Key Changes in the Individuals with Disabilities Education Act (IDEA) 2004 Amendments

On December 23, 2004, the Individuals with Disabilities Education Improvement Act of 2004 (IDEA'04) was signed into law by President Bush. Under this Act, a free and appropriate public education (FAPE), in the least restrictive environment (LRE), while ensuring students have access to the general curriculum, continues to be the cornerstone of IDEA.

The goal of the IDEA 2004 amendments was to improve educational services to students with disabilities, with the focus on improving student performance. In addition, the reauthorization emphasized the alignment of IDEA with the No Child Left Behind Act (NCLB) and strengthening the Act's discipline provisions for children with disabilities, Individualized Education Programs, due process, services to children enrolled in private schools by their parents, secondary transitions, and Part C services.

IDEA & NCLB Alignment

Several changes were made in IDEA'04 to allow for better alignment with NCLB.

Highly Qualified Teacher

- Under IDEA a "Highly Qualified Teacher" (HQT) must meet the requirements in NCLB and, in addition, have full state certification in special education, have earned at minimum a bachelor's degree, and demonstrate knowledge of core subject matter taught in a regular classroom, resource room or another setting.
- Teachers were to be Highly Qualified by the end of the 2005-2006 school year (The U.S. Department of Education has granted a one year extension through the 2006-2007 school year for States to meet this requirement.).
- Special education teachers meeting IDEA's criteria are highly qualified under NCLB. Newly hired teachers may demonstrate competence in all core subject matters they teach by meeting the state's Highly Objective Uniform State Standard of Evaluation (HOUSSE) within 2 year of employment, if they are already HQT in math, language arts, or science.
- Special education teachers who teach core academics to children assessed with alternate achievement standards must demonstrate subject mastery on the level at which they instruct.
- Special education teachers of non-core academic subjects and those providing only consultation must have a minimum of a bachelor's degree and either full state certification as a special education teacher or a license to teach special education in that

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state and passed the state special education licensing exam. These teachers are also considered highly qualified if they have a minimum of a bachelor's degree and are actively working on a qualified alternative route to special education certification.

Performance Goals

- Performance goals are required to be defined as the same for **all** students.

Participation in Assessments

- All students with disabilities are required to be included in all district-wide and state-wide assessments, including those required by NCLB. Accommodations or alternate assessments, if appropriate as stated in the IEP, may be used.
- On April 9, 2007, the Department of Education finalized regulations for alternate assessments based on modified achievement standards. This is designed for students with persistent academic disabilities who are unable to achieve grade level proficiency when given high quality instruction. These regulations would allow a school district to exclude from regular assessments up to 2% of all students in the grades that are tested. These students would be required to be assessed at grade level against modified achievement standards using assessments based on these standards. This is in addition to existing regulatory authority that permits 1% of all students to be assessed against alternative achievement standards. Students covered under the 1% policy have to have significant cognitive disabilities. Collectively, these two authorities allow approximately 30% of students with disabilities to be assessed against alternative or modified achievement standards.

Discipline

Changes made to the discipline provisions of the Act have given schools flexibility when considering consequences for students with disabilities and students whom the school district knows may be eligible for IDEA services, but who violate the school's student conduct code. However, protections to ensure that children with disabilities are provided access to educational services for long-term suspension or expulsions remain.

- The incident is to be reviewed by school personnel on a case by case basis with consideration of any unique circumstances before any sanctions are applied.
- Students may be disciplined in the same manner as their mainstream peers if the removal from school is for up to 10 school days. Before a change of placement can occur, a manifestation determination must be conducted to determine if the behavior was a result of the student's disability or if the school failed to implement the student's IEP. A manifestation determination is to take place after a child is removed for 10 school days.
- Students removed for more than 10 school days must continue to have a free and appropriate public education (FAPE) provided.
- The standard for determining FAPE is that the student has to continue to "participate in the general curriculum" and make "progress toward meeting the goals set out in the child's Individualized Education Program (IEP)."

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- For situations involving serious bodily injury of others, an interim 45 school day placement in an alternative educational setting may now occur. This option can also be exercised in situations involving weapons or drugs.
- If a student is expelled, special education services must be continued.

Individual Education Program (IEP)

IDEA'04 made several changes to the required contents and development of the IEP.

- The IEP for a student who turns 16 must address newly-defined transition services—defined as a coordinated set of results-oriented transition activities for a student with a disability to become an independent adult, e.g., postsecondary education, employment, independent living and community participation. The '04 amendments removed the requirement to provide transition services at age 14.
- The IEP no longer needs to contain a statement of interagency responsibilities or linkages.
- Short term objectives are now only required for children taking alternate assessments aligned to alternate achievement standards.
- With parental agreement, IEP team members may be excused from the IEP meeting and the IEP meeting and evaluation summary meetings may be consolidated.

Specific Learning Disabilities

- IDEA 2004 permits school districts to identify a child who has a specific learning disability by whether such child responds to scientific research based interventions. This permissive authority allows school districts to use such a method instead of identifying children with learning disabilities solely by their IQ score.

Due Process

Due process refers to the rules and procedures concerning parental rights and the steps required for resolving IEP disagreements between school districts and families.

- Parents now have a two-year limit in which to exercise their due process rights after they knew or should have known that a violation occurred.
- Procedural safeguard notices only need to be given one time a year, and in certain situations: when requested by a parent, upon initial filing of a complaint, or when there is a parental request for an evaluation or an initial referral for evaluation.
- A mandatory resolution session, in which the basis of the due process complaint is discussed between parties, must occur before parents may exercise their due process rights.
- Parents' attorneys may now be responsible for paying the school system attorney fees if a cause of action in a due process hearing or court action is determined to be frivolous, unreasonable, or without foundation.

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- Parents may also have to pay for these fees if the cause of action was for any improper purpose, such as to harass, or to cause unnecessary delay or needless increase in the cost of litigation.

Private School Enrollment by Parents

The provisions concerning the enrollment of students in private schools by their parents were also modified. Under previous law, school districts were required to conduct child-find, i.e., systematically identify, locate and evaluate students who may be eligible for special education and provide special education services to students found eligible for them, within their district boundaries, regardless of where a child attended school. Under IDEA 2004, Child Find activities and special education services are now provided by the school district in which the private school is located, **not** by the district in which the child resides.

Part C

Part C provides early intervention services to infants and toddlers less than three years of age. To the extent possible, services are to take place in the same environments as their non-disabled peers.

- IDEA '04 established a "Seamless System" for infants, toddlers, and preschoolers with disabilities. This new option added to Part C creates flexibility that gives families the option of continuing early intervention services from age 3 through enrollment in kindergarten instead of starting Part B preschool services.
- States are now required to make referrals for early intervention services for all children under age 3 who are involved in a substantiated case of child abuse or neglect; or are identified as being affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure.

Pilot projects:

- The Paperwork Waiver Pilot allows 15 states to have waivers for up to 4 years, which allow states to reduce "excessive" paperwork and "non-instructional" time burdens.
- The Multi-year IEP project permits fifteen states to offer, with parental consent, up to a 3-year IEP, rather than the standard 1-year IEP. A 3-year IEP will contain multi-year goals.

Waiting Final Regulations from the Department of Education:

- Comprehensive Plan for National Activities under Subparts 2 and 3, Part D. The plan is to enhance the provision of early intervention services, educational services, related services and transitional services to children with disabilities under parts B and C of IDEA with the goal of improving results for these students.

Recent Court Decisions of Note:

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- *Arlington Central School District Board of Education v. Pearl and Theodore Murphy (2006)* – This ruling prevents parents who prevail from recovering expert witness fees.
- *Schaffer v. Weast (2005)* – Ruled that the burden of proof falls on the party initiating the hearing, which, in IDEA litigation, is typically a parent.
- *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources (2001)* – While not an IDEA case, application of this ruling requires that parents can not be reimbursed for attorney fees when they settle their cases and can only obtain such awards when they get a formal judgment.

The *Murphy* and *Schaffer* rulings make it much more difficult and expensive, and often impossible for parents to exercise their IDEA due process hearing rights when they disagree with a school district's decisions regarding their children. The due process system is complex and can be hard for parents to navigate without legal help while questions concerning children's educational needs are often technical and require expert testimony. While these factors alone make it difficult for parents to carry the burden placed upon them by *Schaffer*, the burden of proof becomes more difficult for parents to carry with the *Murphy* ruling which disallows reimbursement of expert witness fees to prevailing plaintiffs in IDEA litigation. Requiring parents to undertake the expense of experts to show that the school district was wrong effectively strips the parents of the right to a "free" appropriate public education for their child. Parents who lack the funds to pay for experts are unlikely to be able to exercise their right to a hearing and prove that the education offered by their school district is not appropriate. School districts, by way of comparison, use their employees (teachers, psychologist, speech therapists, etc.) as experts and/or use public funds to pay for experts. These factors combine to make it challenging for most parents to exercise their due process rights.

Schaffer is also inconsistent with legal principles that sometimes place the burden on the party with an advantage in resources needed to make a case. Schools usually have in depth expertise, to which courts routinely defer greater resources, and greater access to information than parents of children with disabilities. Placing the burden on parents also seems inconsistent with IDEA which places an affirmative obligation on the school system to provide FAPE. Requiring parents to prove that FAPE was not provided also requires them to prove the negative.

Parents' ability to collect attorneys' fees has been made virtually unattainable because of application of *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*. Courts are maintaining that there must be a judicial or administrative order whereby the parents obtain relief for their children in order for the parents to be able to recover attorney's fees. Parents cannot recover fees when there is a settlement agreement in which there is not an order by an administrative hearing officer or state or federal judge. For the large number of parents who lack the funds to pay lawyers, attorneys are increasingly unwilling to take their case because they know that they will not get paid if the school district settles at the last minute, or in any event, after many hours of preparation. Courts generally favor settlement out of court. This application may actually encourage lawyers to litigate rather than to take a settlement offer. IDEA supports parent participation and cooperation with the school systems; application of *Buckhannon* to IDEA cases has become an obstacle to parents' access to the courts to ensure that their children receive the benefits to which they are entitled.

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