

## IDEA 2004 SUMMARY

This is a summary of some of the most critical changes affecting children with disabilities and their families in IDEA 2004, concentrating on the IEP process, due process and the discipline provisions. How these changes affect our children will depend, at least in part, on how the U.S. Department of Education interprets them through policies and regulations and how they are implemented at the state, district and school level. Most of these changes will be effective as of July 1, 2005.

A new provision in the Act authorizes the Secretary to issue only regulations necessary to secure compliance with the statute. This provision may limit the Secretary's authority to issue regulations that could be useful in clarifying ambiguities. A new section of the Act also suggests that states minimize the number of rules, regulations and policies to which the school districts are subject.

This law, as amended by the 2004 changes, will not provide mandatory full funding. Although the annual amounts now authorized (permitted) to be spent on IDEA would achieve full funding in six years, that assumes these amounts will actually be appropriated (spent), and explains why mandatory funding of IDEA is so important. In fact, two days after Congress passed the IDEA Conference Report with its "glide path to full funding" it appropriated significantly less funding for special education than it had just promised.

### IEP PROCESS

**1. Short-term objectives.** The long established obligation for IEP teams to spell out short-term objectives for meeting each child's measurable annual IEP goals no longer exists for most children. Such short-term objectives are only required for the very small percentage of children (generally less than 1% of students with disabilities) who are taking alternate assessments aligned to alternate achievement standards. The No Child Left Behind Act (NCLB) limits participation on these assessments to students with the most significant cognitive disabilities. NCLB also provides that both grade-level and alternate achievement standards should be aligned with state content standards. Parents should ensure that their child's academic IEP goals are also aligned with these standards. Short-term objectives are essential stepping stones toward these goals for all students with disabilities, not just a very small percentage.

In states that offer alternate assessments aligned to alternate achievement standards, it is the IEP team that determines whether a child fits the criteria for students with the most significant cognitive disabilities. Parents, as members of the IEP team, may feel pressure to agree that their child fits these criteria in order to retain short-term objectives. Such pressure directly undermines the accountability provisions of NCLB.

Even if these short-term objectives are not mandated by law, all parents can still request their child's IEP team to identify them. IDEA 2004 still requires a description of how progress toward meeting will be measured and parents can contend that short-term objectives are the answer. Without short term objectives parents will have virtually no way of measuring whether their children are making progress in achieving their annual goals and will not be informed participants in their child's education. In addition, teachers will not have a guide as to the intervening steps that should be taken towards achieving these goals and when they should be taken. Teachers will also have great difficulty developing meaningful progress reports to the parents.

**2. IEP progress reports.** The progress the child is making toward meeting the annual goals must be reported, but there is no longer a reference to "the extent to which the progress is sufficient to attain the goal by the end of the year." This information seems especially important to parents and teachers if there is a shared commitment to help all children learn to high standards set for all. Parents may see progress all year only to realize in June that the progress was not sufficient to meet the goal.

**3. Transition information in IEP.** The amendments clarify that the transition process for a student with a disability now begins at age 16 and is not merely a plan for transition. Parents should request that the student's IEP, when appropriate, include a statement of inter-agency responsibilities and any needed linkages since this language is no longer in the statute.

**4. IEP attendance and participation.** A new section allows IEP team members to be excused from attendance if their area is not being discussed. When this section is read with new provisions allowing alternate means of meeting participation (e.g. conference calls), consolidation of reevaluation meetings and other IEP meetings, and a pilot program authorizing up to 15 states to use multi-year IEPs, the combined effect is a revolution in the traditional IEP meeting. Some say these are positive changes. Others are concerned that these provisions will limit cross fertilization of ideas and undermine the interdisciplinary nature of IEP meetings (team members each bring areas or "disciplines" of expertise to the table).

While written parental consent is required before these actions can occur, parents may find that they are under considerable pressure to provide their consent. At least once a year the parents should be able to get all the members of their child's team in one room, all sharing ideas for the benefit of the child. The potential richness of these conversations can not be anticipated in written reports submitted by excused members and conference calls do not allow for the same flow of ideas. You never know which IEP team member will turn the tide of a meeting.

**5. Pilot program for multi-year IEPs.** The Secretary of Education is authorized to approve proposals from up to 15 states to allow local school districts to offer, with parental consent, a multi-year IEP, not to exceed 3 years. This option will limit parent participation in their child's education by not having a comprehensive annual IEP review, except in certain situations. Also, 3-year IEPs will contain multi-year goals which can be expected to be less specific and harder to measure than annual goals—especially when benchmarks and short-term objectives are no longer required for all but those students with the most significant cognitive disabilities. Another serious problem is that the required elements under IDEA for these multi-IEPs are not as inclusive as for annual IEPs. This is true with respect to statements on progress reports, accommodations, supplementary aids and services and more. While, the states may include these as required elements in the multi-year IEPs, IDEA does not mandate that they do so. Parents in these states will have to consent to the 3-year IEPs that must be reviewed at natural transition points by the IEP team. Therefore, it will be critical that parents are informed, knowledgeable and well prepared to deal with any pressure that may be put on them.

**6. Pilot program for paperwork reduction.** The Secretary of Education is authorized to grant waivers of statutory and regulatory requirements, for a period not to exceed 4 years, to 15 states proposing to reduce excessive paperwork and non-instructional time burdens. The Secretary is prohibited from waiving requirements related to civil rights or the right of a child to a free appropriate public education (FAPE). How this process is implemented is a matter of special concern to parents, who worry that many requirements in the IEP process which parents consider to be related to civil rights and FAPE, may be seen as contributors to the paperwork burden. Another significant concern is that "pilot" implies that this is the first step toward expanding these programs beyond the 15 states.

**7. IEP team transition.** Parents of a child transitioning from Part C services (early childhood) to part B services (school-age) can request an invitation to the initial IEP meeting be sent to representatives of the Part C system to assist with a smooth transition of services. This provision doesn't require a Part C representative to attend but it does encourage collaboration.

**8. Transfers between school districts.** Services comparable to those described in the IEP in effect before a child's transfer must be provided by the new school district. These services must continue until the previous IEP is adopted, or a new IEP is developed, adopted and implemented, in the case of a transfer in the same state or until a new IEP is developed, in the case of a transfer

outside the state. This new provision will help parents of transferring students know what they can expect from their new schools.

## **DUE PROCESS**

1. **Procedural safeguards notice.** The procedural safeguards notice will be distributed only once a year except that a copy will be distributed upon initial referral, when a parent makes a request for an evaluation, when a due process complaint has been filed or if a parent requests a copy. The notice will no longer be automatically distributed with the IEP team notice or upon reevaluation. This is only a problem if parents are unaware of their rights, including the right to request this notice if they need one.

2. **Statute of limitations.** Parents now have two years in which to exercise their due process rights after they knew or should have known that an IDEA violation has occurred. The interpretation of the language "should have known" will be critical.

3. **Due process complaint notice** Parents who feel their child's educational rights are being compromised must file a complaint with the school district (with a copy to the state) identifying the name and contact information of the child, describing the nature of the problem with supporting facts and a proposed resolution. A new provision provides that the school district shall file a response within 10 days unless the district within 15 days notifies the state hearing officer that it is challenging the sufficiency of the parent's due process complaint notice. The State hearing officer has 5 more days to make a finding. In addition to the obvious delay, of particular concern is that the complexity of filing for due process may have a chilling effect on parents.

4. **Resolution session.** Parents must go through a mandatory "resolution session" before due process. The school district will convene a meeting with the parents and relevant members of the IEP team within 15 days of when the school district receives the parent's due process complaint. The school district has 30 days from the time the complaint is filed to resolve the complaint to the satisfaction of the parents, after which a due process hearing can occur. This provision may encourage school systems to wait until a due process complaint is filed before trying to resolve issues. Attorney's fees are not reimbursed for work related to the resolution session.

5. **Attorney's fees.** Parent's attorneys may be responsible for paying the school system attorney's fees if a cause of action in a due process hearing or court action is determined to be frivolous, unreasonable, or without foundation. Parents may be responsible for the school system's attorney fees if a cause of action was presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. Obviously, parents should not file frivolous or improper causes of action, but it is important that school districts not use these changes in the law to intimidate parents. This could have a chilling effect on parents obtaining legal representation and filing valid complaints to improve their children's education.

6. **Qualifications for Hearing Officers.** A positive change is that there are now explicit qualification requirements for Hearing Officers.

## **DISCIPLINE**

1. **Stay put.** The right of a student with a disability to "stay put" in his/her current educational placement pending an appeal is eliminated for alleged violations of the school code that may result in a removal from the student's current educational placement for more than 10 days. Previously the law only denied "stay-put" rights to students with disabilities involved in drugs, weapons or other dangerous behavior or activity. The right to "stay put" while a parent challenges the manifestation determination or proposed placement is a critical element to ensuring a student's continued free appropriate public education in the least restrictive environment.

Moving back and forth between the current placement and an interim alternative educational setting during an appeal can have a significant negative impact on achievement for children who already have difficulty adjusting to transitions. Parents must remain vigilant and ensure that their children continue to be provided the educational programming and services they need to make progress toward meeting their IEP goals. If this progress is negatively affected, the school may recommend a change to a more restrictive setting for the future. In addition, for purposes of reporting Adequate Yearly Progress under the No Child Left Behind Act, individual schools do not have to count children who are transferred to alternative settings and are, therefore, not in the same school for the full academic year. This could create an incentive for disciplinary actions against students with disabilities.

**2. Services to be received in interim alternative educational setting.** A child is entitled to receive programming and services necessary to enable him or her to receive a free appropriate public education consistent with section 612(a)(1) during the period in which he/she is in an interim alternative education setting. Under IDEA 2004, the student must be provided services to enable him or her to continue to participate in the general education curriculum and to progress toward meeting the goals in the IEP. The new provision replaced language requiring that a child in an interim alternative educational setting receive services and modifications, including those described in the student's current IEP which will enable the child to meet the goals in the IEP. The change in language cannot be interpreted as diluting any of these services that are consistent with the definition of FAPE because a student with a disability must continue to receive FAPE during the period of removal from his/her current educational placement.

**3. Manifestation Determination Review.** Before IDEA 2004, the burden was on the school district to show that the behavior resulting in a disciplinary action was not a manifestation of the child's disability before being allowed to apply the same disciplinary procedures as they use for non-disabled children. The burden of proof for the manifestation determination review has now been shifted to the parents who have to prove that the behavior was caused by or had a direct and substantial relationship to the disability. The language requiring the IEP team to consider whether the disability impaired the child's ability to control or to understand the impact and consequences of the behavior has been deleted. The language that gave the school an incentive to address behavior appropriately by requiring the IEP team to consider whether the IEP was appropriate has also been deleted.

Because the amendments to IDEA make it easier for schools to remove children for non-dangerous, non-weapon, non-drug related behaviors, and place the burden on parents to prove the connection between behavior and disability, parents will need to pay careful attention to the behavioral needs of their child in developing the IEP. Even if the child has not previously been subjected to disciplinary exclusion, parents may need to anticipate, to consider and spell out any concerns they may have about their child's possible emotional and behavioral responses particularly when they are not provided the supports and services they may need.

**4. Special Circumstances.** Since 1997, IDEA had expressly authorized schools to unilaterally remove children to an interim alternative educational setting for as long as 45 days for offenses involving drugs and weapons—even if the behavior was a manifestation of the student's disability. In addition, a hearing officer could make the same decision if it was determined based on a preponderance of the evidence that keeping the child in his/her current placement was substantially likely to result in injury to the child or others. Although school authorities have always had the authority to respond to an emergency and to unilaterally remove any student with or without a disability who is causing serious bodily injury to another, now schools can also unilaterally remove children for 45 days for "inflicting serious bodily injury." This term is defined as involving 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.

The hearing officer in determining whether to remove a child because maintaining his/her current placement is substantially likely to result in injury to self or others is no longer required to consider

whether the school district's proposed change in placement is based on a preponderance of the evidence. In addition, the amended statute no longer requires the hearing officer to consider whether the school has made reasonable efforts to minimize the risk of harm, including the use of supplementary aids and services. These changes, to the degree they have the effect of punishing the child even if proper supports could have prevented the problem, arguably violate Section 504 of the Rehabilitation Act.

5. **45 day limit.** The 45 calendar day limit on the removal for these offenses has been changed to 45 school days, which is significantly longer [now 9 instead of 6 weeks of school at a critical time when students with disabilities are being held accountable for meeting high state standards.]

6. **Functional Behavioral Assessments.** The requirement for Functional Behavioral Assessments and Behavioral Intervention Plans are maintained in the discipline provisions

7. **Case-by-case determination.** A paragraph has been added to the discipline provisions, which states that school personnel can consider any unique circumstances on a case-by-case basis when determining whether to change the placement of a child with a disability who violates a school code of conduct. This is a good provision for parents to quote when they are having trouble proving that their child's behavior is a manifestation of the disability. It serves to remind the school personnel that common sense should prevail and all circumstances should be considered.

