

# Examining the 2004 Amendments to the Individuals with Disabilities Education Act: What Advocates for Students and Parents Need To Know

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**S**igned by Pres. George W. Bush in December 2004, the Individuals with Disabilities Education Improvement Act amended the permanently authorized Part B of the Individuals with Disabilities Education Act (IDEA).<sup>1</sup> The Individuals with Disabilities Education Improvement Act reauthorized the remaining Parts A, C, and D of the IDEA.<sup>2</sup> Many changes reflect the intent of the Bush administration and Congress to align the IDEA with the No Child Left Behind Act of 2001.<sup>3</sup> These changes are expected to help children achieve higher levels of learning by promoting accountability for results, by requiring use of proven practices and instructional materials, and by giving greater flexibility to states and school districts in exchange for more accountability. Other changes were intended to reduce a yet to be defined “paperwork burden” on educators and to lessen conflict between parents and school personnel.<sup>4</sup> In this article I target the statutory changes and proposed regulations that, if implemented, represent opportunities for improving educational achievement and outcomes for students with disabilities. Also flagged are the provisions that eliminate, alter, or otherwise compromise the rights of students with disabilities to receive a full, free appropriate public education and that present special challenges for parents and advocates. Due to space constraints, I focus only on those changes likely to affect the opportunities of students with disabilities from low-income families to attain a high-quality public education.<sup>5</sup> Most of the 2004 amendments became effective on July 1, 2005.<sup>6</sup>

<sup>1</sup>Individuals with Disabilities Education Improvement Act, Pub. L. No. 108-448, 118 Stat. 2647 (2004) (codified at 20 U.S.C. §§ 1400 *et seq.*).

<sup>2</sup>In addition to Part B (state grants for children 3 to 21 with disabilities), Title I of the Individuals with Disabilities Education Improvement Act amends Part A (general provisions), Part C (state grants for eligible infants and toddlers), Part D (national grants and programs).

<sup>3</sup>No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified at 20 U.S.C. §§ 6301 *et seq.* (2004).

<sup>4</sup>20 U.S.C. § 1400 (c)(9)(2004).

<sup>5</sup>See generally CONGRESSIONAL RESEARCH SERVICES REPORT RL 32716, INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): ANALYSIS OF CHANGES MADE BY P.L. 108-446 (2005).

<sup>6</sup>The “highly qualified teacher” provisions, discussed in Part I.E, became effective upon enactment of the bill on December 3, 2004. See 20 U.S.C. §§ 1400 *et seq.* (2004), § 1412(a)(14)(C) (requiring special education teachers to become highly qualified by the 2005–2006 based on 20 U.S.C. § 6319(a)(2) (2002)).

## I. Substantive Changes

The Individuals with Disabilities Education Improvement Act reflects the recommendations of the President's Commission on Excellence in Special Education that was created to recommend policies for improving educational performance of students with disabilities and to inform the reauthorization of the Act. The Commission's primary recommendation was that the "IDEA ... be fundamentally shifted to focus on results"—to change from a culture of compliance and process to a culture of outcomes.<sup>7</sup> Summary findings discounted the accountability provisions of the IDEA, characterized students' individualized education programs (IEPs) as tools of litigation, and generally identified procedural requirements as sources of excessive paperwork impeding the ability of teachers to improve student outcomes or contributing to adversarial relationships between parents and school personnel.<sup>8</sup> This same tension resonates through the Act, which, while aligning more closely with the No Child Left Behind Act's provisions raising expectations for learning and achievement, lessens many of the rights and protections historically belonging to students with disabilities and their parents.

Congress added a new purpose and findings that implicitly and expressly connect the IDEA with the No Child Left Behind Act (Title I of the Elementary and Secondary Education Act of 1965).<sup>9</sup> To prepare students with disabilities for "further education"—in addition to "employment, and independent living"—is mostly noteworthy by its prior absence.<sup>10</sup> New findings in the Individuals with Disabilities Education Improvement Act recognize that students with disabilities

are more effectively educated when held to "high expectations," provided "access to the 'general education curriculum' in the regular classroom," so they might "meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children..." and when the IDEA is coordinated "with other local, educational service agency, State and Federal school improvement efforts, including improvement efforts under the Elementary and Secondary Education Act of 1965..."<sup>11</sup> The new findings acknowledge the importance of "intensive preservice preparation" and professional development to ensure that all personnel have the skills and knowledge necessary "to improve the academic achievement and functional performance of children with disabilities, including the use of scientifically-based instructional practices, to the maximum extent possible..."<sup>12</sup> Furthermore, "scientifically based early reading programs, positive behavioral interventions and supports, and early intervening services" are identified as strategies for reducing the labeling of children as "disabled" while addressing learning and behavioral needs.<sup>13</sup>

These additions to the purpose and findings of the IDEA underscore high expectations for students with disabilities who, as all other students, are now not only expected but also required to be instructed in the regular education curriculum consistent with their respective states' academic content and achievement standards. What remains to be seen, however, is what impact the Individuals with Disabilities Education Improvement Act will have on improving the educational achievement of students with disabilities and ensuring that, in fact, no child is left behind.

<sup>7</sup>U.S. DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES, A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES 12 (2002).

<sup>8</sup>*Id.* at 11–35.

<sup>9</sup>20 U.S.C. §1400(c)–(d) (2004).

<sup>10</sup>*Id.* § 1400(d)(1)(A) (emphasis added).

<sup>11</sup>*Id.* § 1400(c)(5) (emphasis added).

<sup>12</sup>*Id.* § 1400(c)(5)(E) (emphasis added); see also *id.* § 6301(9)–(10)

<sup>13</sup>*Id.* § 1400(c)(5)(F); see also *id.* §§ 6301(9), 6368(6).

### A. Funding Changes for States and School Districts

A number of changes in the funding provisions give the state more flexibility and discretion in its use and control of monies for special education (Part B for students aged 3–21) and for early intervention services (Part C for infants and toddlers). For the first time the Individuals with Disabilities Education Improvement Act establishes a non-mandatory seven-year authorization plan for increasing appropriations until full funding is achieved.<sup>14</sup> Thereafter the Act authorizes “such sums” as may be necessary for succeeding fiscal years, thus preserving the permanent authorization of Part B.<sup>15</sup> As became evident in the 2005 fiscal year, there is no guarantee that the funds will be appropriated according to schedule.

Beginning in 2007, the Individuals with Disabilities Education Improvement Act eliminates any population-based fiscal incentive used to identify students with disabilities—a practice that may have contributed to certain students, especially racial minorities, being erroneously classified as having disabilities. Instead the maximum grant (full funding) will be based on the number of children with disabilities served in the state during the 2004–2005 school year; the number will be adjusted by the annual rate of change in the state’s population of children of comparable age to those provided a free appropriate public education (85 percent of the adjustment) and of the state’s children living in poverty (15 percent of the adjustment) in the same age range.<sup>16</sup>

Another change limits the state from setting aside more than 10 percent of funds under the IDEA for nonadministrative activities at the state level.<sup>17</sup> These funds must be used for monitoring, enforcement, and complaint investigation—previously discretionary activities—and for implementing the statutorily mandated mediation process.<sup>18</sup>

The Individuals with Disabilities Education Improvement Act expands the discretionary state-level activities for which states may spend their federal monies to include activities required to comply with the No Child Left Behind Act. Those activities include, among others, developing valid and reliable alternate assessments to ensure full participation in state assessments, professional development to introduce teachers to scientifically based research, and support and technical assistance to align specialized instruction with challenging academic content and achievement standards.<sup>19</sup>

A state may also set aside 10 percent of funds reserved for discretionary state-level activities to create a fund for local educational agencies to cover the high costs of providing “direct special education and related services.”<sup>20</sup> An example of such high costs might be extensive medical or health-related services not provided by a licensed physician to certain children with significant disabilities whose cost is greater than three times the average per-pupil expenditure.<sup>21</sup> States choosing to establish a “high-cost pool” must develop a state plan with the application and disbursement procedures.<sup>22</sup>

<sup>14</sup>In the 2007 fiscal year, full funding will be 40 percent of the national average per pupil expenditure times the number of children who have disabilities and were served in the state in the 2004–2005 school year.

<sup>15</sup>20 U.S.C. § 1411(i)(8) (2004).

<sup>16</sup>*Id.* § 1411(a)(2)(A)–(B); 70 Fed. Reg. 35881–82 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.7).

<sup>17</sup>20 U.S.C. § 1411(e)(2)(A)(i) (2004).

<sup>18</sup>*Id.* § 1411(e)(2)(B).

<sup>19</sup>Other activities are technical assistance for providing mental health services, behavioral interventions, classroom support, and technology to enhance learning; maximizing accessibility of students with disabilities in the regular education curriculum; using universal design principles; transition programs and services for students pursuing postsecondary education. *Id.* § 1412(e)(2)(A).

<sup>20</sup>A public board of education recognized in a state as an administrative agency with responsibility for its public schools in a city, town, or school district is an example of a local educational agency.

<sup>21</sup>20 U.S.C. § 1411(e)(3)(D)(iii) (2004).

<sup>22</sup>*Id.* § 1411(e)(3)(C)(ii).

## 1. Special Education (Part B) Funds for Early Intervention (Part C) Services

The Individuals with Disabilities Education Improvement Act affords states new flexibility to use Part B special education funds for eligible preschool-age children from 3 to 5 years old to fund instead early intervention services previously limited to eligible infants and toddlers from birth to 3 years old under Part C.<sup>23</sup> A state may elect to offer such option.<sup>24</sup> If so, parents of children 3 to 5 years old who have disabilities and who are otherwise eligible for Part B preschool special education services under an IEP may elect to continue to receive Part C early intervention services until their children enter kindergarten.<sup>25</sup> Such services include family training, nutrition services, social work, and an educational component.<sup>26</sup>

A parent, with informed consent, may choose to continue to receive early intervention services under Part C, on behalf of a child who is now 3 to 5 years old and eligible for special education services based on an IEP under Part B.<sup>27</sup> Once the parent does so, the state has no legal obligation to provide that child with a free appropriate public education under Part B of the IDEA.<sup>28</sup> Although early intervention services “shall include an educational component that promotes school readiness and incorporates preliteracy, language, and numeracy skills,” these services are not necessarily representative of the programming and services necessary to meet the statutory requirements of a free appropriate public education.<sup>29</sup> Nor are states

required to provide services “free and without cost to the parent” or that meet state standards governing preschool education.<sup>30</sup> While ostensibly offering parents greater choice, this change represents a lost opportunity for addressing the educational needs of the most vulnerable, preschool-age children who can be expected to enter kindergarten already disproportionately behind their nondisabled peers. If such policy is adopted by a state, advocates need to make certain that families understand that participation in the Part C program means rejection of their child’s right to a free appropriate public education in the public preschool program. To give informed consent, parents need to possess sufficient knowledge about early education research, child development, the legal mandates of the state and the local educational agency to provide a free appropriate public education, as well as any relevant state or district assessment-based data analyzing the performance of children entering kindergarten.<sup>31</sup> This statutory change seems to counter the goals and intent of the No Child Left Behind Act.

## 2. Special Education (Part B) Funds for Non-Special-Education Students

For the first time, school districts may funnel money earmarked for special education into the general education classroom for non-special-education purposes. Local educational agencies are permitted and, in certain instances, required to use up to 15 percent of their IDEA funds to “develop and implement coordinated, early intervening services” that do not constitute special education.<sup>32</sup> These services are

<sup>23</sup>*Id.* § 1411(e)(7).

<sup>24</sup>See *id.* §§ 1412(a)(1)(C), 1431–39.

<sup>25</sup>*Id.* § 1411(e)(7).

<sup>26</sup>*Id.* Services may also include service coordination, or case management for families receiving services under Part C.

<sup>27</sup>*Id.*

<sup>28</sup>*Id.* §§ 1412(a)(1)(C), 1435(c)(5).

<sup>29</sup>*Id.* § 1435(c)(1).

<sup>30</sup>*Id.* § 1401(9).

<sup>31</sup>Although the phrase is used in the IDEA, as amended, “informed consent” is not defined by either statute or proposed regulation. Presumably informed consent requires a heightened level of “consent” than is defined at 70 Fed. Reg. 35782, 35837 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.9).

<sup>32</sup>20 U.S.C. §§ 1413(f)(1), 1413(j) (2004)

designed for children who are not in need of special education or related services under the IDEA but who nevertheless need additional academic and behavioral support to succeed in a general education environment. This money may be used to assist students (primarily in grades K–3) who are not meeting their grade-level standards and who may be “at risk” of being identified as having a learning disability and being in need of special education.<sup>33</sup> Early intervening services cover professional development for teachers and other school staff to deliver scientifically based academic instruction and behavioral interventions, scientifically based literacy instruction, software instruction, where appropriate, and educational and behavioral evaluations, services, and supports, including literacy instruction.<sup>34</sup> Such funds may also support coordinated, early intervening services aligned with activities funded by the Elementary and Secondary Education Act as amended by the No Child Left Behind Act, provided that the funds are used to supplement and not supplant the Act’s funds.<sup>35</sup>

While intended to ameliorate the unnecessary labeling of children—in particular racial minority students who are disproportionately represented as in need of special education—as having disabilities, this new provision raises a number of concerns.<sup>36</sup> First, the new provision explicitly authorizes school districts to take monies from a finite source of inadequate special education funds to cover the costs of educating students without identified disabilities in the regular education curriculum. Second, special education funding but neither protection nor accountability under the IDEA is given to those students who are from kindergarten through grade 12 (with an emphasis on kindergarten through grade 3, but not a mandate) and are identified as

requiring additional academic and behavioral supports to succeed in a general education environment.

This new flexibility must not be used to deny eligible students who have disabilities and need specialized instruction and related services to achieve standards set for all and to stay in school.<sup>37</sup> Neither the statutory provision nor the proposed regulations contain any time frame for how long a local educational agency may permit a child, for example, one with an undiagnosed specific learning disability, to fail, to fall further behind grade-level standards, to be nonresponsive to “early intervention services,” before referring the child for a special education evaluation. Congress underscored in the statute that nothing related to the establishment of an early intervening program should be construed to limit or create a right to a free appropriate public education.<sup>38</sup> However, the U.S. Department of Education’s proposed regulations suggest nothing to ensure that the local educational agency will give serious consideration to these concerns.

Advocates for students from low-income families, in particular, need to ensure that older students receiving early intervention services and parents know of their right to request an evaluation under the IDEA and to receive specialized instruction in the general education curriculum even if they are making sufficient progress to move from grade to grade. Arguably the parent of every child who receives early intervening services with Part B funds should be given notice of rights, including the right to request an evaluation for eligibility, under the amended IDEA.

### 3. Disproportionate Representation of Minorities as Trigger for Early Intervention Services

New statutory language requires any school district with a significant racial or

<sup>33</sup>*Id.* § 1413(f)(1).

<sup>34</sup>*Id.* § 1413(f)(2).

<sup>35</sup>*Id.* § 1413(f)(5).

<sup>36</sup>*Id.* §§ 1412(a)(24), 1418(d).

<sup>37</sup>See generally *id.* §§ 1415(k)(5), 1412(a)(1)(A).

<sup>38</sup>*Id.* § 1413(f)(3).

ethnic disproportionality of children with a particular disability or in a particular education setting to reserve 15 percent of funds for early intervening services to provide comprehensive, coordinated instructional support services targeted, in particular, to children in those racial or ethnic groups.

Furthermore, each local educational agency with a program of early intervening services must annually report to the state educational agency the number of students served, and the number served who receive special education within two years of being served by the early intervening services program. Racial and language minorities and students from low-income families are disproportionately subject to suspension, expulsion, higher rates of dropping out of school, and increasingly, given the implications of the No Child Left Behind Act, failure on statewide and districtwide assessments. Their advocates should examine data disaggregated by population group to make certain that particular students are not being removed, including during suspension or expulsion, under the guise of concern about their overidentification or disproportionate representation among those students receiving specialized instruction, from their “protected” status as students who have disabilities under IEPs and are entitled to a free appropriate public education.

#### 4. Local Maintenance-of-Effort Requirement Exception

Section 613 of the Individuals with Disabilities Education Improvement Act significantly changes the local maintenance-of-effort requirement.<sup>39</sup> This pro-

vision creates an exception to the maintenance-of-effort requirement, which, in general, prevents state and local spending on special education from being reduced from year to year. Previously a local educational agency was allowed to treat up to 20 percent of any annual increase in its IDEA grant as local funds on a noncumulative annual basis.<sup>40</sup> The new law contains no such limitation.<sup>41</sup> In essence, notwithstanding the supplanting and maintenance-of-effort provisions, the local educational agency may, in order to “reduce the level of expenditure” for special education, use up to 50 percent of the increase in its IDEA grant.<sup>42</sup> Moreover, the new law dictates that the local educational agency must use local funds equal to the reduction in expenditures to carry out activities authorized by the No Child Left Behind Act.<sup>43</sup> Such activities include early intervening services for students who are experiencing academic and behavioral needs and are not identified as having a disability and in need of special education.<sup>44</sup>

#### B. Eligibility, Evaluations, and Reevaluations

With the 2004 amendments to the IDEA, Congress extended the “child find” requirement to cover children who have disabilities and are either homeless or wards of the state.<sup>45</sup> Also included are “highly mobile” students, such as migrant children, and children who are suspected of having a disability and being in need of special education, “even though they are advancing from grade to grade.”<sup>46</sup> States must identify, locate, and evaluate such children to determine whether such chil-

<sup>39</sup>*Id.* § 1413(a)(2)(C).

<sup>40</sup>*Id.* § 1413(a)(2)(C) (1997).

<sup>41</sup>66 Fed. Reg. 1475 (Jan. 8, 2001).

<sup>42</sup>20 U.S.C. § 1413(a)(2)(C)(i) (2004) (“The Conferees intend that in any fiscal year in which the [local educational agency] or [state educational agency] reduces expenditures pursuant to section 613(j), the reduced level of effort shall be considered the new base for purposes of determining the required level of fiscal effort for the succeeding year.” H.R. Rep. No. 108-779, at 197 (2004).

<sup>43</sup>See 70 Fed. Reg. 35782, 35858 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.205); *id.* at 35860 (to be codified at 34 C.F.R. § 300.226), revealing the intersection between early intervening services and maintenance of effort.

<sup>44</sup>*Id.* at 35858 (to be codified at 34 C.F.R. § 300.205).

<sup>45</sup>20 U.S.C. § 1412(a)(3)(A) (2004).

<sup>46</sup>*Id.* § 1412(a)(3)(A); 70 Fed. Reg. 35782, 35843 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.111(a)(1)(i),(b)); *id.* (to be codified at 34 C.F.R. § 300.111(c)(1)-(2)).

dren, including “wards of the state,” need individualized specialized instruction and related services.<sup>47</sup> Local educational agencies must now cooperate with ongoing efforts of the Education Department secretary to link electronically the health and education records of migratory children with disabilities.<sup>48</sup>

### 1. “Child Find” Requirements

The “child find” requirements continue to encourage equitable participation in special education services of children who are enrolled in private schools by their parents and for whom a free appropriate public education is not an issue. However, as a result of a change in the statute, children who have disabilities and are eligible for these services now include all those who attend private schools, including religious schools, *located within the school district* served by the local educational agency, even if the student resides in another school district.<sup>49</sup> The local educational agency must report to the state educational agency the number of children who are placed by their parents in private schools and for whom a free appropriate public education is not at issue, the number of these children evaluated, the number found eligible for special education, and the number currently receiving special education and related services. As under prior law, these students have no individual right to special education and related services.<sup>50</sup> Rather, equitable special education services, with a new emphasis on direct special education services that are “secular, neutral, and nonideological” shall be provided to students by employees of the local educational agency or through contract by the agency, con-

sistent with proportionate funding. The agency determines how these services will be apportioned after a “timely and meaningful consultation” with private school representatives and the parents of children who have disabilities and are enrolled in private schools during the development of special education and related services for the children.<sup>51</sup> If the agency and the private school officials disagree, the agency must explain in writing its choice not to provide services. A private school official also has a right to complain in writing to the state educational agency about the local agency’s failure to engage in meaningful, timely consultation or to give due consideration to the views of the private school community. An appeal may also be filed with the U.S. secretary of education.<sup>52</sup>

### 2. Evaluations

A parent of a child, a state educational agency, another state agency, or a local education agency may request an evaluation to determine if a particular child qualifies as a “child with a disability” under the IDEA.<sup>53</sup> The new law requires this evaluation to take place within sixty days of receiving parental consent unless the state establishes its own time frame.<sup>54</sup> When a federal standard is established, here sixty days, and is more protective than a state law, the federal law should be applied.<sup>55</sup> However, the proposed regulations offer no guidance on the time frame. Without regulatory guidance, the time frame for completing evaluations will continue to vary by state and in some instances be longer than sixty days. The time frame for completing reevaluations is also left to state law, for the IDEA, as amended, is silent.

<sup>47</sup>20 U.S.C. § 1412(a)(3)(A) (2004).

<sup>48</sup>*Id.* § 1413(a)(9); *id.* § 6398(b)(2).

<sup>49</sup>*Id.* § 1412(a)(10)(A)(ii)(II).

<sup>50</sup>*Id.* § 1412(a)(10)(A); 70 Fed. Reg. 35782, 35846 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.137).

<sup>51</sup>20 U.S.C. § 1412(a)(10)(A)(iii) (2004).

<sup>52</sup>*Id.* § 1412(a)(10)(A)(v).

<sup>53</sup>*Id.* § 1414(a)(1)(B).

<sup>54</sup>*Id.* § 1414(a)(1)(C)(i)(I).

<sup>55</sup>70 Fed. Reg. 35782, 35862 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.301(c)(1)(i)).

The federal law creates two exceptions to the sixty-day time frame for completing a student's initial evaluation. If, after evaluation begins, the child enrolls in a school served by a different local education agency, that agency is not bound to the previously initiated evaluation timeline, provided that the agency where the child is enrolled "is making sufficient progress to ensure a prompt completion of the evaluation."<sup>56</sup> A local educational agency is also relieved of responsibility for meeting the timeline if the child's parent repeatedly fails or refuses to produce the child for the evaluation.<sup>57</sup> Advocates should be prepared to argue that before a parent may be alleged to have failed or refused to produce the child for an initial evaluation, the local educational agency must have initiated multiple, documented attempts to engage the parent and identify obstacles to bringing the child to the evaluation site. Advocates for parents should argue that the local educational agency may not be passive; the agency must make multiple, meaningful efforts to connect with the parent, to address the parent's fears or concerns, to ensure that the parent has ample opportunity to become informed about the evaluation so that the parent's decision on consent to the child evaluation is, in fact, an informed one.

An added "rule of construction" further clarifies that a teacher's or specialist's screening of a student for appropriate instructional strategies for curriculum implementation does not qualify as an evaluation for eligibility for special education and related services.<sup>58</sup> Screenings do not require consent.

Determinations of eligibility under the 2004 amendments continue to be based

on evaluations that rely on a variety of assessments, multiple measures, and technical standards of validity and reliability.<sup>59</sup> Nonetheless, there were a few modest but important additions. For example, assessments must be "provided and 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 so provide or administer."<sup>60</sup> Students with disabilities should now be assessed not only in their native language or other mode of communication but also through the use of alternate assessments, such as portfolios or performance assessments if doing so will yield more accurate information of the student's academic performance or achievement.

### 3. Eligibility

As before, a student may not be found eligible for special education based on either

- lack of appropriate reading instruction<sup>61</sup> or
- lack of instruction in math or limited English proficiency.<sup>62</sup>

A change in the eligibility requirements for students with "specific learning disabilities" should help ensure that all children, especially low-income and minority children, who disproportionately score low on standardized aptitude assessments are equally likely to be identified as having a specific learning disability. The amended statute states that a local educational agency shall no longer "be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual

<sup>56</sup>20 U.S.C. § 1414(a)(1)(C)(ii)(I) (2004).

<sup>57</sup>*Id.* § 1414(a)(1)(C)(ii)(II).

<sup>58</sup>*Id.* § 1414(a)(1)(E).

<sup>59</sup>*Id.* § 1414(b)(2).

<sup>60</sup>*Id.* § 1414(b)(3)(A)(ii), 70 Fed. Reg. 35782, 35862 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.304(c)(iii)); cf. 34 C.F.R. § 300.532(a)-(b).

<sup>61</sup>The Elementary and Secondary Education Act, 20 U.S.C. § 6368(3), as amended by the No Child Left Behind Act, defines the essential components of reading instruction to be phonemic awareness; phonics, vocabulary development, reading fluency, including oral reading skills, and reading comprehension strategies.

<sup>62</sup>*Id.* § 1414(b)(5)(A).



ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.”<sup>63</sup> A proposed regulation further authorizes states to prohibit local educational agencies from using the severe discrepancy model.<sup>64</sup> It requires states to adopt criteria that such agencies must use for determining whether a child has a “specific learning disability.”<sup>65</sup> Such agencies must “use a process that determines if the child responds to *scientific, research-based intervention* as a part of the evaluation procedures...” for determining if a student has a specific learning disability.<sup>66</sup> The “criteria adopted by the State” must also “permit the use of other *alternative research-based procedures* for determining whether a child has a specific learning disability....”<sup>67</sup>

Eligible students with specific learning disabilities do not achieve commensurately with their age in one of eight specified academic areas after they are given age-appropriate learning experiences.<sup>68</sup> There is evidence that the student fails to make sufficient progress in meeting state approved results in one or more of the eight identified areas “when assessed with a response to scientific, research-based intervention process; or [ ] ... exhibits a pattern of strengths and weaknesses in performance, achievement, or both, or a pattern of strengths and weaknesses in performance, achievement, relative to intellectual development....”<sup>69</sup>

Under the proposed regulations, either before or as part of the referral process for evaluating a child “suspected of hav-

ing a specific learning disability,” a group of educators must confirm that the child has been provided with

- appropriate high-quality, research-based instruction by qualified personnel in regular education settings<sup>70</sup> and
- “repeated assessments of achievement at reasonable intervals” reflecting student progress during instruction.<sup>71</sup>

That group includes a special education teacher, the child’s general educator or a general education teacher qualified to teach the child, and other professionals, if appropriate.<sup>72</sup>

While eligibility criteria and the referral process have been changed to ensure greater fairness and accuracy in identifying eligible students with specific learning disabilities, advocates must be wary of obstacles to eligibility likely to impede students, particularly low-income, disproportionately racial- and ethnic-minority students who are most likely to attend low-performing schools without appropriate high-quality, research-based instruction from qualified personnel. However, students should not be identified as having disabilities based on their not having received effective teaching and instruction. A finding of specific learning disability should not be delayed because a school cannot provide research-based instruction from qualified teachers.

The proposed regulations offer minimal protection to students who might otherwise be determined to have a specific learning disability but for an inability to rule out that they have not yet received appropriate high-quality, research-based

<sup>63</sup>*Id.* § 1414(b)(6)(A).

<sup>64</sup>70 Fed. Reg. 35782, 35864 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.307(a)(1)).

<sup>65</sup>*Id.* at 35864 (to be codified at 34 C.F.R. § 300.307(a)–(b)).

<sup>66</sup>20 U.S.C. § 1414(b)(6)(B).

<sup>67</sup>70 Fed. Reg. 35782, 35864 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.307(a)(4)).

<sup>68</sup>*Id.* at 35864 (to be codified at 34 C.F.R. § 300.309(a)).

<sup>69</sup>*Id.* (to be codified at 34 C.F.R. § 300.309(a)(2)(i)–(ii)).

<sup>70</sup>*Id.* (to be codified at 34 C.F.R. § 300.309(b)(1)).

<sup>71</sup>*Id.* (to be codified at 34 C.F.R. § 300.309(b)(2)).

<sup>72</sup>*Id.* (to be codified at 34 C.F.R. § 300.308(b)).

instruction in regular education settings, including instruction delivered by qualified personnel. Moreover, there is no guarantee that these individual students will receive such instructional services under Title I or under state law. Nor is there a time frame for how long a student who receives “research-based intervention” strategies must fail to improve significantly before she can be referred for evaluation for a specific learning disability. The regulations do not recognize biologically based learning disabilities of children whose certain disabling conditions suggest that their learning needs be immediately addressed.

#### 4. Reevaluations and Summary of Performance

Grounds for reevaluation have been modified somewhat to reflect the outcome focus of the 2004 law. Reevaluations may be conducted if the local educational agency determines that the “educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation” or upon the request of the child’s parents or teacher.<sup>73</sup> Such a reevaluation shall occur at most once a year unless the agency and parents agree otherwise.<sup>74</sup> As before, a reevaluation must be conducted at least once every three years but may be waived if the agency and parents agree that it is unnecessary.<sup>75</sup> If an IEP team with other qualified professionals decides that no additional data are needed to determine a student’s eligibility and educational needs, there is no duty to conduct such an assessment unless a parent requests it.<sup>76</sup> In this instance, however, the IEP team must notify the parent of its decision, the reasons for its decision, and the right of the parents to have such an assessment conducted. At least for students who have disabilities and are experiencing difficulty in closing the achievement gap,

there seems little justification for not reevaluating their disability-related educational and noneducational needs that might be relevant to their instruction and IEP.

The Individuals with Disabilities Education Improvement Act creates two explicit exceptions to the prior legal requirement that an agency responsible for providing a free appropriate public education to a student must complete an evaluation or reevaluation of the student before terminating the student’s eligibility for a free appropriate public education.<sup>77</sup> Neither is the agency required to complete an evaluation when the student graduates from secondary school with a regular high school diploma, nor is an evaluation required when the student exceeds the age of eligibility for a free appropriate public education under state law.<sup>78</sup> Instead the local educational agency must provide students in both instances with a summary of their academic achievement and functional performance with recommendations for assisting them in meeting their postsecondary goals.<sup>79</sup> Especially useful for students who have disabilities and fail to graduate with a high school diploma, this summary should be a record of the competencies and levels of proficiency they have attained.

#### 5. Informed Parental Consent

The Individuals with Disabilities Education Improvement Act changes the parental consent provisions somewhat and lowers the standard for obtaining consent for wards of the state. As under prior law, a local educational agency responsible for a free appropriate public education must obtain written *informed* consent from the child’s parents before it conducts an initial evaluation and before it begins specialized instruction and related services

<sup>73</sup>20 U.S.C. § 1414(a)(2)(A)(i), (ii) (2004).

<sup>74</sup>*Id.* § 1414(a)(2)(B)(i).

<sup>75</sup>*Id.* § 1414(a)(2)(B)(ii).

<sup>76</sup>*Id.* § 1414(c)(4).

<sup>77</sup>*Id.* § 1414(c)(5)(A).

<sup>78</sup>*Id.* § 1414(c)(5)(B)(i).

<sup>79</sup>*Id.* § 1414(c)(5)(B)(ii).

based on the evaluation.<sup>80</sup> The agency no longer has the option of providing initial services by using mediation and due process if the parent of such child “refuses to consent to services” based on this initial evaluation. This avenue is expressly foreclosed by the Individuals with Disabilities Education Improvement Act.<sup>81</sup> Lack of parental consent to be *initially* provided with or to receive special education and related services—either by refusing to consent to receive such services or by failing to respond to a request to consent—effectively relieves the agency of its obligation to provide the child with a free appropriate public education or an IEP.<sup>82</sup>

However, explicit language in the proposed regulations affirms that only when a parent refuses to consent or fails to respond to a request to consent to the “*initial* provision of special education and related services” will the local educational agency not be considered in violation of its obligation to provide a free appropriate public education.<sup>83</sup> And only in such circumstances will the agency be required to convene an IEP meeting or develop an IEP.<sup>84</sup> The proposed regulations clarify that districts do not need to seek parental consent every time a particular service is provided to an eligible child.<sup>85</sup> Hence, once a child actually receives specialized instruction, a parent’s denial of consent to certain services or refusal to respond to a request for consent does not remove the local educational agency’s or the state educational agency’s duty to provide a free appropriate public education.<sup>86</sup>

The proposed regulations, like the current regulation, permit states to require parental consent for other services and activities, provided that a parent’s refusal to consent to any such service cannot result in a refusal to provide the child with a free appropriate public education.<sup>87</sup> Furthermore, 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 of the public agency.<sup>88</sup> This means that if a parent and school disagree about the services in a child’s IEP, the local educational agency must provide those on which the parties agree.

A curious change in the law establishes a lower standard for obtaining informed consent for students who are “wards of the state” and who have not been identified as eligible for special education services. Why such a ward whose parent cannot be located or whose parent’s rights have been terminated is not assigned a surrogate parent to represent the ward’s educational needs and interests, including giving informed consent to an initial evaluation and perhaps subsequently to the initial provision of special education and related services, is not clear.<sup>89</sup> Children who are “wards of the state” are disproportionately poor, disproportionately members of racial- and ethnic-minority groups, and disproportionately individuals with disabilities. Given the new law’s focus on mitigating the overidentification of poor, minority students as in need of special education, the justification for weakening the “parental informed consent” is disturbing.

<sup>80</sup>*Id.* §§ 1414(a)(1)(D)(i)(I), 1414(a)(1)(D)(i)(II).

<sup>81</sup>*Id.* § 1414(a)(1)(D)(ii)(II); 70 Fed. Reg. 35782, 35864 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.300(b)(2)).

<sup>82</sup>20 U.S.C. § 1414(a)(1)(D)(ii)(III) (2004).

<sup>83</sup>70 Fed. Reg. 35782, 35862 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.300(b)(1)–(3)).

<sup>84</sup>*Id.* at 35862 (to be codified at 34 C.F.R. § 300.300(b)(3)).

<sup>85</sup>*Id.* (to be codified at 34 C.F.R. § 300.300).

<sup>86</sup>20 U.S.C. § 1414(c)(3) (2004); 70 Fed. Reg. 35782, 35862 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.300).

<sup>87</sup>70 Fed. Reg. at 35862 (to be codified at 34 C.F.R. § 300.300(d)(2)).

<sup>88</sup>*Id.* (to be codified at 34 C.F.R. § 300.300(d)(3)).

<sup>89</sup>20 U.S.C. § 1414(a)(1)(D)(iii)(II) (2004).

### C. Individualized Education Programs and Content

The 2004 amendments changed some of the previously required elements of a student's IEP in part to align the delivery of academic programming, instruction, and services more closely with the No Child Left Behind Act and in part to simplify the law and to reduce the so-called paperwork burden. On balance the provisions eliminated from the IDEA by the 2004 amendments undermine school and district accountability contrary to the No Child Left Behind Act and to the stated intent to align the IDEA with the No Child Left Behind Act. For example, the requirements for measuring and reporting on a student's educational progress are somewhat weakened. A new requirement that each student's IEP provide specialized instruction based on "peer-reviewed research" raises questions. Also, the provisions on accommodations for assessments and transition services are modified.

The IDEA, as amended, requires the IEP to identify a 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...."<sup>90</sup> Although used more than two dozen times throughout the 2004 law, the term "functional" is not defined. Whereas the IEPs of all students eligible under the IDEA were previously required to include "benchmarks or short-term objectives," they are now required only for students who take alternate assessments aligned with alternate achievement standards.<sup>91</sup> Instead of "bench-

marks or short-term objectives," each student's IEP now must include "academic and functional goals" in its "statement of measurable annual goals."<sup>92</sup> The academic and functional goals are expected to address the student's disability-related needs so that the student can be involved in and make progress in the general education curriculum.<sup>93</sup> A new provision requires IEPs to describe how and when the student's progress toward meeting the annual goals will be measured and reported.<sup>94</sup> However, a key accountability requirement that parents be informed if their child's progress "is sufficient to enable the child to achieve the goals by the end of the year" is deleted from the IDEA.<sup>95</sup> Previously when a student failed to meet a "benchmark or short-term objective," the parent would have been informed if the lack of progress affected the student's meeting annual goals and triggered additional or alternative instructional intervention.

Congress targeted "short-term objectives" and "benchmarks" for elimination because they were identified with the "paperwork burden" on teachers and administrators.<sup>96</sup> This diminished requirement marks a lost opportunity for aligning the IDEA with the No Child Left Behind Act. However, parents may still match academic and functional goals with highly specific instructional objectives and interim timetables describing what the child needs to learn, how, and when the student's progress toward meeting the limited goals will be measured. Moreover, a highly prescriptive regulation implementing Title I or the No Child Left Behind Act requires schools and districts to report to parents in detail about

<sup>90</sup>*Id.* § 1414(d)(1)(A)(i)(I) (emphasis added).

<sup>91</sup>*Id.* § 1414(d)(1)(A)(i)(I)(cc). These students consist of approximately 1 percent of all students assessed or about 9 percent of students who have disabilities and who, because of the severity of their cognitive disabilities, cannot make progress toward the standards expected to be met by all students on the required grade-level state or district assessments even with accommodations. See 34 C.F.R. § 200.6(a)(B) (2005).

<sup>92</sup>20 U.S.C. § 1414(d)(1)(A)(i)(II) (2004).

<sup>93</sup>*Id.* § 1414(d)(1)(A)(i)(II)(aa).

<sup>94</sup>*Id.* § 1414(d)(1)(A)(i)(III).

<sup>95</sup>*Id.* § 1414(d)(1)(A)(viii)(II)(bb) (1997).

<sup>96</sup>U.S. DEPARTMENT OF EDUCATION, *supra* note 7; 20 U.S.C. § 1400(c)(9) (2004).

their individual child's performance on the mandated state assessments in which all children, including those with disabilities, participate.<sup>97</sup> This assessment report may be used to make IEPs more proactive and responsive to students' needs.

Another significant 2004 amendment requires each student's IEP to provide specialized instruction "based on peer-reviewed research to the extent practicable."<sup>98</sup> This new requirement mirrors multiple No Child Left Behind Act provisions requiring use of effective methods and instructional strategies grounded in "scientifically based research," which is defined to include "acceptance by a peer-reviewed journal or approved by a panel of independent experts through a comparably rigorous, objective, and scientific review."<sup>99</sup> The IDEA reference to "peer-reviewed research to the extent practicable" instead of the more comprehensively defined "scientifically based research" may suggest a lack of special education programs that can meet the higher standard. Intended to improve the quality of specialized instruction and supportive services for students with disabilities, this provision reminds advocates to examine "state of the art" knowledge and research especially when representing a child whose IEP team proposes that the child participate in an alternate state assessment based on "modified" or alternate standards instead of the standards set for all students.<sup>100</sup>

According to a new provision in the Individuals with Disabilities Education

Improvement Act, all students with disabilities must participate in all state and districtwide assessment programs, including those specifically prescribed by the No Child Left Behind Act. All IEPs must identify "any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments," including those under the No Child Left Behind Act.<sup>101</sup> Students who have disabilities and cannot participate in regular assessments with appropriate accommodations must as needed, and consistent with their IEPs, participate in an alternate assessment.<sup>102</sup> State guidelines require alternate assessments to be aligned with the state's challenging academic content standards and challenging achievement standards.<sup>103</sup> The Individuals with Disabilities Education Improvement Act clarifies that the state, as permitted under the Title I regulations for students with the most significant cognitive disabilities, may adopt an alternate assessment that measures alternate academic achievement standards.<sup>104</sup> Even so, the students' achievement must be measured against those standards established for all.<sup>105</sup>

If an IEP team determines that a student will take an alternate assessment, the IEP must now explain why the student cannot participate in the regular assessment and, perhaps more significant, why the selected alternate assessment, that is, based on regular or alternate standards, is appropriate.<sup>106</sup> Another amendment requires the state (and the local educational agency for districtwide assess-

<sup>97</sup>34 C.F.R. § 200.8 (2005).

<sup>98</sup>20 U.S.C. § 1414(d)(1)(A)(i)(IV) (2004).

<sup>99</sup>See *id.* § 6368(6) (2002).

<sup>100</sup>*Id.* § 1414(d)(91)(A)(i).

<sup>101</sup>*Id.* §§ 1414(d)(1)(A)(i)(VI)(aa), 1412(a)(16)(A).

<sup>102</sup>*Id.* § 1412(a)(16)(A). Alternate assessments were mandated to be developed by 2000 by the 1997 amendments to the IDEA.

<sup>103</sup>*Id.* § 1412(a)(16)(C)(ii).

<sup>104</sup>34 C.F.R. § 200.1(d) (2005).

<sup>105</sup>20 U.S.C. § 1412(a)(16) (2004); 70 Fed. Reg. 35782, 35851 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.160(c)(2)(i)).

<sup>106</sup>20 U.S.C. § 1414(d)(1)(A)(i)(VI)(bb) (2004).

ments) to disaggregate and report the number of children who have disabilities and take the regular statewide assessments with and without accommodations, the number participating in alternate assessments based on regular standards, and the number participating based on alternate standards.<sup>107</sup>

The Individuals with Disabilities Education Improvement Act truncated requirements concerning transition services. Under the Act, a student's first IEP in effect after turning 16 must now include "appropriate measurable post-secondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills. . . ." <sup>108</sup> The IEP is no longer required to spell out the student's "transition service needs" as part of a two-phase planning process beginning at age 14. However, the proposed regulations clarify that students or their parents may request that transition planning goals and services begin even earlier than 14, particularly when prerequisite course selections may be most relevant to subsequent courses of study (e.g., vocational education or advance study).<sup>109</sup>

A new "rule of construction" states that IEP provisions shall not be construed to require additional information in a student's IEP beyond what is explicitly required by the Act.<sup>110</sup> Nor is the IEP team required to include information under one component of a student's IEP that is already contained under another.<sup>111</sup> In all likelihood these provisions are to reduce the "paperwork burden" on educators and administrators.<sup>112</sup> This

provision should have no legal effect on a recipient state that chooses to have its own more extensive IEP requirements or other requirements that afford students with additional or more specific substantive or procedural protection.

#### D. IEP Process

The IEP process has been changed in a number of ways, some quite minor and others very significant.

The basic composition of the IEP team remains the same, namely, the parents, at least one regular education teacher of the child, one special education teacher, a representative of the local educational agency, an individual who can interpret evaluations, and the child when appropriate. However, under the Individuals with Disabilities Education Improvement Act, an IEP team member may not have to attend an IEP meeting in two situations.<sup>113</sup> First, if an IEP team member's area of the curriculum or related services is not being modified or discussed and the parent and the local educational agency *agree* that the member's attendance is not necessary, the member may be excused.<sup>114</sup> Second, a team member may be excused, even if the member's area of the curriculum or related services is being modified or discussed, if the parent and agency *consent* to the excusal, and the member submits, in writing to the parent and the IEP team, input into the development of the IEP prior to the meeting.<sup>115</sup> Parental agreement and consent, respectively, to either of these situations must be in writing.<sup>116</sup> Advocates should require that such written agreement be reached before the meeting.

<sup>107</sup>*Id.* § 1412(a)(16)(D).

<sup>108</sup>*Id.* § 1414(d)(1)(A)(i)(VIII)(aa).

<sup>109</sup>70 Fed. Reg. 35782, 35865 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.320(b)(2)).

<sup>110</sup>20 U.S.C. § 1414(d)(1)(A)(ii)(I) (2004).

<sup>111</sup>*Id.* § 1414(d)(1)(A)(ii)(II).

<sup>112</sup>*Id.* § 1400(c)(9).

<sup>113</sup>*Id.* § 1414(d)(1)(C).

<sup>114</sup>*Id.* § 1414(d)(1)(C)(i).

<sup>115</sup>*Id.* § 1414(d)(1)(C)(ii).

<sup>116</sup>*Id.* § 1414(d)(1)(C)(iii).

Another change allows for alternate means of participation, such as video conferencing or conference calls, in the IEP meeting if the parent and local educational agency agree.<sup>117</sup> While this kind of flexibility seems reasonable, other provisions allowing excusal of IEP team members from attendance and the consolidation of reevaluation and IEP meetings raise concerns.<sup>118</sup> Taken together, these provisions may stifle the sharing of ideas and a parent's opportunity to educate the school staff about the child's particular educational and other needs. Parents may find themselves pressured to agree to limit attendance and participation and meeting alternatives. Thus their advocates, working in conjunction with parent training information centers, community resource centers, and other state and local disability organizations, should prepare parents to be unapologetic about expecting that all members of the team meet, at least once per year, face-to-face, to share information and to discuss insights, knowledge, and observations about each child whose education is at stake.

The Individuals with Disabilities Education Improvement Act incorporates a number of changes in the IEP development process that, if implemented in good faith, should help mitigate the nuisance factor in the logistics of completing a final document. After the child's annual IEP meeting, the parent and the local educational agency may agree to modify the IEP further without reconvening a full meeting but rather through a written amendment to the document.<sup>119</sup> Whether the parent or other IEP team member proposes an amendment, the local educational agency must give the parent prior written notice of the

change.<sup>120</sup> Although the proposed regulations are silent on this, the notice must specify the proposed IEP amendment to which both parties must agree in writing. Such notice must inform parents that upon request they have a right to receive a written copy of the revised IEP incorporating the amendments.<sup>121</sup> As evidence of "good faith" and collaboration, the local educational agency ought to supply parents routinely with a revised IEP incorporating any "agreed upon" amendments. Advocates should seek this outcome in negotiations with their state education agencies.

Sometimes students with IEPs transfer between school districts and between states. The Individuals with Disabilities Education Improvement Act should help smooth the transition. When transferred to a different school district, the new district's local educational agency, in consultation with the child's parents, must provisionally accord the child with a free appropriate public education, including services comparable to the child's previous IEP.<sup>122</sup> If the new district is in the same state as the child's previous school, services must continue until the new district adopts the previous school's IEP or develops and adopts a new IEP.<sup>123</sup> If the new district is in a different state, it shall provide the child with comparable services to those delivered under the child's prior IEP until the local educational agency evaluates the child for eligibility if necessary and develops a new IEP if appropriate.<sup>124</sup> In either situation the new local educational agency must promptly obtain and transfer the child's education records, including prior IEPs, evaluations and supporting documents, and other relevant records, and the prior

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<sup>117</sup>*Id.* § 1414(f).

<sup>118</sup>*Id.* § 1414(d)(3)(E).

<sup>119</sup>*Id.* §§ 1414(d)(3)(D), (F).

<sup>120</sup>20 U.S.C. § 1415(b)(3)(A).

<sup>121</sup>*Id.* § 1414(d)(3)(F).

<sup>122</sup>*Id.* § 1414(d)(2)(C)(i).

<sup>123</sup>*Id.* § 1414(d)(2)(C)(i)(I).

<sup>124</sup>*Id.* § 1414(d)(2)(C)(i)(II); see *id.* § 1414(a)(1).

school is obligated to comply promptly with such requests.<sup>125</sup> The proposed regulation offers no greater specificity.

The children's placement in a private school by their parents continues to raise questions. When a student with a disability is placed in a private school by a local educational agency or a state educational agency for purposes of receiving a free appropriate public education, the public agency bears the cost of the placement. A parent seeking a free appropriate public education for her child may unilaterally place the child in a private school and seek reimbursement for such costs, but whether the parent is reimbursed by the local educational agency, or the state educational agency, depends upon the findings of the administrative hearing officer or the court. The Individuals with Disabilities Education Improvement Act, as prior law, states that any reimbursement may be reduced or denied if the parent fails to give required notice to the public agency.<sup>126</sup> However, the Individuals with Disabilities Education Improvement Act further narrows the exception to this notice requirement by limiting the hearing officer or a court's use of discretion to instances when compliance would result in "serious emotional harm to the child" or if the parent is illiterate or unable to write in English.<sup>127</sup>

### **E. Highly Qualified Special Education Teachers**

Of special significance in educating students with disabilities to the same stan-

dards set for all other students is that the Individuals with Disabilities Education Improvement Act does not amend the definition of "highly qualified" in the No Child Left Behind Act.<sup>128</sup> The definition applies to special education teachers of "core academic subjects."<sup>129</sup> Such special education teachers must meet the same No Child Left Behind Act requirements for either new middle school and high school teachers or veteran teachers.<sup>130</sup> This means that these special education teachers must be certified in special education.<sup>131</sup> Also, such special education teachers must have a degree in and be able to demonstrate a high level of competency in the discipline that they are teaching.<sup>132</sup> However, the No Child Left Behind Act requirements are significantly modified for special education teachers who are instructors in two or more core academic subjects exclusively for students with disabilities.<sup>133</sup> And the No Child Left Behind Act requirements are modified for those special educators teaching one or more core academic subjects to students with the most severe cognitive disabilities.<sup>134</sup> For example, those teaching students with the most significant cognitive disabilities above the elementary school level may meet the definition of "highly qualified" by demonstrating "subject matter knowledge appropriate to the level of instruction being provided, as determined by the State, needed to effectively teach to those [alternate achievement] standards."<sup>135</sup>

<sup>125</sup>*Id.* § 1414(d)(2)(C)(ii).

<sup>126</sup>*Id.* § 1412(a)(10)(C)(iii).

<sup>127</sup>*Id.* § 1412(a)(10)(C)(iv).

<sup>128</sup>20 U.S.C. § 7801(23).

<sup>129</sup>*Id.* § 7801(11). The term means English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, art, history, and geography.

<sup>130</sup>*Id.* § 1401(10)(A); 70 Fed. Reg. 35782, 35837–38 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.18(a)).

<sup>131</sup>20 U.S.C. § 1401(10)(B) (2004).

<sup>132</sup>*Id.* § 7801(23)(B)(ii), (C).

<sup>133</sup>*Id.* § 1401(10)(D)(i)–(iii).

<sup>134</sup>*Id.* § 1401(10)(D), (C); 70 Fed. Reg. 35782, 35837–38 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.18(d), (c)).

<sup>135</sup>20 U.S.C. § 1401(10)(C); 70 Fed. Reg. 35782, 35838 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.18(c)(2)).



A special education teacher who is not giving instruction in one of the core academic subjects and meets the general degree and certification requirements for all special education teachers is “highly qualified” for purposes of complying with the amended IDEA and with the No Child Left Behind Act.<sup>136</sup> Such a special educator may be a resource room teacher, a teacher providing consultative services to regular education teachers, or a teacher working with students with disabilities to address, for example, students’ social, emotional, behavioral, and functional skills. Based on the 2004 amendments, all special education teachers are now required at a minimum to be certified or licensed and have at least a bachelor’s degree.<sup>137</sup> None may hold an emergency or temporary certificate and meet the definition of “highly qualified.”<sup>138</sup>

## II. Procedural Safeguards

In a number of ways the Individuals with Disabilities Education Improvement Act amended Section 615, which requires any state educational agency, other state agency or local educational agency receiving funds under the IDEA to establish and maintain procedures to ensure that all eligible children and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education.<sup>139</sup>

### A. Rights of Children and Parents

As before, a parent of a child with a disability is guaranteed the opportunity to examine the child’s education records, to

participate in meetings with respect to the child’s identification, evaluation, and placement and provision of a free appropriate public education, and to obtain an independent educational evaluation.<sup>140</sup> The proposed regulations no longer expressly require states and local educational agencies to make and to document reasonable efforts, such as arranging for interpreters for parents who have hearing impairments or who do not speak English, to ensure that parents can understand and participate in those proceedings.<sup>141</sup> In comments accompanying the proposed regulations, the Education Department explains that the prior regulatory language is unnecessary because the right to meaningful participation, including the ability to understand what is being said, is inherent in the right to participate.<sup>142</sup>

Under the Individuals with Disabilities Education Improvement Act, the state must for the first time assign a surrogate parent within an explicit time frame. Not more than thirty days after a child is determined by the local educational agency or other public agency to be in need of a surrogate, the state must make reasonable efforts to make an assignment.<sup>143</sup> The same provision identifies the need for a surrogate to be appointed for a ward of the state but recognizes that a judge overseeing the child’s care may also appoint the surrogate.<sup>144</sup> Consistent with earlier regulations, the surrogate may not be an employee of the state or the local educational agency or any other agency involved in the education or care of the child.<sup>145</sup> The proposed regulations

<sup>136</sup>20 U.S.C. § 1401(10)(F); 70 Fed. Reg. 35782, 35838 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.18(b)(1)–(3)).

<sup>137</sup>20 U.S.C. § 1401(10)(B) (2004).

<sup>138</sup>*Id.* § 1401(10)(B)(ii).

<sup>139</sup>*Id.* § 1415 (a)–(m).

<sup>140</sup>*Id.* § 1415(b)(1).

<sup>141</sup>See 70 Fed. Reg. 35782, 35868 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.501(c)).

<sup>142</sup>*Id.* at 35807, citing 20 U.S.C. § 1415(b)(1).

<sup>143</sup>20 U.S.C. § 1415(b)(2)(B) (2004).

<sup>144</sup>*Id.* § 1415(b)(2)(A)(i); but see *id.* § 1414(a)(1)(D)(iii)(cc), suggesting that informed parental consent need not be sought for a ward of the state.

<sup>145</sup>*Id.* § 1415(b)(2)(A).

require that the surrogate parent have no other personal or professional conflict with the interests of the child and must have the skills and knowledge to assure accurate representation of those interests.<sup>146</sup>

Specific procedures also require the local educational agency to appoint a surrogate parent for an unaccompanied homeless minor as defined by the McKinney-Vento Homeless Assistance Act.<sup>147</sup> Proposed regulations, however, delete an arguably important safeguard for children in foster care. The earlier definition of “parent” was limited to those foster parents who had an “ongoing, long-term parental relationship with the child.” The Individuals with Disabilities Education Improvement Act deletes this limitation. Thus, many a child who is in foster care and moves frequently may be deprived of adequate representation that would otherwise be available through the appointment of a trained surrogate parent with responsibility for the child.

### 1. Procedural Safeguards Notice

In its quest to reduce paperwork, Congress altered the mechanisms for parents receiving notice of the procedural safeguards available to them. Schools are now required to supply parents a copy of the procedural safeguards only once a year, except that a copy must also be given upon initial referral or request for evaluation, upon the first filing of a complaint, and at the request of a parent.<sup>148</sup> Such a copy may be posted on the local educational agency’s website if one exists.<sup>149</sup> However, placement of the procedural safeguards’ notice on a website alone may not be construed to satisfy the local edu-

cational agency’s requirement to “give” a copy of the safeguards to parents.

The notice must fully explain all the available procedural safeguards.<sup>150</sup> New components in the notice include information about the opportunity to present and resolve complaints through a new thirty-day resolution session; the time period for filing a complaint that triggers the right to an administrative due process hearing; the availability of mediation; the right to file a civil action; and information regarding attorney fee reimbursement.<sup>151</sup>

### 2. Due Process Complaint Notice

The IDEA, as amended, clarifies that either the parent or the public agency may file a complaint requesting a due process hearing regarding any matter concerning identification, evaluation, educational placement, or the provision of a free appropriate public education to a child.<sup>152</sup> Either party (or its attorney) seeking a due process hearing on their complaint must give “due process complaint notice” to the other party and “forward a copy of such notice” to the state education agency.<sup>153</sup> The complaint shall be confidential.<sup>154</sup>

The “due process complaint notice” must include the child’s name, address (or other contact information), school attended, and a brief description of the nature of the problem with relevant facts; a proposed resolution; and an allegation that a “violation” occurred within the applicable two-year statute of limitations.<sup>155</sup> The state educational agency must “develop a model form to assist parents in filing a complaint and due process complaint notice” to comply with the above require-

<sup>146</sup>70 Fed. Reg. 35782, 35874 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.519).

<sup>147</sup>20 U.S.C. § 1415(b)(2)(A)(ii) (2004), citing 42 U.S.C. § 11434a(6).

<sup>148</sup>*Id.* § 1415(d)(1)(A).

<sup>149</sup>*Id.* § 1415(d)(1)(B).

<sup>150</sup>70 Fed. Reg. 35782, 35869–70 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.504(c)).

<sup>151</sup>20 U.S.C. § 1415(d)(2) (2004).

<sup>152</sup>*Id.* § 1415(b)(6)(A); 70 Fed. Reg. 35782, 35870 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.507).

<sup>153</sup>20 U.S.C. § 1415(b)(7)(A)(i) (2004).

<sup>154</sup>*Id.* § 1415(b)(7)(A); 70 Fed. Reg. 35782, 35870 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.508(a)).

<sup>155</sup>20 U.S.C. §§ 1415(b)(7)(A)(ii), 1415(b)(6) (2004).

ments.<sup>156</sup> As interpreted by the Education Department, the “due process complaint” seeking a due process hearing and the “notice complaint” are the same document.<sup>157</sup>

The due process complaint notice is presumed sufficient unless the receiving party notifies the hearing officer and complainant in writing within fifteen days of receiving the complaint that the party does not believe that the notice meets the requirements.<sup>158</sup> In that instance, the impartial hearing officer must determine sufficiency within five days and immediately notify both parties in writing of that determination.<sup>159</sup> This can amount to a twenty-day delay even if the complaint is found to be sufficient.

If the local educational agency receiving this due process complaint notice has not already sent the required written notice regarding the subject matter of the complaint to the parent, within ten days the agency must send the parent a response that includes what should have been in the notice.<sup>160</sup> Such response must explain why the agency proposed or refused to take the action raised in the complaint, what other options the IEP team considered, and why those options were rejected.<sup>161</sup> However, even when the agency responds to a parent’s complaint by sending “prior written notice,” the agency is not precluded from challenging the parent’s due process complaint notice on sufficiency grounds.<sup>162</sup> Alternatively a noncomplaining party that

has given prior written notice or for whom that requirement is not relevant to the matter at issue shall, within ten days of receiving the complaint, send to the other party a written response that addresses the issues raised in the complaint.<sup>163</sup>

Furthermore, issues not raised in the original due process complaint notice may not be raised at a hearing without the other party’s consent. A due process complaint notice may be amended but only with the consent of the other party or if the hearing officer grants permission no later than five days prior to the scheduled hearing.<sup>164</sup> If a party successfully files an amended complaint, the timeline for the hearing recommences at that point.<sup>165</sup>

### 3. New Statute of Limitations

The Individuals with Disabilities Education Improvement Act establishes for the first time a statute of limitations requiring the parent or public agency presenting a complaint to allege any violation of the IDEA within two years of when the parent or public agency knew or should have known about the alleged action forming the basis of the complaint.<sup>166</sup> Three exceptions are given.

First, the two-year statutory period may be abrogated by a state statute of limitations for “presenting such a complaint.”<sup>167</sup> Neither the IDEA, as amended, nor the proposed regulations, however, protect parents if the state statute of limitations is *more* restrictive.<sup>168</sup> If the Education Department does not resolve this matter

<sup>156</sup>*Id.* § 1415(b)(8).

<sup>157</sup>70 Fed. Reg. 35782, 35870 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.508).

<sup>158</sup>20 U.S.C. §§ 1415(c)(2)(A), (c)(2)(C) (2004).

<sup>159</sup>*Id.* § 1415(c)(2)(D).

<sup>160</sup>*Id.* § 1415(c)(2)(B)(i).

<sup>161</sup>The local educational agency must also describe (1) each evaluation procedure, assessment, or report that the agency used as a basis of the proposed or refused action and (2) the factors applied in the agency’s decision. *Id.* § 1415(c)(2)(B)(i).

<sup>162</sup>*Id.* § 1415(c)(2)(B)(i)(II).

<sup>163</sup>*Id.* § 1415(c)(2)(B)(ii).

<sup>164</sup>*Id.* § 1415(c)(2)(E).

<sup>165</sup>*Id.* § 1415(c)(2)(E)(ii).

<sup>166</sup>*Id.* § 1415(b)(6)(B).

<sup>167</sup>*Id.*

<sup>168</sup>See *id.*; 70 Fed. Reg. 35782, 35870 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.507(a)(2)).

in a final regulation, advocates should consider challenging any state statute that is less protective than the specific two-year federally mandated time frame and, in particular, where the state statute of limitation is not specific to state special education law but derived from state tort or other cause of action.

Second, the two-year federal statute of limitations does not apply if the local educational agency or other public agency responsible for a free appropriate public education makes affirmative misrepresentations to the parents that it has resolved the problem forming the basis of the complaint, or the local educational agency or other agency has withheld, from the parent, information required to be disclosed.<sup>169</sup> To avoid the manipulation of the due process notice complaint and the resolution session (e.g., through misuse and abuse of the sufficiency process and mediation), the Education Department needs to establish that the statute of limitations for purposes of a due process complaint and a request for a due process hearing are tolled with the filing of the complaint notice.

Third, the amended statute provides for a ninety-day statute of limitations for the appeal (when a state has a two-tier administrative hearing system) or for filing a civil action in court.<sup>170</sup> Once again, if the state has an explicit statute of limitations governing these types of actions, state law governs.

#### 4. Complaint Resolution

As before, voluntary mediation conducted by a qualified impartial mediator may be used for alternative dispute resolution.<sup>171</sup> The proposed regulations clarify that mediation is available to resolve any dispute, including matters arising before

a party files a due process complaint notice requesting a hearing. The Individuals with Disabilities Education Improvement Act underscores that mediation is to be voluntary. While public agencies may establish procedures to encourage parents' use of mediation, including meeting with disinterested parties, such as the state-based Parent Training Information Center, whose members can explain the process, such meetings may no longer be required.<sup>172</sup>

A new provision of the statute explicitly requires that any resolution that arises out of mediation must be executed through a legally binding written document, signed by both parties and stating that all discussions occurring during mediation are confidential and may not be used as evidence in any subsequent due process hearing or other civil proceeding.<sup>173</sup> Presumably for such a document to be legally binding, the terms must reflect agreement by the parties, honor the rights of the child as third-party beneficiary, and must not be unconscionable.<sup>174</sup>

Marking a significant change in the due process system, the Individuals with Disabilities Education Improvement Act adds an intermediary step to the complaint process: it requires the local educational agency to convene a "resolution meeting" among the parents, "relevant" members of the IEP team, and an agency representative with authority to commit on behalf of the district within fifteen days of receiving the parents' due process complaint notice seeking an impartial hearing.<sup>175</sup> The resolution session must be convened unless the parents and the school district agree in writing to waive it or agree to use mediation.<sup>176</sup>

At this resolution meeting, the local edu-

<sup>169</sup>20 U.S.C. § 1415(b)(6)(B) (2004).

<sup>170</sup>*Id.* § 1415(i)(2)(B).

<sup>171</sup>*Id.* § 1415(e)(2)(A).

<sup>172</sup>*Id.* § 1415(e)(2)(B).

<sup>173</sup>*Id.* § 1415(e)(2)(F).

<sup>174</sup>Advocates should note that the proposed regulations eliminate the prior safeguard allowing both parties input in the selection of a mediator when a mediator is not selected on a random or rotational basis from a list of qualified persons.

<sup>175</sup>20 U.S.C. § 1415(f)(1)(B)(i) (2004).

<sup>176</sup>*Id.* § 1415(f)(1)(B)(i)(IV).

educational agency may not have an attorney present unless parents are accompanied by counsel.<sup>177</sup> Such a meeting offers parents a final and, in some cases, a first opportunity to sit down with school authorities who may have been unresponsive and an opportunity to gather information about the school's position. Similarly the school district may obtain information from the parent that may not be in the parent's interest to disclose.

If the meeting resolves the complaint, the Individuals with Disabilities Education Improvement Act requires the school district and the parents to execute a "legally binding agreement" enforceable in federal or state court. Either party may void the agreement within three business days of its execution. The legality and fairness of this process are highly questionable. For an agreement to be legally binding and enforceable by a court of competent jurisdiction, the agreement must reflect a meeting of the minds within the parameters of the law—since parents cannot give their children's rights away—and the agreement must not be "unconscionable." Three business days is hardly adequate for a parent to obtain and meet with counsel and for counsel to review the child's records.

The proposed regulations refer to a "resolution period" of thirty days, and expressly state that only after this thirty-day period expires does the forty-five-day timeline for an administrative due process hearing decision commence.<sup>178</sup>

Of particular concern is that this new process may result in substantial delay. A local educational agency has fifteen days to challenge the "sufficiency" of the parent's notice of due process complaint,

and the state hearing officer has five days to determine the "sufficiency" of the complaint. If the thirty-day resolution session is not successful, fifty days will pass before a due process hearing may even begin.<sup>179</sup>

## 5. Impartial Hearing Officer Decisions

The Individuals with Disabilities Education Improvement Act sets stricter statutory standards regarding who may be allowed to act as an impartial hearing officer at an administrative due process hearing. The statute incorporates from prior regulations requirements that an impartial hearing officer may not have any personal or professional conflict of interest that would compromise the officer's impartiality in the proceedings.<sup>180</sup> The Individuals with Disabilities Education Improvement Act also states that an impartial hearing officer must know and be able to understand the law, conduct hearings, and render and write decisions in accordance with appropriate, standard legal practice.<sup>181</sup>

In rather troubling, limiting language Congress amended the IDEA to require that a hearing officer's decision shall be made on "substantive grounds" based on a determination of whether child received a free appropriate public education, not on procedural grounds.<sup>182</sup> The statute explicitly identifies limited exceptions when an impartial hearing officer may decide a case based upon "procedural" grounds: the procedural inadequacies must have impeded the child's right to a free appropriate public education, significantly impeded the parents' opportunity to participate in decision making, or caused a deprivation of educational benefits.<sup>183</sup> The new law is careful to recognize that this requirement is not meant to

<sup>177</sup>*Id.* § 1415(f)(1)(B)(i)(III).

<sup>178</sup>*Id.* § 1415(f)(B)(ii); 70 Fed. Reg. 35782, 35871 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.510(b)(2)).

<sup>179</sup>Under prior law, a party had a right to complain and a right to an administrative due process hearing before an impartial hearing officer who was required to issue a decision within forty-five days of the filing of the complaint. Although the forty-five-day timeline was rarely met, what should be of some concern is that the new time frame for commencing a hearing is at least fifty days later.

<sup>180</sup>20 U.S.C. § 1415(f)(3)(A)(i)(II) (2004).

<sup>181</sup>*Id.* §§ 1415(f)(3)(A)(ii)–(iv).

<sup>182</sup>*Id.* § 1415(f)(3)(E).

<sup>183</sup>*Id.* § 1415(f)(3)(E)(ii).

preclude an impartial hearing officer from ordering a local educational agency to comply with the procedural safeguards of 20 U.S.C. § 1415, nor is it meant to limit or otherwise affect the right of parents to file a state-level complaint with the state educational agency.<sup>184</sup>

Most procedural rights under the IDEA are linked to the delivery of a free appropriate public education. Parents and advocates must be prepared to demonstrate that the violation at issue is beyond *de minimis* and impedes the child's right to a free appropriate public education, the parents' right to participate in decision making, or the child's right to educational benefits. Furthermore, parents are expressly authorized by statute to complain about "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child," and thus the broad right to complain about "any matter" is not limited strictly to nonprocedural matters concerning the substantive provision of a free appropriate public education.<sup>185</sup> Rules of statutory construction require that the provisions be read to be consistent to the extent possible. Section 615(b)(6) provides for the more specific language governing a parent's filing of a due process complaint, and thus the section presumably controls. To the extent that a parent is barred by this new provision from raising a matter concerning the range of issues identified by Section 615(b)(6), "futility" is a recognized exception to the requirement of Section 615(i)(2) that parties exhaust their administrative remedies before filing a

judicial action.

Attorney fees may now be awarded to a prevailing local educational agency or state educational agency against the parents' attorney if the action was "frivolous, unreasonable, or without foundation" or if the attorney continued litigating after it "clearly became frivolous, unreasonable, or without foundation."<sup>186</sup> Attorney fees may also be awarded to the local educational agency or state educational agency against either the parents themselves or their attorney if the complaint or cause of action was presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.<sup>187</sup> Such fees may be sought for any action or proceeding, including administrative and district court hearings, brought under the procedural safeguards section of the IDEA (20 U.S.C. § 1415).<sup>188</sup> Results of the mandatory resolution session—if resolution is reached—are exempt from the fee-shifting provision.<sup>189</sup>

## B. Discipline Procedures and School Authority to Remove Students

The Individuals with Disabilities Education Improvement Act continues to allow school authorities to suspend a student with a disability for up to ten school days (if nondisabled students who violate the "code of student conduct" are similarly treated) without determining whether the alleged misbehavior is a manifestation of the student's disability.<sup>190</sup> The proposed regulations continue to limit this exclusion to ten consecutive school days in the same school year.<sup>191</sup> A student may similarly be removed for a series of suspensions of each

<sup>184</sup>*Id.* §§ 1415(f)(3)(E)(iii), (f)(3)(F).

<sup>185</sup>*Id.* § 1415(b)(6)(A) (emphasis added).

<sup>186</sup>*Id.* § 1415(i)(3)(B)(ii).

<sup>187</sup>*Id.* § 1415(i)(3)(B)(iii).

<sup>188</sup>*Id.* § 1415(i)(3)(B)(i); 70 Fed. Reg. 35782, 35873 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.516(a)(1)). Furthermore, 70 Fed. Reg. 35782, 35873 (to be codified at 34 C.F.R. § 300.517(c)(2)(C)(ii)) implicitly bolsters this point by noting that fees may not be awarded relating to an individualized education program (IEP) team meeting "unless the meeting is convened as a result of an administrative proceeding or judicial action...."

<sup>189</sup>20 U.S.C. § 1415(i)(3)(D)(iii) (2004).

<sup>190</sup>*Id.* § 1415(k)(1)(B). Note that, as established by *Goss v. Lopez*, 419 U.S. 565 (1975), all students have a right to written notice of what behavior or activity is considered a violation of the "student code of conduct" and a due process hearing before any exclusionary discipline is imposed.

<sup>191</sup>70 Fed. Reg. 35782, 35875 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.530(b)(1)).

less than ten school days for separate incidents in the same school year, provided, however, that these removals do not constitute a “pattern” of exclusion requiring them to be considered as a single continuous exclusion, thereby giving rise to rights and protection provisions under the Individuals with Disabilities Education Improvement Act.<sup>192</sup> When a “pattern” exists, no student with a disability may be removed for more than ten cumulative school days from the student’s current educational placement without a manifestation determination.<sup>193</sup>

### 1. Removals and “Change in Placement”

A school district may propose a suspension of more than ten consecutive school days in a school year, a suspension that includes the eleventh cumulative suspension day in a school year where there is evidence of a pattern of a “series of removals,” or an expulsion. When the school district does, it must notify the parents, and the student when appropriate, of all procedural safeguards triggered by the proposed “change in placement.”<sup>194</sup> Such safeguards include convening the relevant members of the IEP team for

- a determination of manifestation,
- behavioral assessment (if appropriate),<sup>195</sup> and
- educational and related services consistent with a free appropriate public education on the eleventh day consecutively or cumulatively.<sup>196</sup>

The proposed regulations increase the difficulty of showing that a “pattern” of exclusions constitutes a “change in placement.” The proposed regulations define what

should be considered “a series of removals that constitute a pattern” that would amount to a “change in placement” that triggers a student’s substantive and procedural rights.<sup>197</sup> As before, the removals must total more than ten days in a school year, and the length of each removal, total time removed, and proximity of the removals to one another are to be considered in the determination of a “pattern.”<sup>198</sup>

The proposed regulations, however, add a third requirement as a condition precedent to finding a “pattern.”<sup>199</sup> This criterion, which is without statutory basis or research-based knowledge, requires that a child’s behavior be “substantially similar to the child’s behavior in the incidents that resulted in the series of removals, taken cumulatively, as determined, under Section 300.530(f), to have been a manifestation of the child’s disability.”<sup>200</sup> This requirement seems to condition the finding of a “pattern of removal,” constituting a technical “change in placement,” upon whether the behaviors in each incident are similar and whether each behavior is a manifestation of disability.

### 2. Infliction of Serious Bodily Injury

The Individuals with Disabilities Education Improvement Act adds a new category to the list of unsafe behaviors for which students with disabilities may be excluded based on the disciplinary procedures applicable to their nondisabled peers whether or not behavior is related to disability. School personnel may unilaterally remove students who carry to or possess a weapon in school or at a school function, or who use, possess, sell, or distribute illegal drugs at school or at a school-sponsored func-

<sup>192</sup>*Id.*, citing 70 Fed. Reg. 35782, 35877 (to be codified at 34 C.F.R. § 300.536).

<sup>193</sup>*Id.* at 35875 (to be codified at 34 C.F.R. § 300.530(e)); *id.* at 35877 (to be codified at 34 C.F.R. § 300.536).

<sup>194</sup>*Id.* at 35877 (to be codified at 34 C.F.R. § 300.536(b)); *id.* at 35869 (to be codified at 34 C.F.R. § 300.503(a)).

<sup>195</sup>*Id.* at 35875 (to be codified at 34 C.F.R. § 300.530(e),(d)(1)(ii)).

<sup>196</sup>*Id.* (to be codified at 34 C.F.R. § 300.530(b)(2), (c)–(d)).

<sup>197</sup>*Id.* at 35877 (to be codified at 34 C.F.R. § 300.536(b)).

<sup>198</sup>*Id.* (to be codified at 34 C.F.R. §§ 300.536(b)(1), (3)).

<sup>199</sup>*Id.* (to be codified at 34 C.F.R. § 300.536(b)).

<sup>200</sup>*Id.* (to be codified at 34 C.F.R. § 300.536(b)(2)).

tion.<sup>201</sup> Another student subject to removal is one who has a disability and has “inflicted serious bodily injury upon another person at school or at a school function.”<sup>202</sup> Such a student may now be removed from the student’s current educational placement.<sup>203</sup> “Serious bodily injury” is defined as a special circumstance involving either 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 mental faculty.<sup>204</sup> Furthermore, any student who has a disability and commits any one of these special offenses, even if the behavior relates to the student’s disability, may now be excluded for up to forty-five school days.<sup>205</sup>

### 3. Manifestation Determinations

The statutory requirement that a manifestation review be conducted and a manifestation determination made before a child with a disability may be excluded from the child’s educational placement for more than ten school days has been modified.

Previously the IEP team and “other qualified persons” explored the relationship among the behavior at issue, the child’s disability, and the educational programming and services designed to address the child’s needs, including behavior. The group was required to consider all relevant information, including evaluation and diagnostic information, observations of the child, and the content, appropriateness, and implementation of the child’s IEP and placement. The IEP team and other qualified persons were authorized only to find that the behavior

was not a manifestation of disability if with respect to the behavior at issue, the child’s IEP and placement were appropriate, and all services were implemented consistent with the IEP; the child’s disability did not impair the child’s ability to understand the impact and consequences of the behavior at issue; and the disability did not impair the child’s ability to control the behavior that was the subject of discipline.<sup>206</sup> If the group found any of these factors had not been met, it was required to find that the behavior was a manifestation of disability.<sup>207</sup>

Under the Individuals with Disabilities Education Improvement Act the burden of proof arguably remains with the school district, although the criteria for demonstrating a manifestation are narrowed and make it more difficult for the student who has committed the offending behavior to make the nexus. As under prior law, school personnel may apply the relevant disciplinary procedures only to students with disabilities in the same manner and duration as would be applied to children without disabilities 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.<sup>208</sup> Proposed regulation Section 300.530(c) tracks the statutory language.<sup>209</sup>

However, under the Individuals with Disabilities Education Improvement Act, the manifestation review is conducted by “relevant” members of the child’s IEP team. They are selected by the parent and the local educational agency and “shall review all relevant information in the student’s file, including the child’s IEP, and teacher observations, and any rele-

<sup>201</sup>20 U.S.C. § 1415(k)(1)(G)(i), (ii) (2004).

<sup>202</sup>*Id.* § 1415(k)(1)(G)(iii).

<sup>203</sup>*Id.* § 1415(k)(1)(G).

<sup>204</sup>*Id.* § 1415(k)(7)(D); 18 U.S.C. § 1365(h)(3) (2005).

<sup>205</sup>20 U.S.C. § 1415(k)(1)(G) (2004). Previously the legally authorized period of exclusion was limited to forty-five calendar days.

<sup>206</sup>*Id.* § 1415(k)(4)(C)(ii) (2003).

<sup>207</sup>34 C.F.R. § 300.523(d) (2004).

<sup>208</sup>20 U.S.C. § 1415(k)(1)(C).

<sup>209</sup>*Id.*



vant information provided by the parents to determine “(I) if the conduct in question was caused by, or had a *direct and substantial* relationship to, the child’s disability; or (II) if the conduct in question was the direct result of the [local educational agency’s] failure to implement the IEP.”<sup>210</sup> If the manifestation team determines that either provision is “applicable to the child, the conduct shall be determined to be a manifestation of the child’s disability.”<sup>211</sup>

The duty of the manifestation review team to consider “all relevant information” must include a review and assessment of the appropriateness of the child’s current IEP. In the context of the behavior(s) at issue, the team must consider evaluations, discipline reports, behavioral goals, objectives, intervention strategies, and qualifications of service providers that are critical to determining whether the “conduct in question was the direct result of the local educational agency’s failure to implement the IEP.”<sup>212</sup> To require less will create a disincentive for local educational agencies to address a child’s disability-related behavior as an educational matter through the child’s IEP.

If a manifestation is found, the IEP team must conduct a functional behavioral assessment and develop a behavioral intervention plan.<sup>213</sup> If a behavioral plan has already been developed, the IEP team must review and modify the plan to address the behavior of concern.<sup>214</sup> The student must be returned to the student’s “current educational placement” unless the parent and the school agree to a different placement and provided that the student’s behavior does not fall within

one of the “special circumstances”—possession of a dangerous weapon; possession, sale, use, or distribution of illegal drugs; or causing serious bodily injury.<sup>215</sup> For these particular “special circumstances” students, even if a manifestation is determined to exist, they shall remain in an interim alternative educational setting.<sup>216</sup>

Any student with a disability whose behavior in violation of the code of student conduct is not found to be a manifestation of the student’s disability is subject to the disciplinary exclusion applied to nondisabled students. However, during any period of exclusion that exceeds ten school days, the student must continue to receive a free appropriate public education.<sup>217</sup> If the failure to make a manifestation determination is challenged, the student with a disability shall remain in an interim alternative educational setting pending a decision by an impartial hearing officer or until expiration of the time period, whichever comes first, unless the parent and the state or the local educational agency agree otherwise.<sup>218</sup> The amended statute requires that an expedited administrative due process hearing be convened to appeal such a decision. An expedited hearing is to occur within twenty school days of the request, and a determination made within ten school days after the hearing.<sup>219</sup>

As noted above, if the student’s behavior is not a manifestation of the student’s disability, school authorities may order a “change in placement” or a removal of a student with a disability for more than ten consecutive or cumulative school days—the same amount of time that would apply

<sup>210</sup>20 U.S.C. § 1415(k)(1)(E)(i); 70 Fed. Reg. 35782, 35875 (proposed June 21, 2005) (to be codified at proposed regulation 34 C.F.R. §§ 300.530(e)–(f)).

<sup>211</sup>20 U.S.C. § 1415(k)(1)(E)(ii) (2004).

<sup>212</sup>*Id.* § 1415(k)(1)(E)(i).

<sup>213</sup>*Id.* § 1415(k)(1)(F)(i).

<sup>214</sup>*Id.* §§ 1415(k)(1)(D)(ii), (F)(ii).

<sup>215</sup>*Id.* § 1415(k)(1)(F)(iii).

<sup>216</sup>*Id.* § 1415(k)(1)(G).

<sup>217</sup>*Id.* § 1412(a)(1)(A).

<sup>218</sup>*Id.* § 1415(k)(1)(G)(4)(A).

<sup>219</sup>*Id.* § 1415(k)(1)(G)(4)(B).

to a child without disabilities. However, as under prior law, educational services consistent with a free appropriate public education must continue.<sup>220</sup>

The Individuals with Disabilities Education Improvement Act expressly authorizes school personnel to “consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a student with a disability who violates a code of student conduct.”<sup>221</sup> This discretion allows educators to exercise professional judgment when extreme measures are not warranted and to correct unjust or educationally harmful results.

Some view this as a major shift in the law giving school personnel authority to overrule the “stay-put” right of otherwise protected students with disabilities. These protected students are those for whom a manifestation determination has been made and who therefore may not be unilaterally removed to an interim alternative education setting. They do not include students who have disabilities and have forfeited the right to remain in their current educational placement, irrespective of a showing of manifestation because of their involvement with or possession of unlawful drugs or dangerous weapons, infliction of serious bodily injury or an impartial hearing officer’s finding to be substantially likely to cause injury to oneself or to others. Any interpretation of the “case by case” determination provision as overruling the “right to stay put” by those students who have disabilities and are protected from unilateral removal under the statute is not viable; such interpretation is not consis-

tent with the statute and would create an exception that would swallow the rule.

#### 4. Services for Students Removed Through a “Change in Placement”

The statutory language governing the continuing duty to educate students with disabilities during a period of exclusion has been slightly modified from prior law.<sup>222</sup> Unless clarified by final regulation, the statutory language is likely to be construed as a setback for students with disabilities—inconsistent with the goal to align the IDEA with the basic premises of the No Child Left Behind Act and inconsistent with the statutory mandate to provide a free appropriate public education. Under the Individuals with Disabilities Education Improvement Act, any student who is removed for a code violation for more than ten school days or for behavior relating to weapons, drugs, or bodily injury shall, irrespective of manifestation, “continue to receive educational services, as provided in § 612(a)(1), so as to enable the child to continue to participate in the general curriculum,” though in a different setting, and “to progress toward meeting the goals set out in the child’s IEP.”<sup>223</sup> The proposed regulations reiterate the modified statutory language.<sup>224</sup>

In either case, the education for students during the period of any suspension or other exclusion from school must be consistent with the requirements of a free appropriate public education.<sup>225</sup> The definition of a free appropriate public education is not limited to only those “educational services” allowing a student “to progress toward meeting the goals set out in the child’s IEP.” Rather, a free appropriate public education is statutori-

<sup>220</sup>*Id.* § 1415(k)(1)(C), referring to *id.* § 1412(a)(1)(A); 70 Fed. Reg. 35782, 35875 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.530(b)(1)).

<sup>221</sup>20 U.S.C. § 1415(k)(1)(A) (2004).

<sup>222</sup>Compare 20 U.S.C. § 1415(k)(3)(B)(1997) with 20 U.S.C. § 1415(k)(1)(D)(i)(2004).

<sup>223</sup>*Id.* § 1415(k)(1)(D)(i) (emphasis added).

<sup>224</sup>70 Fed. Reg. 35782, 35875 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.530(d)(i)). Previously by law, IEP teams or an independent hearing officer (in the case of students substantially likely to injure themselves or others) were required to select an interim alternative education setting that would enable the child to continue to participate in the general curriculum, to receive those services and modifications (including, but not limited to, those described in their IEPs) that would “enable the child to meet the goals set out in that IEP....” 20 U.S.C. § 1415(k)(3)(B) (1999).

<sup>225</sup>This interpretation is based on the statutory mandate of Section 612(a)(1)(A), which is cross-referenced in new Section 615(k)(1)(D)(i), 20 U.S.C. 1415(k)(1)(D)(i).

ly mandated during any period of exclusion from school.<sup>226</sup> A free appropriate public education is statutorily defined as specialized instruction, with supportive and supplementary services under public supervision, without cost to the parents; meets the state educational agency's standards, including academic content and achievement standards adopted by the state under the No Child Left Behind Act; and includes an appropriate prescribed preschool, elementary, or secondary education; and conforms with the child's IEP.<sup>227</sup>

Under the Individuals with Disabilities Education Improvement Act, after deciding to change the educational placement of a child with a disability for discipline reasons, regardless of whether a manifestation determination exists, a local educational agency must convene the child's IEP team to conduct a functional behavioral assessment, if appropriate, and develop a behavioral intervention plan to address the behavior or violation so that it does not recur.<sup>228</sup> For a student whose behavior is a manifestation of the student's disability, if a functional behavioral assessment has been conducted earlier and a behavioral plan developed, the team must review and modify the plan to address the behavior. The team must return the student to the placement from which the student was removed unless the student was removed for behavior related to a weapon, drugs, or serious bodily injury.<sup>229</sup>

**Students Not Yet Identified as Having Disabilities.** Students who have not yet been identified as needing special education and related services are purportedly

protected by the Individuals with Disabilities Education Improvement Act.<sup>230</sup> However, what is troubling is that a local educational agency cannot determine a student's behavior to be a manifestation of disability if the agency has not identified the existence of the underlying disability in the first place. Furthermore, the Individuals with Disabilities Education Improvement Act restricts nonidentified students' receiving its disciplinary safeguards. Previously a local educational agency was *presumed* to have "had knowledge" that a student was a child with a disability before the behavior that qualified the child for "protections for children not yet eligible for special education and related services" occurred if, *inter alia*, "the child's behavior or performance demonstrates the need for such services."<sup>231</sup> This specific provision has been removed from the statute.<sup>232</sup> A local educational agency is now deemed to have this knowledge only if the child's parent expressed concern in writing to supervisory or administrative personnel or the child's teacher that the child is in need of special services; the child's parent requested an evaluation under the Individuals with Disabilities Education Improvement Act (20 U.S.C. § 1414(a)(1)(B)); or the teacher or other personnel expressed specific concerns about "a pattern of behavior demonstrated by the child" directly to the director of special education or other supervisory agency personnel.<sup>233</sup> Furthermore, a local educational agency may not be deemed to have knowledge of a child's disability if the parent has not allowed an evaluation of the child or has refused services, or if the child has been evaluated and determined unqualified as a child with a disability

<sup>226</sup>20 U.S.C. § 1412(a)(1)(A) (2004).

<sup>227</sup>*Id.* § 1401(9).

<sup>228</sup>*Id.* § 1415(k)(1); 70 Fed. Reg. 35782, 35875. (proposed June 21, 2005) (to be codified at 34 C.F.R. §§ 300.530(d)(ii), (f)(i)).

<sup>229</sup>20 U.S.C. § 1415(k)(1)(F) (2004); see also 70 Fed. Reg. 35782, 35875. (proposed June 21, 2005) (to be codified at 34 C.F.R. §§ 300.530(f)(i)–(ii)).

<sup>230</sup>See 20 U.S.C. § 1415(k)(5) (2004).

<sup>231</sup>*Id.* § 1415(k)(8)(B)(ii) (1997).

<sup>232</sup>See *id.* § 1415(k)(5)(B) (2004).

<sup>233</sup>*Id.* § 1415(k)(5)(B).

under the IDEA.<sup>234</sup> The Individuals with Disabilities Education Improvement Act removes a prior exception where a parent's illiteracy or disability would prevent the parent from complying with these conditions.<sup>235</sup>

These changes shift the onus to parents to solicit assistance in writing or request an evaluation related to their child's possible disability even though the parents would have no reason to be aware of the law with which they must comply. Qualified children are now more likely than ever to slip through the cracks due to procedural gaffes by uninformed parents. Instead of holding school authorities accountable, as professionals, and through the "child find" responsibilities, the Individuals with Disabilities Education Improvement Act virtually places the burden solely on parents.<sup>236</sup> The proposed regulations offer no relief. If a local educational agency does not "have knowledge" of the child's disability, the child "may be subjected to the disciplinary measures applied to children without disabilities who engaged in comparable behaviors...."<sup>237</sup>

If a parent, teacher, or other party requests an evaluation during the period when the child is subjected to the disciplinary measures, the evaluation must be expedited, and to the child a free appropriate public education must be delivered consistent with procedural safeguards if the child is determined eligible for special education.<sup>238</sup> However, "pending the results of the evaluation, the child shall remain in the *educational placement* determined by school authorities."<sup>239</sup> Instead of using this as an opportunity to

mitigate harm and loss of education, the Education Department does just the opposite by specifying through proposed regulations that the term "educational placement" may "include suspension or expulsion without educational services."<sup>240</sup>

#### **Loss of "Stay-Put" Right During Appeals.**

A major erosion of rights under the Individuals with Disabilities Education Improvement Act has been the loss of the "stay-put" right during appeals. As under prior law, parents may appeal the basis of their child's discipline, the discipline, and the programming and services provided while the child is in an interim alternative education placement or during a manifestation determination; furthermore, the local education agency may challenge a hearing officer's decision upholding a child's placement if the agency believes that the child's current placement is substantially likely to result in injury to the child or others.<sup>241</sup> Under the Individuals with Disabilities Education Improvement Act, however, *all* children who have disabilities and are alleged to have violated the school code of conduct, not just those in "special circumstances" (who are allegedly involved with a dangerous weapon, illegal drugs, or infliction of serious bodily injury), must now remain in their interim alternative educational setting pending the decision of the hearing officer or, if no manifestation is determined, the expiration of either the forty-five-school-day period for children in "special circumstances" or the duration for which the disciplinary procedures would be applied to children without disabilities.<sup>242</sup> The "stay-put" right of all students with disabilities to remain in their

<sup>234</sup>*Id.* § 1415(k)(5)(C).

<sup>235</sup>See *id.* § 1415(k)(5)(B)(i).

<sup>236</sup>*Id.* § 1412(a)(3). The state educational agency is responsible for ensuring that a system is in effect for identifying, locating, and evaluating all eligible children in need of special education.

<sup>237</sup>70 Fed. Reg. 35782, 35876 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.534(d)).

<sup>238</sup>20 U.S.C. § 1415(k)(5)(D)(ii) (2004).

<sup>239</sup>*Id.*

<sup>240</sup>70 Fed. Reg. 35782, 35876 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.534(d)(2)(ii)).

<sup>241</sup>20 U.S.C. § 1415(k)(3)(A) (2004).

<sup>242</sup>*Id.* § 1415(k)(4)(A); 70 Fed. Reg. 35782, 35876 (proposed June 21, 2005) (to be codified at 34 C.F.R. § 300.533). The point regarding the "special circumstances" forty-five-day period was made in the regulations, not the statute.

last lawful education placements during the pendency of any complaint or evaluation has now been effectively eliminated for all students whose behavior is not initially found to be a manifestation of disability.

### III. Conclusion

Despite the intentions of Congress to align the IDEA with the No Child Left Behind Act to improve the quality of specialized instruction, to raise standards, to close the achievement gap, and to make schools and school districts more accountable to students with disabilities and their parents, many of the changes made by the Individuals with Disabilities Education Improvement Act undermine rights and protection provisions that are critical to ensuring that students with disabilities obtain a free appropriate public education consistent with state academic content and achievement standards set for all and that these students are not left behind.

In what may most aptly be described as a cruel irony, under the guise of aligning with the No Child Left Behind Act, the Individuals with Disabilities Education Improvement Act has eliminated for most students the short-term objectives and benchmarks used to assess students' educational progress as well as the effectiveness of their instruction and intervention strategies. Similarly distressing, parents and their advocates are less equipped to hold schools and school districts accountable. Parents are not only without markers to indicate if children are making adequate progress toward their individual IEP goals but also without information telling them in a timely manner whether their children's progress is sufficient to achieve their annual IEP goals. They no longer can expect a full participatory IEP meeting in which special and regular education teachers come together with parents to share knowledge and information. They no longer can expect that data from mandatory three-year reevaluations—especially crucial for those children who have serious academic deficiencies and are not performing at grade level—will be considered by highly qualified teachers. Furthermore, instead of minimizing periods of exclusion from school so that students with disabilities can make up lost

learning opportunities, the Individuals with Disabilities Education Improvement Act makes it easier to exclude students with disabilities from their education by eliminating the right to “stay put” in their current educational placements pending appeals even when they are not engaged in safety- or drug-related matters. Students who have disabilities, especially those who are poor and lack resources, have more difficulty demonstrating that the offending behavior is a manifestation of their disability or that they are, in fact, eligible students who are entitled to protection and whose disability-related needs have been ignored too long. In time we will be able to see whether and to what degree the amended attorney fee provision has a chilling effect on parents and attorneys pushing to hold schools and school districts more accountable to students and their parents.

On its face there is little evidence to suggest that this legislation as enacted will improve the accountability of schools and school districts and improve educational achievement for students with disabilities. Perhaps most disappointing is that the Individuals with Disabilities Education Improvement Act does so little to reinforce the premises of the No Child Left Behind Act for students with disabilities: that all children can learn to a high level; achievement gaps are not acceptable; the educational system is accountable for closing the gap by using effective instructional strategies to educate all students to achieve at high levels; parent involvement is critical; and no child shall be left behind. The two areas that offered the most promise—application of the ‘highly qualified’ standards to special education teachers and holding schools and districts accountable to students with disabilities by ensuring their participation through state assessments aligned to high standards—have already been seriously eroded, and the law is only a year old.

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