8); (c)(2)(C). The hearing officer shall make a determination on the face of the notice of whether the notification meets the requirements of this section, and shall immediately notify the parties in writing of such determination. 20 U.S.C. 1415(c)(2)(D).

E. Issues Not Raised in the Complaint. The party requesting a hearing shall not be allowed to raise issues at the hearing that were not raised in the due process complaint notice, unless the other party agrees. 20 U.S.C. 1415(f)(3)(B).

F. Amended Complaint Notice- A party may amend its due process complaint notice only if: (1) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a “resolution session” or (2) the hearing officer grants permission at least 5 days before a due process hearing occurs. 20 U.S.C. 1415(c)(2)(E)(i). The 45 day timeline for a resolution meeting and the due process hearing

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recommences at the time the party files an amended notice. 20 U.S.C. (c)(2)(E)(ii).

G. **Separate Complaint** – Nothing precludes a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed. 20 U.S.C. 1415(o).

H. **Response to Due Process Complaint** – If the school district has not sent a prior written notice to the parent regarding the subject matter contained in the parent’s due process complaint notice, the district must send such notice to the parent within 10 days of receiving the complaint. 20 U.S.C. 1415(c)(2)(B)(i)(I).

I. **Sufficiency** – A response filed by a school district (above) shall not prevent the school district from asserting that the parent’s due process complaint notice was insufficient. 20 U.S.C. 1415(c)(2)(B)(i)(II).

J. **Other Party Response** – The recipient of a request for due process hearing shall, within 10 days of receiving the complaint, send to the complainant a response that specifically addresses the issues raised in the complaint. 20 U.S.C. 1415(c)(2)(B)(ii).

K. **Resolution Session**

A school district must convene an IEP meeting within 15 days after receiving a due process complaint notice, unless the parents and the school district agree in writing to waive such meeting, or agree to use the mediation process. 20 U.S.C. 1415(f)(1)(B). This IEP meeting must include “a representative of the agency who has decision-making authority on behalf of such agency,” and may not include the school district’s attorney unless the parent brings an attorney. 20 U.S.C. 1415(f)(1)(B)(i). If a resolution is reached, the parties shall execute a legally binding agreement that is signed by both parties and enforceable in a State or federal court. 20 U.S.C. 1415(f)(1). The written agreement may be voided by either party within 3 business days of execution. 20 U.S.C. 1415(f)(1)(B)(iv). If the school district has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the due process hearing notice, the hearing timelines commence and the hearing may occur. 20 U.S.C. 1415(f)(1)(B)(ii).
2006 IDEA Regs add the following:

A. **Purpose of the Resolution Session** – The purpose of the meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the LEA has the opportunity to resolve the dispute that is the basis for the due process complaint.

B. **When Resolution Session is not necessary** – The meeting need not be held if the parent and the LEA agree in writing to waive the meeting, or the parent and the LEA agree to use the mediation process.

C. **Members of the Team** – The parents and the LEA determine the relevant members of the IEP Team to attend the meeting.

D. **Resolution Period** –

i. If the LEA has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur.

ii. Except as provided below, the timeline for issuing a final decision begins at the expiration of this 30-day period.

iii. Except where the parties have jointly agreed to waive the resolution process or to use mediation, the failure of the parent filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.

iv. If the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented), the LEA may, at the conclusion of the 30-day period, request that a hearing officer dismiss the parent’s due process complaint.

v. If the LEA fails to hold the resolution meeting within 15 days of receiving notice of a parent’s due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of a hearing officer to begin the due process hearing timeline.
E. Adjustments to 30-day resolution period –

i. The 45-day timeline for the due process hearing starts the day after one of the following events:

1. Both parties agree in writing to waive the resolution meeting;
2. After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible.

ii. If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process.

iii. Written settlement agreement – If a resolution to the dispute is reached at the resolution meeting, the parties must execute a legally binding agreement that is –

1. Signed by both the parent and a representative of the agency who has the authority to bind the agency; and
2. Enforceable in any State court of competent jurisdiction or in a district court of the United States, or, by the SEA, if the State has other mechanisms or procedures that permit parties to seek enforcement of resolution agreements.

iv. Agreement review period – If the parties execute an agreement as a result of a resolution meeting, a party may void the agreement within 3 business days of the agreement’s execution. 34 C.F.R. § 300.510.

v. Timelines and convenience of hearings and reviews. The public agency must ensure that not later than 45 days after the expiration of the 30 day period under § 300.510(b), or the adjusted time periods described in § 300.5109c), a final
decision is reached in the hearing and a copy is mailed to
each of the parties. 34 C.F.R. § 300.515(a).

F. Decision of the Hearing Officer – A decision made by a hearing
officer shall be made on substantive grounds based on a determination of
whether the child received a free appropriate public education. 20 U.S.C.

i. Decision of hearing officer on the provision of FAPE.

ii. Subject to paragraph (2) of this section, a hearing officer’s
determination of whether a child received FAPE must be
based on substantive grounds.

iii. In matters alleging a procedural violation, a hearing officer
may find that a child did not receive a FAPE only if the
procedural inadequacies –

1. Impeded the child’s right to a FAPE;

2. Significantly impeded the parent’s opportunity to
participate in the decision-making process regarding
the provision of FAPE to the parent’s child; or

3. Caused a deprivation of educational benefit.

iv. Nothing in paragraph (a) of this section shall be construed
to preclude a hearing officer from ordering an LEA to
comply with procedural requirements under §§ 300.500
through 300.536.

G. Construction clause. Nothing in [the due process regulations] shall
be construed to affect the right of a parent to file an appeal of the
due process hearing decision with the SEA …if a State level
appeal is available.

H. Separate request for a due process hearing. Nothing in [the due
process regulations] shall be construed to preclude a parent from
filing a separate due process complaint on an issue separate from a
due process complaint already filed.

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I. Findings and decision to advisory panel and general public. The public agency, after deleting any personally identifiable information, must –

i. Transmit the findings and decisions…to the State advisory panel….and

ii. Make those findings and decisions available to the public.
34 C.F.R. § 300.513.

J. Exception – A hearing may find a denial of FAPE based on a procedural violation if the procedural violation: (1) impeded the child’s right to FAPE, (2) significantly impeded the parents’ opportunity to participate in the decision-making process regarding FAPE, or (3) caused a deprivation of educational benefits. 20 U.S.C. 1415(f)(3)(E)(ii).

K. Timelines and convenience of hearings and reviews.

i. The public agency must ensure that not later than 45 days after the expiration of the 30 day period under § 300.510(b), or the adjusted time periods described in § 300.510(c) –

1. A final decision is reached in the hearing; and
2. A copy of the decision is mailed to each of the parties.

ii. The SEA must ensure that not later than 30 days after the receipt of a request for a review –

1. A final decision is reached in the review; and
2. A copy of mailed to each of the parties.
3. A hearing or reviewing officer may grant specific extensions of time beyond the periods set out …at the request of either party.

4. Each hearing and each review involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents and child involved.

L. Rule of Construction – Nothing in this section shall be construed to: (1) preclude a hearing officer from ordering a school district to comply with procedural requirements under the IDEA, or (2) affect the right of a parent to file a complaint with the State educational agency. 20 U.S.C. 1415(f)(3)(E)(iii) and (F).

M. Appeal from Adverse Due Process Hearing Decision – An aggrieved party shall have 90 days from the date of the decision of the hearing officer to file an appeal (or, as according to State law if the State has an explicit timeline for appeal). 20 U.S.C. 1415(i)(2)(B).

2006 IDEA Regs: Clarify that “if the State has an explicit time limitation for bringing civil actions under Part B of the Act, in the time allowed by that State law.” 34 C.F.R. § 300.516(b).

N. Child’s Status during proceedings.

i. Transitioning Pre-school Child. If the complaint involves an application for initial services under this part from a child who is transitioning from Part C of the Act to Part B and is no longer eligible for Part C services because the child has turned three, the public agency is not required to provide the Part C services that the child had been receiving. If the child is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services under § 300.300(b), then the public agency must provide those special education and related services that are not in dispute between the parent and the public agency. 34 C.F.R. § 300.518(c).
Stay-put during Appeal or State review. If the hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child’s parents that a change of placement in appropriate, that placement must be treated as an agreement between the State and the parents for purposes of [stay put]. 34 C.F.R. § 300.518(d).

O. Attorney’s Fees –

i. A court may award attorney’s fees to a school district “against the attorney of a parent” who: (1) files a complaint or appeal that is frivolous, unreasonable, or without foundation, (2) who continues to litigate after the litigation clearly became frivolous, unreasonable, or without foundation. A Court may also award attorney’s fees to a school district against the attorney of a parent, or a parent, if the due process complaint was brought for “any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation. 20 U.S.C. 1415(i)(3)(B). At the discretion of the State, attorney’s fees may be awarded for mediation. 20 U.S.C. 1415(i)(3)(D)(ii). Attorney’s fees are not available for an attorney’s attendance at a Resolution Session. 20 U.S.C. 1415(i)(3)(D)(iii).

ii. Reduction in Amount of Attorney’s Fees – A fee award may be reduced or denied if the court finds that either a parent, or the parent’s attorney, unreasonably protracted the final resolution of the controversy. 20 U.S.C. 1415(i)(3)(F).

P. Surrogate Parents

i. Unaccompanied homeless youth , 34 C.F.R. § 300.519(f). In the case of a child who is an unaccompanied homeless youth, appropriate staff of emergency shelters, transitional shelters, independent living programs, and street outreach programs may be appointed as temporary surrogate parents without regard to [the normal requirements], until a surrogate parent can be appointed that meet all of the requirements of [the Act].

ii. Special Rule. 34 C.F.R. § 300.520(b) A State must establish procedures for appointing the parent of a child with a disability, or, if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the
period of the child’s eligibility under Part B of the Act if, under State law, a child who has reached the age of majority, but has not been determined to be incompetent, can be determined not to have the ability to provide informed consent with respect to the child’s educational program.

XX. DISCIPLINE

A. Authority of School Personnel –

School personnel under this section may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement….).

34 C.F.R. § 300.530(b).

B. Case-by Case Determination

School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct. 34 C.F.R. § 300.530(a)(Emphasis added).

C. Change of placement because of disciplinary removals. For purposes of removals of a child with a disability from the child’s current educational placement, a change of placement occurs if –

i. The removal is for more than 10 consecutive school days; or

ii. The child has been subjected to a series of removals that constitute a pattern –

1. Because the series of removals total more than 10 school days in a school year;
2. Because the child’s behavior is substantially similar to the child’s behavior in previous incidents that resulted in the series of removals; and

3. Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

34 C.F.R. § 300.536(a).

D. The public agency determines on a case-by-case basis whether a pattern of removals constitutes a change of placement. This determination is subject to review through due process and judicial proceedings. 34 C.F.R. § 300.536(b).

E. Additional Authority

2006 IDEA Regs:

For disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child’s disability…school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except that a child with a disability who is removed from the child’s current placement for more than 10 consecutive days (or for 45 school days for weapons, drugs, or the infliction of serious bodily injury).

34 C.F.R. § 300.530(c).

F. Continuation of FAPE

2006 IDEA Regs:

A child with a disability who is removed from the child’s current placement for disciplinary reasons must “continue to receive [a free appropriate public education], so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child’s IEP; and receive, as appropriate, a functional behavioral assessment, and
behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

The interim educational services may be provided in an interim alternative educational setting.

A public agency is only required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if it provides services to a child without disabilities who is similarly situated.

After a child with disabilities has been removed from his or her current placement for 10 school days in the same school year, if the current removal is for not more than 10 consecutive school days and is not a change in placement, school personnel, in consultation with at least one of the child’s teachers, determine the extent to which services are needed, so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child’s IEP.

If the removal is a change of placement, the child’s IEP Team determines appropriate services…. 34 C.F.R. § 300.530(d)(Emphasis added).

G. Manifestation Determination

i. The Manifestation Analysis

Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child’s IEP Team (as determined by the LEA and the parent) must review all relevant information in the student’s file, including the child’s IEP, any 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.
The conduct must be determined to be a manifestation of the child’s disability if the LEA, the parent, and relevant members of the child’s IEP Team determine that [either of the above conditions are met].

If the LEA, the parent, and relevant members of the child’s IEP Team determine the child’s conduct was the direct result of the LEA’s failure to implement the IEP, the LEA must take immediate steps to remedy those deficiencies. 34 C.F.R. § 300.530(e)(3)(Emphasis added).

ii. Determination that Behavior Was a Manifestation

If the LEA, the parent, and relevant members of the child’s IEP Team make the determination that the conduct was a manifestation of the child’s disability, the IEP must either:

1. Conduct a functional behavioral assessment (FBA), unless the LEA had conducted an FBA before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan (BIP) for the child, or

2. If a BIP already has been developed, review the BIP and modify it, as necessary, to address the behavior, and return the child to the placement from which the child was removed (except in case of drugs, weapons, or serious bodily injury), unless the parent and the LEA agree to a change of placement as part of the modification of the BIP. 34 C.F.R. § 300.530(f).

iii. 45-day Removal – School personnel may remove a child with a disability to an interim alternative educational setting (determined by the IEP Team) 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:

1. Carries or possess a weapon at school (the 2006 IDEA Regs say “carries a weapon to, or possesses a weapon at school), on school premises, or to or at a school function under the jurisdiction of the school district;

2. Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance while at school, on school
premises, or at a school function under the jurisdiction of the school district; or

3. Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of the school district.

20 U.S.C. 1415(k)(1)(G); (k)(1)(H)(2); 34 C.F.R. § 300.530(g).

Definitions:

“Controlled substance” means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. § 12(c). 34 C.F.R. § 300.530(i(1)).

“Illegal drug” means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law. 34 C.F.R. § 300.530(i)(2).

A “serious bodily injury” means “a serious risk of death; protracted loss or enjoyment of a bodily organ, member, or mental faculty; extreme physical pain.” (Paragraph (3) or subsection (h) of section 1365 of title 18, U.S.C.) 34 C.F.R. § 300.530(i)(3).

“Weapon” means “an instrument, material, substance, or device, animate or inanimate, that is used for, or readily capable of, causing death or serious bodily injury, except this does not include a pocket knife with a blade of less than 2 ½ inches. Paragraph (2) of the first subsection (g) of section 930 of title 18, United State Code.

H. Notification of Rights

2006 IDEA Regs:

On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and provide the parents a procedural safeguards notice. 34 C.F.R. § 300.530(h).
I. Appeal – The parent of a child with a disability who disagrees with any decision regarding placement or manifestation, or a school district that believes that maintaining the current placement of a child is substantially likely to result in injury to the child or to others, may request a hearing. 20 U.S.C. (k)(3)(A). The hearing officer may return the child to his/her previous placement, or order that the child be placed in an interim alternative educational setting for not more than 45 school days (if the hearing officer determines that maintaining the current placement is substantially likely to result in injury to the child or others). 20 U.S.C. 1415(k)(3)(B)(ii).

J. Expedited due process hearing.

i. Whenever a hearing is requested [to challenge a disciplinary decision or manifestation determination], the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing….

ii. The SEA or LEA is responsible for arranging the expedited due process hearing, which must occur within 20 school days of the date the complaint requesting the hearing is filed. The hearing officer must make a determination within 10 school days after the hearing.

iii. Unless the parents and LEA agree in writing to waive the resolution meeting…., or agree to use the mediation process…

iv. A resolution meeting must occur within seven (7) days of receiving notice of the due process complaint; and

v. The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties with 15 days of the receipt of the due process complaint.

vi. A State may establish different State-imposed procedural rules for expedited due process hearings conducted under this section than it has established for other due process hearings…..

vii. The decisions on expedited due process hearings are appealable….

34 C.F.R. § 300.532(c).
K. **Placement During Appeals** – When an appeal is requested (above), the child shall remain in the interim alternative educational setting pending a final decision, or until the expiration of the time period for removal as ordered by school personnel, whichever occurs first, unless the school district and the parents agree otherwise. The State shall arrange for an expedited hearing to occur within 20 school days of being requested, and shall result in a determination within 10 school days after the hearing. 20 U.S.C. 1415(k)(4)

L. **Protections for Children Not Yet Eligible for Services** – *Removes* “behavior or performance demonstrates a need for services.” *Adds* “A local educational agency shall not be deemed to have knowledge that the child is a child with a disability if the parent of the child has not allowed an evaluation of the child …or has refused services …or the child has been evaluated and it was determined that the child was not a child with a disability…” 20 U.S.C. 1415(k)(5)(C).

M. **Referral to and action by law enforcement and judicial authorities.** Nothing in this part prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities, or prevents State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability. 34 C.F.R. § 300.535(a).

N. **Transmittal of records.** An agency reporting a crime committed by a child with a disability must ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime. An agency reporting a crime under this section may transmit copies of the child’s special education and disciplinary records only to the extent that the transmission is permitted by FERPA. 34 C.F.R. § 300.535(b).