

NAPAS

National Association of

Protection & Advocacy Systems

Brief Summary of Individuals with Disabilities Education Improvement Act of 2004 (IDEA 2004) with Current Law December 1, 2004

Here are a few of the changes that might be of interest to those representing students. The changes that will likely have the greatest impact on P&A work are found in sections 614, 615, and 616. A complete side by side comparing the two laws will be provided as soon as possible.

If you note any significant differences between how the language of the law is being interpreted by other organizations and by NAPAS, please share them with us. The new language is certainly not without the potential for multiple interpretations and it is always useful to know other's points of view.

These are summaries only and not verbatim statutory text. The statute itself may be accessed on Thomas (<http://thomas.loc.gov> -- HR 1350, Item 7)

Effective Date: Most provisions of Part B go into effect in July 2005. The exceptions are those provisions related to the definition of “highly qualified teacher” which will go into effect on the enactment date.

Sec 607 – Regulations

It appears that the power to issue regulations may be somewhat truncated. Sec. 607(a) The public comment period has been reduced from 90 to 75 days. Sec. 607(c).

Sec. 611(e)(3) Allows states to develop a “high cost fund” by reserving a portion of the funds reserved for state level activity. Money from this fund may be distributed to LEAs to pay for direct special education and related services identified in the IEP of a “high need child with a disability.”

Sec. 612(a)(1)(C) A state that provides early intervention services in accordance to Part C to children eligible for services under section 619 (ages 3-5) is not required to provide that child with FAPE. (FAPE is currently required for children served under sec. 619.)

Sec. 612 (a) (10) The section regarding services to children placed in private schools by their parents is greatly expanded and does give private schools more say in how the Part B funds allocated for private schools are spent.

Sec 613(a)(4)

LEAs may spend a portion of their IDEA funds in an expanded number of ways, including administrative case management (e.g. purchasing technology for record keeping), and “early intervening services” for students not IDEA eligible but who need additional academic and behavioral support.)

Section 614

Sec. 614(a)(1)(C)

Initial evaluations must be completed within 60 days of the receipt of parental consent, or per a time line determined by the state.

There is also a new provision regarding how consent for the initial evaluation may be obtained for ward of the state who does not reside with his or her parents. Sec 614(a)(1)(D)(iii).

Section 614(b)(6)

LEAs are not required to use the “severe discrepancy” standard to determine eligibility under the category of specific learning disability, but may use a process that determines whether the child responds to scientific, research- based intervention as part of the evaluation procedures.

Sec. 614(d)(1)(A)(I)(cc)

Benchmarks and short term objectives are preserved only for children who take the alternate assessment based on alternate standards. The text does clarify that annual goals are to include both academic and functional goals for all students, not just those that qualify for benchmarks and/or short term objectives.

Sec 614(d)(1)(A)(VIII)

Transition planning is to begin “not later than the first IEP to be in effect when the child is 16” instead of specifically at age 14.

Sec 614(d)(1)(C)

Members of the IEP team may be excused upon the consent of both parties if the subject matter of the IEP does not involve that member’s area of curriculum or services or, if it does, that member may submit information in writing in advance of the meeting. The parent’s consent to this must be in writing.

IEPs may also be amended in writing without reconvening the IEP after the annual IEP has been held. This provision does not appear to require the parent’s written consent.

Sec. 614(d)(3)(A)

Alternative means of meeting participation are allowed (e.g. conference calls) for IEP team meetings, placement meetings, mediation, resolution sessions and the administrative

aspects of due process hearings (e.g. status conferences), upon the agreement of the parties. Written consent is not required. Sec. 614(f)

Sec. 614(d)(2)(C)

There are new requirements regarding when IEPs must be in effect for students who transfer districts within the school year.

Sec 614(d)(5) The 3 year IEP is a pilot program of 15 states. On the individual student level, consent of the parent is required before the LEA may skip the annual IEP. The parent must provide informed consent, but it does not specify that written consent of the parent is required. Annual reviews must occur when this option is selected and IEPs must occur at “natural transition points” such as the transition from middle to high school.

Section 615

Sec. 615(b)(2)

Surrogates must be assigned not more than 30 days after the agency determines that one is needed. Also, the judge overseeing the case of a ward of the state may appoint a surrogate.

Sec 615(b)(6)(B)

There is a 2 year statute of limitations (SOL)(for either party) from the date that the complainant knew or should have known of the violation, unless the state has set a shorter SOL. There are exceptions to this timeline (e.g. the agency misrepresented or withheld information from the parent). Sec 615 (f)(3)(D) Information about the SOL must be included in the procedural safeguards notice.

Sec. 615(c)(2) Due Process Complaint Notice.

Once the notice has been filed, the non-complaining party must respond within 10 days in a manner that specifically addresses the issues in the complaint. If the non-complaining party feels the notice is insufficient, it may notify the hearing officer within 15 days of receipt of the complaint. The hearing officer then has 5 days to rule on the sufficiency. In some circumstances, the party will be allowed to amend the complaint.

Parties may not raise issues at hearing that were not addressed in the due process complaint notice, unless the parties agree. Sec. 615(f)(3)(B)

Sec. 615(e)

Mediation may be utilized for any matter, even when a due process complaint has not been filed. (Current law requires a complaint to be filed first). Mediation agreements are legally binding and enforceable in state or federal court. Sec. 615(e)(2)(F)

Sec. 615(f)(1)(B)

Resolution Session:

After a due process complaint has been filed, the LEA shall convene a meeting with the parents and relevant members of the IEP team who have specific knowledge of the facts

identified in the complaint for the purpose of resolving the complaint. A representative of the LEA with decision making authority must be included. The LEA may not bring a lawyer to the meeting unless the parents are also accompanied by a lawyer. The LEA then has 30 days to resolve the complaint. If this does not occur, the case may then go to hearing. If resolution is reached, the parties shall execute a legally binding agreement, enforceable in the same way as a mediation agreement. There is a 3 business day “cooling off” period, during which time either party may void the agreement. Parties may agree in writing to waive the meeting or to use mediation.

Note: This is not a “meeting” for the purposes of obtaining attorney fees, so if the parent wins, this time cannot be included in the prevailing party fee award. Sec. 615(i)(3)(D)(iii) Hence, parents will have to pay out of pocket for attorney representation at these meetings.

Sec. 615(f)(3)(A)(i)

New qualifications for hearing officers (e.g. “ must possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice”)

Sec 615(f)(3)(E)

The decision of the hearing officer must be restricted to substantive matters, except in cases where the procedural issues impeded the right to FAPE, significantly impeded the parent’s participation in the decisionmaking process, or caused a deprivation of educational benefits.

Sec. 615(i)(2)(B)

Appeals must be filed within 90 days of the date of the hearing officer’s decision, or a shorter time set by the State.

Sec. 615(i)(3)(B)

Rather than confuse the issue, I’ll include the actual text here: (*italicized text is new*)

“(3) JURISDICTION OF DISTRICT COURTS; ATTORNEYS' FEES-...

(B) AWARD OF ATTORNEYS' FEES-

(i) IN GENERAL- In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs--

(I) to a prevailing party who is the parent of a child with a disability;

(II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(ii) RULE OF CONSTRUCTION- Nothing in this subparagraph shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.

Discipline

(This is not an inclusive list of every change in the discipline section)

Sec 615(k)(1)(A) The import and meaning of the following phrase, which is placed at the very front of the section, is somewhat mysterious. Does it trump the remaining sections or grant districts “permission” not to punish students in the same manner as their non-disabled peers” or is it something else altogether?

“(A) CASE-BY-CASE DETERMINATION- School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.”

Sec 615(k)(1)(B)

The section which allows districts to remove students for 10 days now specifies that removals are for students “who violate[s] a code of student conduct”

Sec 615(k)(1)(D)(i) The standard for the services that must be provided to a student while removed has been reduced.

“...continue to participate in the general education curriculum, although in another setting, and *to progress* toward meeting the goals set out in the child's IEP...”

However, all students who are removed get services to prevent recurrence of the behavior, not just those removed under one of the “stay put exceptions” (guns, drugs etc.)

“ ... (ii) receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur”

Sec. 615(k)(1)(E)

The protections provided by the manifestation determination review (MDR) have also been reduced, apparently placing the burden of proof on the parent and removing a determination as to whether or not the IEP and placement were appropriate. Also, the entire IEP team is no longer required to be present at the MDR, only “relevant members.” In order for a manifestation to be found, the conduct must be a “direct result” of the LEA’s failure to implement the IEP or must be “caused by” or have a “direct or substantial relationship” to the disability.

The statute now specifies what must occur when the conduct was a manifestation. Sec. 615(k)(1)(F).

The “stay put exceptions” have been enlarged to include “serious bodily injury” (sec. 615(k)(1)(G)(iii)). The review of a student’s behavior that is “substantially likely to result in injury” by a hearing officer contains fewer protections than under current law. Sec 615(k)(3)(B)(ii)(II).

Sec. 615(k)(4)

If the conduct was determined not to be a manifestation, the student remains in the interim alternative educational setting (e.g. stays suspended) until the appeal takes place. The hearing on the appeal of the discipline decision must take place within 20 school dates of the request and a determination must be made within 10 school days after the hearing. This is a significant change in the law -- under current law, only certain conduct (guns, drugs, behavior substantially likely to result in injury) allowed the LEA to remove the child from the current placement until the appeal could be held.

Sec 615(k)(5)

The discipline protections for students not yet IDEA eligible are also reduced. For example, the teacher must have expressed “specific concerns about a pattern of behavior” in order to trigger the protections. Under current law, the teacher need only express “concern about the behavior or performance of the child” Presumably this also means that performance is no longer a valid trigger for the discipline protection.

Section 616

Monitoring and Enforcement

There is new system laid out in IDEA 2004 that directs how the Secretary (i.e. O.S.E.P.) must implement monitoring and enforcement of IDEA compliance by states. Current law does not specify how the Secretary must implement monitoring and enforcement, in fact the current law requirements in this area are quite sparse.

Under IDEA 2004, each state must complete a “state performance plan” that evaluates its efforts to implement the law and describes how it will improve implementation, including measurable targets. Sec 616(b) The relationship between this plan and other current state planning efforts is unclear. The plan must be approved by the Secretary. Sec. 616(c) The state shall report annually regarding its performance under the plan. Sec 616((b)(2)(C). If performance is not acceptable, OSEP must select from a hierarchy of potential enforcement actions. Sec. 615(e).

The Secretary must monitor states using quantifiable indicators in 3 specific priority areas and must require the states to do the same for their monitoring of LEAs. The areas are: FAPE in the LRE, state exercise of general supervisory authority (child find, use of resolution sessions, etc.), and disproportionate representation of racial and ethnic groups. Sec 616(a)(3).

If an LEA is not complying with Part B, including the targets in the state performance plan, the state may not allow it to reduce its maintenance of effort (the amount of local funds it spends on IDEA) for “any fiscal year.” Sec 616(f)

Sec 618

Data Collection

This is the section regarding data that states must submit to OSEP. The revisions are a noteworthy improvement over current law.

Sec. 618(a)(1)

Data previously collected must be disaggregated by gender and status as limited English proficient (LEP), in addition to the current categories (race, ethnicity and disability category). Discipline data must be collected for suspensions of one day or more (not just students removed to an IAES). Discipline data must be compared to discipline data regarding students without disabilities, and must also be disaggregated by race, ethnicity, gender, LEP status and disability category.

Data must be collected on the number of complaints filed and hearings held in the state, mediations (and resulting settlement agreements), discipline hearings (and resulting changes in placement). Discipline data with regard to racial disproportionality must also be collected.

Sec 618 (d)

In states that are determined to have a significant racial or ethnic disproportionality problem, the state must review identification and placement policies and procedures that may be causing the problem, and LEAs so identified must reserve the maximum amount of funds for early intervening services. They must also public report on the revision of any of the policies or procedures described above.

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