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*The Individuals with Disabilities Education Act: Final Part
B Regulations*

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December 11, 2008

Abstract. The Individuals with Disabilities Education Act (IDEA) provides federal funding for the education of children with disabilities and requires, as a condition for the receipt of such funds, the provision of a free appropriate public education (FAPE). The statute also contains detailed due process provisions to ensure the provision of FAPE. On December 1, 2008, the Department of Education (ED) issued a final regulation to "clarify and strengthen current regulations" promulgated under the Individuals with Disabilities Education Act. The areas covered by the regulation include (1) parental revocation of consent after consenting to the initial provision of services; (2) a state's or local educational agency's (LEA's) obligation to make positive efforts to employ qualified individuals with disabilities; (3) representation of parents by non-attorneys in due process hearings; (4) state monitoring, technical assistance, and enforcement of the Part B program; and (5) the allocation of funds, under Sections 611 and 619 of the act, to LEAs that are not serving any children with disabilities. The regulations take effect on December 31, 2008. This report will briefly discuss the issues raised by these changes.

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Summary

The Individuals with Disabilities Education Act (IDEA) provides federal funding for the education of children with disabilities and requires, as a condition for the receipt of such funds, the provision of a free appropriate public education (FAPE). The statute also contains detailed due process provisions to ensure the provision of FAPE. On December 1, 2008, the Department of Education (ED) issued a final regulation to “clarify and strengthen current regulations” promulgated under the Individuals with Disabilities Education Act. The areas covered by the regulation include (1) parental revocation of consent after consenting to the initial provision of services; (2) a state’s or local educational agency’s (LEA’s) obligation to make positive efforts to employ qualified individuals with disabilities; (3) representation of parents by non-attorneys in due process hearings; (4) state monitoring, technical assistance, and enforcement of the Part B program; and (5) the allocation of funds, under Sections 611 and 619 of the act, to LEAs that are not serving any children with disabilities. The regulations take effect on December 31, 2008. This report will briefly discuss the issues raised by these changes.

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Introduction

The Individuals with Disabilities Education Act (IDEA)¹ provides federal funding for the education of children with disabilities and requires, as a condition for the receipt of such funds, the provision of a free appropriate public education (FAPE). The statute also contains detailed due process provisions to ensure the provision of FAPE. On December 1, 2008, the Department of Education (ED) issued a final regulation to “clarify and strengthen current regulations” promulgated under the Individuals with Disabilities Education Act.² The areas covered by the regulation include (1) parental revocation of consent after consenting to the initial provision of services; (2) a state’s or local educational agency’s (LEA’s) obligation to make positive efforts to employ qualified individuals with disabilities; (3) representation of parents by non-attorneys in due process hearings; (4) state monitoring, technical assistance, and enforcement of the Part B program; and (5) the allocation of funds, under Sections 611 and 619 of the act, to LEAs that are not serving any children with disabilities. The regulations take effect on December 31, 2008. This report will briefly discuss the issues raised by these changes.³

Parental Revocation of Consent

IDEA currently contains statutory provisions requiring that parental consent be obtained prior to providing special education or related services to a child with a disability.⁴ However, the statute does not specifically address the issue of what responsibilities the LEA has when a child has been receiving special education services and a parent wishes to revoke consent for such services. Previously, ED had interpreted the statute and regulations to prohibit the unilateral withdrawal of a child from special education in most circumstances.⁵

The new regulations reverse this interpretation to allow parents to unilaterally withdraw their child from the receipt of special education services,⁶ but require that the revocation be in writing.⁷ The Department described the rationale for the new provision as a continuation of the parents’ right to consent to services. “Allowing parents to revoke consent for the continued provision of special education and related services at any time is consistent with the IDEA’s emphasis on the role of parents in protecting their child’s rights and the Department’s goal of enhancing parent involvement and choice in their child’s education.”⁸ The regulations do not allow a LEA to use mediation or due process procedures to override a parent’s decision to refuse to consent to further

¹ 20 U.S.C. §1400 et seq.

² 73 FED. REG. 73006 (Dec. 1, 2008).

³ For a discussion of IDEA generally see CRS Report RS22590, *The Individuals with Disabilities Education Act (IDEA): Overview and Selected Issues*, by Richard N. Apling and Nancy Lee Jones. For a discussion of the current IDEA regulations see CRS Report RL33649, *The Individuals with Disabilities Education Act (IDEA): Final Regulations for P.L. 108-446*, by Richard N. Apling and Nancy Lee Jones.

⁴ 20 U.S.C. §1414(a)(1)(D).

⁵ 73 FED. REG. 27691 (May 13, 2008).

⁶ 34 C.F.R. §300.9(c)(3); 73 FED. REG. 73027 (Dec. 1, 2008).

⁷ *Id.*

⁸ 73 FED. REG. 73009 (Dec. 1, 2008).

services.⁹ Under the regulations, the LEA will not be considered in violation of the FAPE requirement if the child was not provided with special education or related services because of the parent's revocation of consent.¹⁰ In addition, the regulations specifically provide that if the parents revoke consent, the LEA is not required to amend the child's records to remove references to the child's receipt of special education services.¹¹ ED described the rationale for not requiring changes in the child's records by observing that "[a] parent's revocation of consent is not retroactive...."¹²

The new regulations allowing for parental revocation of consent for IDEA services have generally been supported by parents' groups.¹³ One parent advocate has observed that allowing parental revocation of consent may "prompt districts to heed parents' requests for inclusiveness in the face of pressures to pull children out."¹⁴ However, other commentators have seen the new approach as "undermining the team approach to decision-making."¹⁵ In addition, a parent's revocation of consent for special education may affect how the child is included for accountability purposes under the No Child Left Behind Act (NCLBA). ED addressed this issue in its comments on the regulations noting that a state may include a child whose parents revoke consent for special education in the special education subgroup of purposes of calculating the Annual Yearly Progress (AYP) for two years following parental revocation of consent.¹⁶ However, although ED does not expect the revision to affect AYP under the NCLBA, one commentator has argued that there may be more of an effect than expected since if a student needed special education services, a student's scores may be weaker on state tests without those services.¹⁷

The regulations allowing parental revocation of consent for IDEA services also create some uncertainties regarding the child's coverage under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA). Several federal statutes, notably the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act,¹⁸ and the Americans with Disabilities Act (ADA),¹⁹ address the rights of individuals with disabilities to education. Some children who do not receive special education services under IDEA may receive them under Section 504 and the ADA.²⁰ Several commenters on the regulations raised issues regarding whether Section 504 and ADA protections would continue to apply to a student when a parent revokes consent for IDEA services. Commenters also noted that ED had previously stated that, under Section 504, children with disabilities may not be disciplined for behavior that is a manifestation of their disabilities if that disciplinary action constitutes a change of placement, and

⁹ 34 C.F.R. §300.300(b)(4); 73 FED. REG. 73027 (Dec. 1, 2008).

¹⁰ 34 C.F.R. §300.300(b)(4)(iii); 73 FED. REG. 73027 (Dec. 1, 2008).

¹¹ 34 C.F.R. §300.9; 73 FED. REG. 73027 (Dec. 1, 2008).

¹² 73 FED. REG. 73007 (Dec. 1, 2008).

¹³ Mark W. Sherman, "ED Releases Amended IDEA Part B Regulations," 41 EDUCATION DAILY (December 2, 2008).

¹⁴ Mark W. Sherman, "Right to Consent May Lead to Greater Inclusiveness," 41 EDUCATION DAILY (December 4, 2008).

¹⁵ *Id.*

¹⁶ 73 FED. REG. 73011 (Dec. 1, 2008).

¹⁷ Kim Riley, "Alignment Continues for IDEA, NCLB," 41 EDUCATION DAILY (December 4, 2008).

¹⁸ 29 U.S.C. §794.

¹⁹ 42 U.S.C. §§12101 et seq.

²⁰ For a discussion of Section 504 and the ADA with regard to children with disabilities in K-12 schools see <http://www.ed.gov/about/offices/list/ocr/504faq.html>.

asked how that interpretation affects students whose parents have revoked consent for IDEA services. The Department did not provide guidance on these issues, stating only that “[t]hese final regulations implement provisions of the IDEA only. They do not attempt to address any overlap between the protections and requirements of the IDEA, and those of Section 504 and the ADA.”²¹

Employment of Qualified Individuals with Disabilities

The statutory language of IDEA abrogates state sovereign immunity and requires that the Secretary of Education ensure that each recipient of assistance under IDEA make positive efforts to employ, and advance in employment, qualified individuals with disabilities.²² The new regulations amend the regulatory section on sovereign immunity to add a new section requiring that recipients of assistance under IDEA must “make positive efforts to employ, and advance in employment, qualified individuals with disabilities in programs assisted under Part B of IDEA.”²³

Representation by Non-Attorneys in Due Process Hearings

One of the changes in the regulations relates to the use of lay advocates. Currently, IDEA provides that any party to a hearing under Part B of IDEA has “the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities.”²⁴ However, neither the act nor previous regulations addressed the issue of whether individuals with special knowledge, but who are not attorneys, may represent parties at due process hearings. In a 1981 letter from Theodore Sky, acting general counsel of the Department of Education, to the Honorable Frank B. Brouillet, the Department had previously interpreted Section 615(h) of the act and implementing regulations as allowing both attorneys and non-attorneys to perform the same functions at due process hearings.²⁵ However, ED specifically rejected this previous interpretation.

In 2000, a decision by the Delaware Supreme Court in *In the Matter of Arons*²⁶ held that a lay advocate who represented families of children with disabilities in due process hearings had engaged in the unauthorized practice of law. A 2006 survey found that 10 states, like Delaware, prohibit lay advocates from representing parents, 12 states permit lay advocates, 21 states have no official policy, and 8 states leave the matter to the hearing officer.²⁷ This survey also noted a shortage of “readily affordable attorneys” to represent parents, and that the “availability of

²¹ 73 FED. REG. 73013 (Dec. 1, 2008).

²² 20 U.S.C. §§1403, 1405.

²³ 34 C.F.R. §300.177; 73 FED. REG. 73027 (Dec. 1, 2008).

²⁴ 20 U.S.C. §1415(h).

²⁵ 73 FED. REG. 73019 (Dec. 1, 2008).

²⁶ 756 A.2d 867 (Sup.Ct. Del. 2000); cert. denied, 532 U.S. 1065 (2001).

²⁷ Perry A. Zirkel, “Lay Advocates and Parent Experts under the IDEA,” 217 ED. LAW REP. 19 (May 3, 2007). The jurisdictions surveyed include the District of Columbia.

specialized lay advocates has not been nearly sufficient to close the gap.”²⁸ The issue regarding representation by lay advocates had prompted attempts to add statutory language authorizing lay advocates during the last IDEA reauthorization (culminating in P.L. 108-446), but language in the House bill (H.R. 1350, 108th Congress) was deleted in conference.²⁹ The regulations change the previous interpretation by ED which allowed the use of lay advocates at due process hearings. The regulations allow the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities, but add an exception stating that “whether parents have the right to be represented by non-attorneys at due process hearings is determined under State law.”³⁰ The Department stated that “[g]iven that the Act is silent regarding the representational role of non-attorneys in IDEA due process hearings, the issue of whether non-attorneys may ‘represent’ parties to a due process hearing is a matter that is left, by the statute, to each State to decide.”³¹

Commenters on the regulations argued that the rule on non-attorney advocates “would negatively affect future cases as parents unable to afford attorneys’ fees, or unable to find an attorney knowledgeable about special education law, will be faced with the choice of either representing themselves or foregoing a due process hearing.”³² School officials and parents’ groups have both predicted activity in the states if the proposed rule becomes final.³³ The issue may come up at the federal level again when Congress begins the reauthorization process for IDEA.³⁴

State Monitoring, Technical Assistance, and Enforcement

Section 616 of IDEA³⁵ provides for federal and state monitoring and enforcement of state implementation of Part B of IDEA. The new regulations clarify that a state must make determinations annually about the performance of each LEA in the state. The specific enforcement mechanisms that a state must use are also identified.³⁶ The regulations also require that LEA noncompliance be corrected “as soon as possible, and in no case later than one year after the state’s identification of the noncompliance.”³⁷

Section 616(b)(2)(C)(ii)(I) of IDEA requires a state to report annually to the public on the performance of each LEA and to make the state’s performance plan available through public

²⁸ *Id.*

²⁹ H.Rept. 108-779, at 218, note 227. The use of lay advocates was made more problematic by the Supreme Court’s decision in *Arlington Central School District v. Murphy*, 548 U.S. 291 (2006), which held that IDEA does not authorize prevailing parents to recover fees they have paid to experts.

³⁰ 34 C.F.R. §300.512(a)(1); 73 FED. REG. 73027 (Dec. 1, 2008).

³¹ 73 FED. REG. 73017 (Dec. 1, 2008).

³² 73 FED. REG. 73018 (Dec. 1, 2008).

³³ Mark W. Sherman, “State Battles Foreseen Over Non-Attorney Representation,” 41 EDUCATION DAILY 5 (May 20, 2008).

³⁴ Legal Watch, “Non-Attorney Rule Prompts Strong Reactions on Both Sides,” 41 EDUCATION DAILY 5 (May 20, 2008).

³⁵ 20 U.S.C. § 1416.

³⁶ 34 C.F.R. §300.600(a); 73 FED. REG. 73027 (Dec. 1, 2008).

³⁷ 34 C.F.R. §300.600(e); 73 FED. REG. 73027 (Dec. 1, 2008).

means, including posting on the website of the state educational agency.³⁸ However, IDEA does not specify when the state must provide this report. The proposed regulations would have required this public report “no later than 60 days following the State’s submission of its annual performance report to the Secretary....”³⁹ Several commenters requested that this public reporting timeline be changed. ED agreed “with the commenters who suggested that an extended timeline would allow for more accurate analysis of LEA data, thereby improving the quality of information reported to the public, and ultimately contributing to improved outcomes for children with disabilities and their families.”⁴⁰ Therefore, ED revised the proposed regulations to require the report “as soon as practicable but no later than 120 days following the State’s submission of its annual performance report to the Secretary....”⁴¹

In addition, although IDEA requires the posting of the state’s performance plan, it does not specify whether other materials, such as the annual report on each LEA must also be made available. The new regulations require the state’s performance plan, the state’s annual performance report (APR), and the state’s annual reports on the performance of each LEA to be made available through public means.⁴²

Section 616(e)(7) of IDEA requires states that have received a determination from the Secretary that the state needs intervention to make such information available to the public.⁴³ However, the statute does not specify when this information is to be made available. The new regulations clarify the circumstances under which public notice is required by requiring public notice “whenever a State receives notice that the Secretary is proposing to take or is taking an enforcement action....”⁴⁴

The Allocation of Funds to LEAs That Are Not Serving Any Children with Disabilities⁴⁵

IDEA currently contains statutory provisions requiring states to distribute IDEA Part B funds not reserved for state activities to local education agencies (LEAs), including public charter schools that operate as LEAs.⁴⁶ States first allocate a base amount to each LEA based on its FY1999 grant amount. Then, 85% of the remainder is allocated based on public and private school enrollment within the LEA compared to all such enrollment in the state and 15% of the remainder is based on the number of children living in poverty compared to the number in all LEAs.

³⁸ 20 U.S.C. § 1416(b)(2)(C)(ii)(I).

³⁹ Proposed 34 C.F.R. § 300.602(b)(1)(A), 73 FED. REG. 27699 (May 13, 2008).

⁴⁰ 73 FED. REG. 73022 (Dec. 1, 2008).

⁴¹ 34 C.F.R. §300.602(b)(1)(i)(A); 73 FED. REG. 73027 (Dec. 1, 2008).

⁴² 34 C.F.R. §300.602(b)(1)(i)(B); 73 FED. REG. 73027 – 73028 (Dec. 1, 2008).

⁴³ 20 C.F.R. § 1416(e)(7).

⁴⁴ 34 C.F.R. §300.606; 73 FED. REG. 73028 (Dec. 1, 2008).

⁴⁵ This discussion concerns IDEA Section 611, which pertains mainly to the education of school-aged children. The proposed regulations contain similar provisions relating to Section 619, which pertains to the education of preschool children.

⁴⁶ 20. U.S.C. §1416 (f)(1). In addition, states must comply with the general requirements on allocating funds to charter schools in subpart H of 34 CFR part 76.

The Department of Education’s (ED) Office of Inspector General (OIG) found that neither that statute nor the IDEA regulations addresses whether a state is required to allocate funds to a charter school in its first year of operation if the school has no students with disabilities enrolled.⁴⁷ The new regulations clarify that states are required to allocate some funds to LEAs, including public charter schools that operate as LEAs, even if an LEA is not serving any children with disabilities.⁴⁸ The rationale for this new rule is that allocating funds to all LEAs “will ensure that LEAs have Part B funds available if they are needed to conduct child find activities [i.e., identifying and evaluating children in need of special education] or to serve children with disabilities who subsequently enroll or are identified during the year.”⁴⁹

The OIG also found that neither the statute nor the IDEA regulations addresses whether a charter school LEA that received a base payment of zero in its first year of operation because it was serving no children with disabilities and subsequently provided special education to children with disabilities is entitled to a base payment in subsequent years if it does enroll students with disabilities.⁵⁰ The new regulations require that a base payment adjustment be made for these LEAs, including a public charter school that operates as an LEA, for the fiscal year after the first annual child count in which the LEA reports that it is serving any children with disabilities.⁵¹ The state will be required to divide the base allocation for the LEAs that would have been responsible for serving children with disabilities now being served by the new LEA, among the new LEA and affected LEAs based on the relative numbers of children with disabilities currently provided special education by each of the LEAs.⁵² Finally, the regulations modify the procedures for the reallocation of LEA funds.⁵³

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⁴⁷ Office of Inspector General, U.S. Department of Education, “Charter School’s Access to Title I and IDEA Part B Funds in the State of Arizona.” Final Audit Report, ED_OIG/A09-D0033, August 2004, p.17. Hereafter: cited as Office of Inspector General, *Charter Schools*.

⁴⁸ This requirement will be effective with funds that become available on July 1, 2009. 34 C.F.R. §300.705(a); 73 FED. REG. 73028 (Dec. 1, 2008).

⁴⁹ 73 FED. REG. 73024 (Dec.1, 2008).

⁵⁰ Office of Inspector General, *Charter Schools*, p. 17.

⁵¹ This requirement will be effective with funds that become available on July 1, 2009. 34 C.F.R. §300.705 (b)(2)(iv); 73 FED. REG. 73028 (Dec. 1, 2008).

⁵² 34 C.F.R. §300.705 (b)(2)(iv); 73 FED. REG. 73028 (Dec. 1, 2008). This method for making the base payment adjustment is the same as that required in current regulations (34 C.F.R. §300.705.(b)(2)(i)) for any new LEA.

⁵³ 34 C.F.R. §300.705 (c); 73 FED. REG. 73028 (Dec. 1, 2008).