

## **CHAPTER 4**

# **An Overview of IDEA 2004**

The Individuals with Disabilities Education Act of 2004 includes significant changes from the previous authorization in 1997. This chapter provides an overview of the law, how the law is organized, and new requirements in IDEA 2004.

### **Accountability, Improved Outcomes, Research Based Instruction**

When Congress reauthorized the law, it focused on accountability and improved outcomes by bringing IDEA 2004 into conformity with the No Child Left Behind Act (NCLB).

IDEA 2004 requires schools to use “proven methods of teaching and learning” based on “replicable research.” Many schools continue to use educational methods that are not research-based. Pressure from litigation and No Child Left Behind requirements are forcing school districts to adopt research-based methods of teaching. IDEA 2004 also includes new requirements for early intervening services and highly qualified special education teachers.

The Individuals with Disabilities Education Act of 2004 is divided into five parts:

Part A – General Provisions (Sections 1400 – 1409)

Part B – Assistance for Education of All Children with Disabilities (Sections 1411 – 1419)

Part C – Infants and Toddlers with Disabilities (Sections 1431 – 1444)

Part D – National Activities to Improve Education of Children with Disabilities (Sections 1450 – 1482)

Part E – National Center for Special Education Research (Section 9567)

Parents, advocates, attorneys, and educators will refer most often to the following sections:

Section 1400 – Findings and Purposes

Section 1401 – Definitions

Section 1412 – State Responsibility (the Catch-all Section)

Section 1414 – Evaluations, Eligibility, Individual Education Programs, Educational Placements

Section 1415 – Procedural Safeguards

### **Part A – General Provisions**

Part A of the Individuals with Disabilities Education Act of 2004 includes Sections 1400 through Section 1409 of Title 20 of the United States Code (U. S. C.). Section 1400 describes the Findings and Purposes of the law. The legal definitions in alphabetical order are in Section 1401. Section 1403 advises that states are not immune from suit if they violate IDEA. Section 1408 is a new section about paperwork reduction.

### **Section 1400: Findings & Purposes**

The most important section in the Individuals with Disabilities Education Act is Section 1400 which describes the Findings and Purposes of the law.

## Findings

The history and findings that led Congress to pass the federal special education law that is now the Individuals with Disabilities Education Improvement Act (IDEA 2004) are in Section 1400(c). When Congress enacted the Education for All Handicapped Children Act (Public Law 94-142) in 1975, fewer than half of all children with disabilities were receiving an appropriate education. More than one million children were excluded from school.<sup>1</sup> Initially, the law focused on ensuring that children had *access* to an education and due process of law.

In Findings of IDEA, Congress described obstacles to implementation of the law:

. . . implementation of this title has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.<sup>2</sup>

Congress reported that “over 30 years of research and experience” demonstrated that special education would be more effective by:

. . . having high expectations for such children and ensuring their access to the general education curriculum in regular classrooms, to the maximum extent possible . . . to meet the challenging expectations that have been established for all children; and be prepared to lead productive and independent lives to the maximum extent possible.<sup>3</sup>

When Congress reauthorized the Individuals with Disabilities Education Act in 2004, they added new language to Findings about meeting the “developmental goals” and “challenging expectations that have been established for nondisabled children” so children will “be prepared to lead productive and independent adult lives.”<sup>4</sup>

## Purposes

The most important statute in IDEA is Purposes in Section 1400(d). The main purposes are:

. . . to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to **meet their unique needs and prepare them for further education, employment and independent living**” and “to ensure that the **rights of children with disabilities and parents of such children are protected** . . .<sup>5</sup>

Purposes is the mission statement of IDEA. When you are developing IEPs, use this mission statement as your long-term goal. If you are confused about a term or section in the law, go back and re-read Section 1400, especially Purposes in Section 1400(d).

## Section 1401: Definitions

Section 1401 of IDEA 2004 includes thirty-six legal definitions. Read these definitions carefully, especially the definitions of child with a disability, free appropriate public education, highly qualified teacher, special education, and transition services (below). Six new definitions were added to IDEA 2004: core academic subjects, highly qualified teacher, homeless children, limited English proficient, universal design, and ward of the state.

### *Child with a Disability*

If you are a parent, the most important definition is likely to be “child with a disability.”<sup>6</sup> Your child’s classification as a “child with a disability” determines whether your child is eligible for special education and related services under the law.

1 20 U. S. C. § 1400(c)(2)

2 20 U. S. C. § 1400(c)(4)

3 20 U. S. C. § 1400(c)(5)

4 20 U. S. C. § 1400(c)(4)(A)

5 20 U. S. C. § 1400(d)(1)

6 20 U. S. C. § 1401(3)

A child with a disability is *not* automatically eligible for special education and related services under IDEA. The key phrase is “who, by reason thereof, *needs special education and related services.*” Does the child’s disability adversely affect educational performance? To be eligible for a free, appropriate public education under the IDEA, the child must meet both criteria.

If a child has a disability but does not need “special education and related services,” the child will not be eligible under IDEA but may be eligible for protections under Section 504 of the Rehabilitation Act.

### ***Free Appropriate Public Education (FAPE)***

The definition of a “free appropriate public education”<sup>7</sup> is special education and related services that are provided at public expense, meet state standards, are appropriate, and are provided in conformity with an IEP. Because the definition is vague, the term has been litigated extensively since the law was enacted. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the U. S. Supreme Court concluded that the child with a disability is not entitled to the “best” education, nor to an education that maximizes the child’s potential.<sup>8</sup>

### ***Highly Qualified***

The requirements for “highly qualified” special education teachers are new and bring IDEA into conformity with the No Child Left Behind Act (NCLB). Special education teachers who teach core academic subjects must meet the highly qualified teacher requirements in NCLB and must demonstrate competence in the subjects they teach. Special educators who do not provide instruction in core academic subjects are not required to meet the highly qualified teacher requirements.<sup>9</sup>

The full definition of “highly qualified teacher” is in Title IX of NCLB at Section 7801(23) and is also referenced in Section 6319 of NCLB.<sup>10</sup>

### ***Special Education***

The law defines “special education” as “specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability . . . .” Special education encompasses a range of services and may include one-on-one tutoring, intensive academic remediation, services in the general education classroom, and 40-hour Applied Behavioral Analysis (ABA) programs. Special education is provided in different settings, including the child’s home.<sup>11</sup>

### ***Specific Learning Disability***

Congress did not change the definition of “specific learning disability”<sup>12</sup> but did change the requirements for evaluations of children who may have specific learning disabilities. Schools “shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability . . . .” to find a child eligible for special education services as a child with a specific learning disability.<sup>13</sup>

### ***Transition Services***

The definition of “transition services” was changed to emphasize that transition is “a results-oriented process” to improve “the academic and functional achievement of the child with a disability.” The goal of transition

7 20 U. S. C. § 1401(9)

8 The full text of the *Rowley* decision is in Chapter 12.

9 20 U. S. C. § 1401(10)

10 For No Child Left Behind definitions, see the Glossary of Terms in *Wrightslaw: No Child Left Behind*.

11 20 U. S. C. § 1401(29)

12 20 U. S. C. § 1401(30)

13 20 U. S. C. § 1414(b)(6)

is to facilitate the child’s transition from school to employment and further education. Transition services must be based on “the individual child’s needs, taking into account the child’s strengths, preferences, and interests.”<sup>14</sup>

## **Part B – Assistance for Education of All Children with Disabilities**

Part B governs special education and related services for children with disabilities between the ages of 3 and 21. For most readers, the most important statutes in Part B are Section 1412, Section 1414, and Section 1415.

Section 1412 includes child find, least restrictive environment, unilateral placements, reimbursement, and state and district assessments. Section 1414 describes requirements for initial evaluations, parental consent, re-evaluations, eligibility, IEPs, and educational placements.

Section 1415 describes the procedural safeguards designed to protect the rights of children and their parents. These safeguards include the right to examine educational records and obtain an independent educational evaluation, and the legal requirements for prior written notice, procedural safeguard notice, due process complaint notice, due process hearings, resolution sessions, mediation, attorney’s fees, and discipline.

### **Section 1412: State Eligibility (“Catch-All Statute”)**

Section 1412 about State Eligibility is often called the “Catch-All” statute because it includes such diverse topics: child find, least restrictive environment, transition to preschool programs, equitable services for children in private schools, unilateral placements in private programs, tuition reimbursement, and new requirements about participation in assessments, accommodations guidelines, and alternate assessments. Although Extended School Year (ESY) is not cited in the IDEA statute, the special education regulations that interpret Section 1412 describe and clarify Extended School Year.<sup>15</sup>

### ***Free Appropriate Public Education (FAPE)***

To receive federal funds, states must provide assurances to the U. S. Department of Education that they have policies and procedures in place to ensure that all children with disabilities receive a free appropriate public education. The right to a free appropriate public education extends to children with disabilities who have been suspended or expelled from school.<sup>16</sup> To remedy problems with evaluations that led to over-representation of minority children in special education, evaluations must be administered in the child’s native language or mode of communication and “no single procedure shall be the sole criterion” for eligibility.<sup>17</sup>

### ***Child Find***

Child find requires school districts to identify, locate, and evaluate *all* children with disabilities, including children who are home schooled, homeless, wards of the state, and children who attend private schools and determine which children are and are not receiving special education and related services.<sup>18</sup>

If a child has a disability and is eligible for special education services, the school does not have to give the child a “label” before providing services.<sup>19</sup> School districts must report data about the number of children who are evaluated, found eligible and provided services. These requirements apply to children who attend private and religious schools in the district.<sup>20</sup>

### ***Children Who Attend Private Schools***

The law includes new requirements about equitable participation of children who attend private schools and consultation between public and private school officials. Children who attend private school are entitled

14 20 U. S. C. § 1401(34)

15 34 CFR 300.106

16 20 U. S. C. § 1412(a)(1)(A)

17 20 U. S. C. § 1412(a)(6)(B)

18 20 U. S. C. § 1412(a)(3)

19 20 U. S. C. § 1412(a)(3)(B)

20 20 U. S. C. § 1412(a)(10)(A)(ii)

to equitable services. Special education and related services may be provided on the premises of private school, including religious schools.<sup>21</sup>

### ***Tuition Reimbursement***

The law about reimbursement for parental placements in private schools is unchanged. If the parent removes the child from a public school program and places the child into a private program, the parent may be reimbursed for the costs of the private program if a hearing officer or court determines that the public school did not offer a free, appropriate public education (FAPE) “in a timely manner.”<sup>22</sup>

If you are a parent and you plan to request a due process hearing for tuition reimbursement, you need to be familiar with the federal statute and regulations, and your state statute and regulations. You should also read the Rules of Adverse Assumptions.<sup>23</sup>

Before you remove your child from the public school program, you must take specific steps if you hope to be reimbursed for the child’s tuition in the private program. At the most recent IEP meeting before you remove your child from the public school program:

You must state your concerns

You must state your intent to enroll your child in a private program at public expense

OR

Ten business days before you remove your child from the public school program, you must write a letter to the school that states:

Your specific concerns, in detail, about the inadequacy of the school’s IEP and/or placement

Your basis for rejecting the IEP

Why your child will be damaged if placed in the school’s proposed program

A statement of your intent to enroll your child in a private program at public expense<sup>24</sup>

### ***Least Restrictive Environment (LRE), Inclusion and Mainstreaming***

The description of “least restrictive environment” did not change in IDEA 2004. Schools are required to educate children with disabilities with children who are not disabled, “to the maximum extent appropriate.” A child may only be removed from the regular educational setting if the nature or severity of the disability is such that the child cannot be educated in regular classes, even with the use of supplementary aids and services.<sup>25</sup> Judicial decisions about mainstreaming, inclusion, and least restrictive environment vary, even within the same state.

### ***Qualifications of Special Education Teachers***

The requirements about qualifications of special education teachers are new and track the highly qualified teacher requirements in the No Child Left Behind Act.<sup>26</sup> Teachers of core academic subjects must be highly qualified by the end of the 2005-2006 school year.<sup>27</sup> The requirements for related services providers and paraprofessionals did not change.

IDEA 2004 requires states to take measurable steps “to recruit, hire, train, and retain highly qualified personnel to provide special education and related services.”<sup>28</sup> There is no “right of action,” such as the right to sue a state or school district, because a teacher is not highly qualified. However, parents may file complaints about inadequately trained teachers with their State Department of Education.

21 20 U. S. C. § 1412(a)(10)

22 20 U. S. C. § 1412(a)(10)(C)

23 Chapter 21, *Wrightslaw: From Emotions to Advocacy*.

24 20 U. S. C. § 1412(a)(10)(C)

25 20 U. S. C. § 1412(a)(5)

26 20 U. S. C. § 1412(a)(14)

27 20 U. S. C. § 6319(a)

28 20 U. S. C. § 1412(c)(14)

### ***Participation in State and District Assessments***

Congress changed the language in IDEA about participation in assessments to “All children with disabilities are included in *all* general State and district wide assessment programs . . . with appropriate accommodations, where necessary and as indicated in their respective individualized education programs.”<sup>29</sup> (emphasis added)

The requirements that schools include all children with disabilities in all state and district assessments may have a negative impact on schools that refuse to use research-based methods to teach children to read, write, spell, and do arithmetic, because these schools are less likely to meet their annual progress goals.

The requirements for accommodation guidelines and alternate assessments are new in IDEA 2004.<sup>30</sup> States and districts must issue reports to the public about state and district assessments, alternate assessments, and the performance of children with disabilities on these assessments.<sup>31</sup>

### ***Over-Identification of Minority Children***

Congress found that African-American children are identified with mental retardation and emotional disturbances at far greater rates than white children. “Studies have found that schools with predominately White students and teachers place disproportionately high numbers of minority students into special education.”<sup>32</sup> Congress required States to develop policies and procedures “to prevent the inappropriate over identification or disproportionate representation by race and ethnicity as children with disabilities . . . .”<sup>33</sup>

### ***Mandatory Medication Prohibited***

IDEA 2004 prohibits school personnel from requiring a child to obtain a prescription for a controlled substance (i.e., Ritalin, Adderal) in order to attend school, receive an evaluation, or receive special education.<sup>34</sup>

## **Section 1413: Local Educational Agency Eligibility**

Section 1413 includes requirements for school district (LEA) and charter school eligibility. IDEA includes new requirements about purchasing instructional materials, records of migratory children, and early intervening services.

### ***Services to Children Who Attend Charter Schools***

School districts must serve children with disabilities who attend charter schools in the same manner as children who attend other public schools, and must provide supplementary services and related services on site at the charter school.<sup>35</sup>

### ***Early Intervening Services***

Early intervening services are new in IDEA 2004. Early intervening services require that schools use “proven methods of teaching and learning” based on “replicable research.”<sup>36</sup> School districts may use a portion of their Part B funds to provide early intervening services for students who need academic and behavioral assistance but have not been identified as needing special education services. Funds may also be used for professional development so teachers have the knowledge and skills to deliver scientifically based academic and literacy instruction.<sup>37</sup>

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29 20 U. S. C. § 1412(c)(16)(A)

30 20 U. S. C. § 1412(a)(16)

31 20 U. S. C. § 1412(a)(16)(D)

32 20 U. S. C. § 1400(c)(12)(E)

33 20 U. S. C. § 1412(c)(24)

34 20 U. S. C. § 1412(c)(25)

35 20 U. S. C. § 1413(a)(5)

36 20 U. S. C. § 1400(c)(4)

37 20 U. S. C. § 1413(f)

## Section 1414: Evaluations, Eligibility, Individualized Education Programs, and Educational Placements

The second most important statute in IDEA 2004 is Section 1414 about Evaluations, Consent, Reevaluations, Eligibility, IEPs and IEP Meetings, and Educational Placements.

### ***Initial Evaluations***

Parents, state departments of education, state agencies, and school district staff may request an initial evaluation of a child.<sup>38</sup> IDEA 2004 includes a new requirement that initial evaluations and eligibility be completed within 60 calendar days of receiving parental consent<sup>39</sup> unless a state has statutes or regulations that permit longer timelines.

### ***Parental Consent***

The school must obtain informed parental consent before conducting an initial evaluation. If the parent does not consent to an initial evaluation, or does not respond to a request to provide consent, the district may pursue a due process hearing against the parent. Parental consent for an evaluation is not consent for the child to receive special education services.<sup>40</sup>

The school must obtain informed parental consent before providing special education services. If the parent does not consent to special education services, the district may not pursue a due process hearing against the parent. If the parent refuses consent for services, the district has not violated the IDEA, and is not required to convene an IEP meeting or develop an IEP for the child.<sup>41</sup>

### ***Reevaluations***

The language about reevaluations changed in IDEA 2004. The school is not required to reevaluate a child more often than once a year, unless the parent and school agree to more frequent evaluations. The school shall evaluate at least every three years, unless the parent and school agree that a reevaluation is unnecessary. The school must reevaluate if the child's educational needs change *or* if the child's parent or teacher requests a reevaluation.<sup>42</sup>

Placing limits on the frequency of evaluations is likely to create difficulties in developing appropriate IEPs. IDEA 2004 requires the IEP to include "a statement of the child's present levels of academic achievement and functional performance."<sup>43</sup> If a child has not been evaluated for a year or more, the IEP team will not have current information about the child's present levels of academic achievement and functional performance on which to base the IEP.

### ***Evaluation Procedures***

The language about evaluation procedures changed in IDEA 2004. The school shall "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information" about the child. Information from evaluations will be used to determine the content of the child's IEP and to help the child make progress in the general education curriculum.<sup>44</sup>

The school shall "not use any single measure or assessment as the sole criterion" for determining if a child is eligible for special education services. The language about assessing children "in all areas of suspected disability" and that assessments shall provide relevant information to determine the child's educational needs did not

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38 20 U. S. C. § 1414(a)(1)(B)

39 20 U. S. C. § 1414(a)(1)(C)

40 20 U. S. C. § 1414(a)(1)(D)(i)

41 20 U. S. C. § 1414(a)(1)(D)(ii)

42 20 U. S. C. § 1414(a)(2)

43 20 U. S. C. § 1414(d)(1)(A)(i)

44 20 U. S. C. § 1414(b)(2)(A)

change.<sup>45</sup> A “screeener”<sup>46</sup> by a teacher or educational diagnostician to determine instructional strategies does not comply with the requirements for evaluations.

IDEA 2004 includes new requirements for assessments. The school must ensure that assessments are not “discriminatory on a racial or cultural basis . . . are 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 . . . [and] are administered by trained and knowledgeable personnel.”<sup>47</sup>

When a child transfers to a new school, the receiving school must complete assessments “as expeditiously as possible to ensure prompt completion of full evaluations.”<sup>48</sup>

### ***Eligibility and Educational Need***

In IDEA 2004, the heading “Determination of Eligibility” was changed to “Determination of Eligibility and Educational Need.”<sup>49</sup> A team of qualified professionals and the child’s parent determine “whether the child is a child with a disability . . . and the educational needs of the child . . .” The school shall give the parents copies of the evaluation report and documentation of eligibility.<sup>50</sup>

If the school decides that a child with a disability is not eligible for special education services under IDEA, or the parent disagrees with the school’s classification or label, the parent should consider obtaining a comprehensive psycho-educational evaluation by an expert in the private sector.

### ***Lack of Appropriate Instruction***

Many experts in the field of learning disabilities believe that a majority of children identified with specific learning disabilities are “victims of poor teaching.” Almost all children can learn to read if taught appropriately, but many do not get appropriate instruction because teachers are not adequately prepared.<sup>51</sup>

A child shall not be found eligible if the child’s problems are due to “lack of appropriate instruction in reading, including in the essential components of reading instruction, lack of instruction in math, or limited English proficiency.”<sup>52</sup> This language about “lack of appropriate instruction in reading, including the essential components of reading instruction” is new and brings IDEA into conformity with NCLB.

The essential components of reading instruction are defined as explicit and systematic instruction in (A) phonemic awareness; (B) phonics; (C) vocabulary development; (D) reading fluency, including oral reading skills; and (E) reading comprehension strategies.<sup>53</sup>

### ***Identifying Children with Specific Learning Disabilities***

The school is not required to consider if a child has a severe discrepancy between achievement and intellectual ability to determine if the child has a specific learning disability and needs special education services. The school district may use Response to Intervention (RTI)<sup>54</sup> to determine if the child responds to scientific, research-based

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45 20 U. S. C. § 1414(b)(3)

46 20 U. S. C. § 6368(7)(B); see *Wrightslaw: No Child Left Behind*.

47 20 U. S. C. § 1414(b)(3)

48 20 U. S. C. § 1414(b)(3)(D)

49 20 U. S. C. § 1414(b)(4)

50 20 U. S. C. § 1414(b)(4)

51 Lyon, G. Reid and Jack M. Fletcher. Early Warning System. [www.educationext.org/20012/22.html](http://www.educationext.org/20012/22.html) (Retrieved October 11, 2006)

52 20 U. S. C. § 1414(b)(5)

53 See 20 U. S. C. § 6368 in *Wrightslaw: No Child Left Behind*.

54 20 U. S. C. § 1414(b)(6)

intervention as part of the evaluation process.<sup>55, 56</sup> The legal definition of “scientifically based reading research” is in No Child Left Behind.<sup>57</sup>

The law includes new language that allows school personnel to decide that “no additional data are needed” to determine the child’s educational needs or eligibility.<sup>58</sup> This language appears to be at odds with the requirement that the school reevaluate “at least once every three years.”<sup>59</sup>

### ***Additional Requirements for Evaluations and Reevaluations***

Information from evaluations and reevaluations shall be used to determine “the educational needs of the child” and “the present levels of academic achievement and related developmental needs of the child.” The school must review evaluations and information provided by the parents.<sup>60</sup>

“Additional Requirements for Evaluations and Reevaluations” changed in IDEA 2004. If the IEP team and other qualified professionals decide they do not need additional data to determine if the child is eligible or the child’s educational needs, the school can notify the parents that they do not intend to reevaluate. The school must provide the reasons for this decision. Under these circumstances, the parent must specifically request a reevaluation.<sup>61</sup>

The school must evaluate the child before terminating the child’s eligibility for special education services. The school is not required to evaluate when the child graduates from high school with a regular diploma or “ages out” of special education.<sup>62</sup> However, if the child graduates with a regular diploma or is no longer eligible for services because of age, the school must provide the child with a summary of “academic and functional performance” and recommendations to help the child meet postsecondary goals.<sup>63</sup>

## **Individualized Education Programs (IEPs)**

### ***Present Levels of Academic Achievement and Functional Performance***

Your child’s IEP must include a statement of the child’s present levels of academic achievement and functional performance, including how the child’s disability affects the child’s involvement and performance in the general education curriculum.<sup>64</sup>

### ***Measurable Goals***

Your child’s IEP must also include “a statement of measurable annual goals” to address the child’s present levels of academic achievement and functional performance.<sup>65</sup>

Congress added new language about research-based instruction to IDEA 2004. The child’s IEP must include “a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child . . . and a statement of program modifications or supports for school personnel that will be provided for the child.”<sup>66</sup>

55 See “Responsiveness to Intervention in the SLD Determination Process” in *Tool Kit on Teaching and Assessing Students with Disabilities* published by the U. S. Department of Education at [www.osepideasthatwork.org/toolkit/pdf/RTI\\_SLD.pdf](http://www.osepideasthatwork.org/toolkit/pdf/RTI_SLD.pdf)

56 For more articles, publications and other resources about Response to Intervention, go to: <http://www.wrightslaw.com/info/rti.index.htm>

57 20 U. S. C. § 6368(6); see also the “Glossary of Terms” in this book.

58 20 U. S. C. § 1414(c)(4)

59 20 U. S. C. § 1414(a)(2)(B)(ii)

60 20 U. S. C. § 1414(c)(1)

61 20 U. S. C. § 1414(c)(4)

62 20 U. S. C. § 1414(c)(5)

63 20 U. S. C. § 1414(c)(5)(B)

64 20 U. S. C. § 1414(d)(1)(A)

65 20 U. S. C. § 1414(d)(1)(A)

66 20 U. S. C. § 1414(d)(1)(A)

### ***Educational Progress***

The IEP must include “a description of how the child’s progress toward meeting the annual goals . . . will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided.”<sup>67</sup>

### ***Appropriate Accommodations and Alternate Assessments***

IDEA contains new language about “individual appropriate accommodations” on state and district testing and new requirements for alternate assessments. Your child’s IEP must include “a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments . . . .”

If the IEP Team recommends that your child take an alternate assessment, the team must include a statement about “why the child cannot participate in the regular assessment” and why “the particular alternate assessment selected is appropriate for the child . . . .”<sup>68</sup>

### ***Transition Requirements***

The requirements for transition in IEPs changed in IDEA 2004. The “first IEP to be in effect when the child is 16, and updated annually thereafter [must include] appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills . . . and the transition services (including courses of study) needed to assist the child in reaching these goals.”<sup>69</sup>

### ***IEP Team Meetings***

A member of the IEP team may be excused from attending an IEP meeting if the member’s area of curriculum or service will not be discussed or modified and if the parent and school agree. An IEP team member may also be excused from an IEP meeting that involves their area of curriculum or service if they submit input in writing and if the parent and school consent. The parent’s consent must be in writing.<sup>70</sup>

### ***Children Who Transfer Schools***

The subsection about IEPs for children who transfer is new. If the child transfers to a district in the same state or another state, the receiving school must provide comparable services to those in the sending district’s IEP until they develop and implement a new IEP.<sup>71</sup>

### ***Developing the IEP***

In developing the IEP, the IEP team *shall* (i.e. must) consider:

- the child’s strengths
- the parent’s concerns for enhancing the child’s education
- the results of the initial evaluation or most recent evaluation
- the child’s academic, developmental, and functional needs<sup>72</sup>

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67 20 U. S. C. § 1414(d)(1)(A)

68 20 U. S. C. § 1414(d)(1)(VI)

69 20 U. S. C. § 1414(d)(1)(A)(i)(VIII)

70 20 U. S. C. § 1414(d)(1)(C)

71 20 U. S. C. § 1414(d)(2)(C)

72 20 U. S. C. § 1414(d)(3)(A)

The IEP team *shall* consider special factors for children:

- whose behavior impedes learning
- who have limited English proficiency
- who are blind or visually impaired
- who are deaf or hard of hearing<sup>73</sup>

### ***Reviewing and Revising IEPs***

The child's IEP must be reviewed at least once a year to determine if the child is achieving the annual goals. In addition, the IEP team must revise the IEP to address:

- any lack of expected progress
- results of any reevaluation
- information provided by the parents
- anticipated needs<sup>74</sup>

IDEA 2004 also changed how IEPs may be revised. If the parent and school decide to amend or modify the IEP that was developed at an annual IEP meeting, and they do not want to convene another IEP Team meeting, they may revise the IEP by agreement. The IEP Team must create a written document to amend or modify the IEP. This document must describe the changes or modification in the IEP and note that, by agreement of the parties, an IEP meeting was not convened.<sup>75</sup> The parent should be provided with a copy of the revised IEP.

### ***Multi-Year IEPs***

IDEA 2004 includes a multi-year IEP pilot project. States may request approval to implement “comprehensive, multi-year IEPs” for periods of no longer than three years. IEP review dates must be based on “natural transition points.” Parents have the right to opt-out of this program and can request a review of the IEP without waiting for the natural transition point.<sup>76</sup>

### ***Placement Decisions***

Parents are members of the team that decides the child's placement. Decisions about the child's placement cannot be made until after the IEP team, which includes the parent, reaches consensus about the child's needs, program, and goals.

Although the law is clear on this issue, the child's “label” or eligibility category often drives decisions about services and placement, leading school personnel to determine the child's placement before the IEP meeting. These unilateral actions prevent parents from “meaningful participation” in educational decision-making for their child.<sup>77</sup>

### ***New Ways to Meet***

School meetings do not have to be face-to-face. IEP and placement meetings, mediation meetings, and due process (IEP) resolution sessions may be convened by conference calls or videoconferences.<sup>78</sup>

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73 20 U. S. C. § 1414(d)(3)(B)

74 20 U. S. C. § 1414(d)(4)

75 20 U. S. C. § 1414(d)(3)(D)

76 20 U. S. C. § 1414(d)(5)

77 20 U. S. C. § 1414(e)

78 20 U. S. C. § 1414(f)

## Section 1415: Procedural Safeguards

Section 1415 describes the safeguards designed to protect the rights of children with disabilities and their parents. These safeguards include the right to participate in all meetings, to examine all educational records, and to obtain an Independent Educational Evaluation (IEE) of the child. Section 1415 includes requirements for prior written notice, procedural safeguards notice, mediation, resolution sessions, due process hearings, the new two-year statute of limitations, appeals, discipline, and age of majority.

### **Prior Written Notice (PWN)**

If the school district proposes to change or refuses to change the identification, evaluation, or educational placement of a child, the school must provide the parent with written notice.<sup>79</sup> The written notice must:

- describe the action proposed or refused
- explain why the school proposed or refused to take action
- describe each evaluation procedure, assessment, record, or report used as a basis for the proposed or refused action
- provide sources the parent can contact to obtain assistance
- describe other options considered and why these options were rejected
- describe the factors that were relevant to the school's proposal or refusal<sup>80, 81</sup>

### **Due Process Complaint Notice**

The party who requests a due process hearing must provide a detailed notice to the other party that includes identifying information about the child, the nature of the problem, facts, and a proposed resolution.<sup>82</sup> A Due Process Complaint Notice can be a letter to request a due process hearing that includes the required components.<sup>83</sup> A due process hearing may not be held until after this notice has been filed.

### **Procedural Safeguards Notice**

The Procedural Safeguards Notice<sup>84</sup> provides parents with specific information about their rights and protections under the law, including the right to an Independent Educational Evaluation (IEE), prior written notice, the right to examine all educational records, notice of the time period (statute of limitations) within which “to make a complaint,” mediation, due process, current educational placement, discipline, reimbursement for private placements, and attorneys’ fees.<sup>85</sup>

### **Independent Educational Evaluation (IEE)**

Parents have a right to obtain an Independent Educational Evaluation of their child.<sup>86</sup> School districts often attempt to restrict the parent’s choice to a list of approved evaluators selected by the district. In 2004, the Office of Special Education Programs issued a policy letter to clarify that parents have the right to choose their independent evaluator.<sup>87</sup>

79 20 U. S. C. §1415(b)(3)

80 20 U. S. C. §1415(c)(1)

81 The U. S. Department of Education published a Model Prior Written Notice Form at [www.ed.gov/policy/speced/guid/idea/modelform-notice.pdf](http://www.ed.gov/policy/speced/guid/idea/modelform-notice.pdf) (Retrieved on October 12, 2006)

82 20 U. S. C. §1415(b)(7); 20 U. S. C. §1415(c)(2)

83 To learn how to write persuasive letters, read Chapter 24, “Letter to the Stranger, in *Wrightslaw: From Emotions to Advocacy*.

84 20 U. S. C. § 1415(d)

85 The U. S. Department of Education published a Model Procedural Safeguards Form at: [www.ed.gov/policy/speced/guid/idea/modelform-safeguards.pdf](http://www.ed.gov/policy/speced/guid/idea/modelform-safeguards.pdf) (Retrieved on October 11, 2006)

86 20 U. S. C. §1415(b)(1)

87 See “Letter to Parker” [www.wrightslaw.com/info/test.eval.choice.osep.htm](http://www.wrightslaw.com/info/test.eval.choice.osep.htm)

## ***Mediation***

The right to use mediation to resolve disputes was added to IDEA in 1997. Mediation must be voluntary, may not be used to deny or delay a parent's right to a due process hearing, and must be conducted by a qualified, impartial mediator.

Mediation is a confidential process in which the parties meet with a disinterested party in an effort to resolve their dispute. A successful mediation requires the parties to discuss their views and differences frankly. Before entering into mediation, both parties should understand their rights and the law. A due process hearing does not have to be pending for a party to request mediation.<sup>88</sup>

## ***Written Settlement Agreements***

The requirements for legally binding written settlement agreements are new in IDEA 2004. Previously, when a party breached or failed to honor a mediation agreement, the other party had to file suit under a breach of contract theory to enforce the agreement. Now, a party can use the power of federal courts to ensure that settlement agreements are honored.<sup>89</sup>

## ***Due Process Hearings***

Many pre-trial procedures and timelines for due process hearings are new in IDEA 2004, including the resolution session,<sup>90</sup> due process complaint notice, amended complaint notice, statute of limitations and timelines.

## ***Statute of Limitations***

The two-year statute of limitations to present a complaint is new.<sup>91</sup> If your state does not have a statute of limitations, you must request a due process hearing within two years. If a due process hearing may be on the horizon, you need to know the statute of limitations in your state.

Because IDEA 2004 includes new, different procedural requirements for pretrial matters in due process hearings, you should assume that your state revised the state special education law and regulations. You should contact your State Department of Education / State Education Agency (SEA) to request the statute of limitations in your state. Be sure to get this information in writing.

## ***New Procedures and Timelines***

If the school did not provide prior written notice to the parents previously, the school must send that notice within 10 days. After receiving the due process complaint notice, the other party must file a response that specifically addresses the issues raised in the complaint within 10 days. If the notice is insufficient, the receiving party must complain to the hearing officer within 15 days.<sup>92</sup>

The hearing officer must determine if the complaint is sufficient within 5 days.<sup>93</sup> A party may only amend its due process complaint notice if the other party consents in writing and is given the opportunity to resolve the dispute by using a resolution session.<sup>94</sup> This requirement is similar to the "12(b)(6)" Motion to Dismiss proceeding in the Federal Rules of Civil Procedure (FRCP).<sup>95</sup>

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88 20 U. S. C. § 1415(e)

89 20 U. S. C. § 1415(e)(2)(F)

90 20 U. S. C. § 1415(f)(B)

91 20 U. S. C. § 1415(b)(6)(B)

92 20 U. S. C. § 1415(c)(2)

93 20 U. S. C. § 1415(c)

94 20 U. S. C. § 1415(c)(2)(E); 20 U. S. C. § 1415(f)(1)(B)

95 20 U. S. C. § 1415(c)(2)

### **Resolution Session**

After the school district receives the parent's due process complaint notice, it is required to convene a resolution session within 15 days, even if the Notice is insufficient. The resolution session provides the parties with an opportunity to resolve their dispute before a due process hearing. The school district must send the "relevant member or members of the IEP team" who have knowledge about the facts in the parent's complaint and a district representative who has decision-making authority (settlement authority).<sup>96</sup> The school board attorney may not attend the resolution session unless an attorney accompanies the parent.

The parent and the district may agree to waive the resolution session or use mediation. If the district has not resolved the complaint to the parents' satisfaction within 30 days of receiving the Complaint, the due process hearing can be held.<sup>97</sup>

### **"Five-Day Rule"**

The law requires that evaluations and recommendations be disclosed within 5 business days before a due process hearing.<sup>98</sup> Most state statutes and regulations, and standards of practice, require that all exhibits, exhibit lists, and witness lists be disclosed at least 5 days before a hearing.<sup>99</sup> Failure to comply with these requirements about disclosure often causes hearing officers to dismiss cases.<sup>100</sup>

### **Substantive v. Procedural Issues**

IDEA 2004 clarifies that "a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education."<sup>101</sup> Examples of substantive issues include determining if the child has a disability that adversely affects educational performance (eligibility) or if the child received a free appropriate education (FAPE). Examples of procedural issues include delays in scheduling evaluations or convening meetings, or not having all appropriate personnel at an IEP meeting.

### **Minimum Standards for Hearing Officers**

IDEA now requires that hearing officers be knowledgeable about the law, federal and state regulations, and caselaw. Hearing officers must also have the knowledge and ability to "conduct hearings and write decisions in accordance with appropriate standard legal practice."<sup>102</sup>

### **Attorneys' Fees from Parents and Their Attorneys**

Parents who prevail can recover attorneys' fees from school districts. Under IDEA 2004, school districts may recover attorneys' fees from the parent or the parent's attorney under specific limited circumstances. If the parent or parent's attorney files a complaint that is frivolous, unreasonable, or for an improper purpose, or to harass, cause unnecessary delay, or needlessly increase the cost of litigation, the Court may award attorneys' fees to the school district.<sup>103</sup>

### **Discipline**

Section 1415(k) includes requirements for disciplinary placements in interim alternative educational settings, manifestation determinations, placements, appeals, and authority of the hearing officer.

96 20 U. S. C. § 1415(f)(1)(B)

97 20 U. S. C. § 1415(f)(1)(B)(ii)

98 20 U. S. C. § 1415(f)(2)

99 In addition to evaluations and other documents specific to the child, the exhibit list should include research reports, learned treatises, relevant journal articles, book chapters, and other documents that are relevant to the issues in the case.

100 **Surviving Due Process: Stephen Jeffers v. School Board** is a DVD that takes you through a due process hearing, from initial preparations to testimony by the final witness. See direct examination and dramatic cross-examination of witnesses, objections, arguments between counsel, and rulings by the hearing officer. **Surviving Due Process** is based on a true story.

101 20 U. S. C. § 1415(f)(3)(E)

102 20 U. S. C. § 1415(f)(3)(A)

103 20 U. S. C. § 1415(i)(3)

IDEA 2004 allows schools to place a child with a disability in an interim alternative setting if the child violates a code of student conduct.<sup>104</sup> To prevent zero-tolerance abuses, Congress added new language to the law that school personnel “consider any unique circumstance on a case-by-case basis” in determining whether to change a child’s placement.

### ***Suspensions & Placements in Interim Alternative Educational Settings***

If a child with a disability violates a code of student conduct, school officials may suspend the child for up to 10 days. If the school removes a child for 10 days or more, regardless of the severity of the child’s misconduct (i.e., violation of a code of conduct v. possession of a weapon), the school must continue to provide the child with FAPE.<sup>105</sup> The child will continue to receive educational services, participate in the general education curriculum, and make progress on the IEP goals. The child will receive “as appropriate, functional behavioral assessment, behavioral intervention services and modifications” to prevent the behavior from reoccurring.<sup>106</sup>

### ***Manifestation Determination***

The law requires the IEP team, which includes the child’s parent, to review all relevant information in the child’s file, including information provided by the parent, to determine if the negative behavior was caused by the disability, had a direct and substantial relationship to the disability, or was a result of the school’s failure to implement the IEP.<sup>107</sup>

### ***Functional Behavioral Assessments and Behavior Intervention Plans***

If the IEP team determines that the child’s behavior was a manifestation of the disability, the IEP Team “shall conduct a functional behavioral assessment and implement a behavioral intervention plan.” If the child already has a behavior intervention plan, the IEP Team shall modify the plan to address the child’s behavior.<sup>108</sup>

### ***45-Day Suspension: Dangerous Weapon, Drugs, and Serious Bodily Injury***

If the child carries a dangerous weapon to school, knowingly possesses or uses illegal drugs at school, or inflicts serious bodily injury upon another person while at school, the school may remove the child to an interim alternative placement for not more than 45 school days.<sup>109</sup> The school must continue to provide the child with FAPE.

## **Part C: Infants and Toddlers with Disabilities**

Part C governs early intervention services for infants and toddlers under the age of 3, with some exceptions. Part C includes Section 1431 through Section 1444 of Title 20 of the United States Code (U. S. C.).

### ***Findings and Policy***

Congress made significant changes to Findings and Policy in Section 1431 and added new language about the “urgent and substantial need . . . to recognize the significant brain development that occurs during a child’s first 3 years of life.” Congress also found that there is an “urgent and substantial need to maximize the potential for individuals with disabilities to live independently in society.”<sup>110</sup> According to the Policy Statement:

It is the policy of the United States to provide financial assistance to States to develop and implement a **statewide, comprehensive, coordinated, multidisciplinary, interagency system that provides early**

104 20 U. S. C. § 1415 (k)

105 20 U. S. C. § 1415(k)(1)

106 20 U. S. C. § 1415(k)(1)(D)

107 20 U. S. C. § 1415(k)(1)(E)

108 20 U. S. C. § 1415(k)(1)(F)

109 20 U. S. C. § 1415(k)(1)(G)

110 20 U. S. C. § 1431(a)

**intervention services** for infants and toddlers with disabilities and their families . . . .<sup>111</sup> (emphasis added)

## Definitions

### ***Infant or Toddler with a Disability***

An infant or toddler with a disability is “an individual under 3 years of age who needs early intervention services because the individual is experiencing developmental delays, as measured by appropriate diagnostic instruments and procedures” in one or more areas of development. At the state’s discretion, an infant or toddler with a disability may also include “at-risk infants and toddlers” and children who previously received early intervention services until they enter kindergarten or elementary school.<sup>112</sup>

### ***Early Intervention Services***

Early intervention services must be designed to meet the child’s developmental needs, including physical, cognitive, communication, social and emotional, and adaptive areas, and must be provided by qualified personnel.<sup>113</sup> Many school districts offer one-size-fits-all school-based programs that are not “designed to meet the developmental needs” of a particular infant or toddler. Early intervention services “are provided at no cost except where a federal or State law provides for payments by families, including a schedule of sliding fees . . . .”<sup>114</sup>

### ***Requirements for Early Intervention Programs***

Part C describes the minimum requirements for early intervention programs.<sup>115</sup> States must have policies to ensure that early intervention services are based on scientifically based research. The evaluation of the child must be timely, comprehensive and multidisciplinary and must include “a family-directed identification of the needs of each family.” States must have comprehensive child find systems and public awareness programs and must maintain central information directories about early intervention services, resources, and experts, and demonstration programs.

States must have comprehensive systems of personnel development, including training for paraprofessionals and primary referral sources, policies and procedures to ensure that personnel are appropriately and adequately trained, and that early intervention services are provided in natural environments.

The subsection about “Flexibility to Serve Children 3 Years of Age Until Entrance into Elementary School” is new.<sup>116</sup> States may continue to provide early intervention services to young children with disabilities until they enter or are eligible to enter kindergarten. These early intervention services must “include an educational component that promotes school readiness and incorporates pre-literacy, language and numeracy skills.”<sup>117</sup>

### ***Individualized Family Service Plan (IFSP)***

The legal requirements for Individualized Family Service Plans (IFSPs) are similar to the requirements for Individualized Education Plans, but with some important differences. The assessment and program development process includes a “family-directed assessment” of the family’s resources, priorities, and concerns. Congress added new requirements for Individualized Family Service Plans which must now include “measurable results or outcomes expected to be achieved . . . including pre-literacy and language skills” and the “criteria, procedures, and timelines” that will be used to measure the child’s progress. IDEA 2004 includes a new requirement that the

111 20 U. S. C. § 1431(b)

112 20 U. S. C. § 1432(5)

113 20 U. S. C. § 1432(4)

114 20 U. S. C. § 1432(4)(B)

115 20 U. S. C. § 1435

116 20 U. S. C. § 1435(c)

117 20 U. S. C. § 1435(c)(2)

IFSP include “a statement of specific early intervention services based on peer-reviewed research . . . necessary to meet the unique needs” of the child and family.<sup>118</sup>

### ***Procedural Safeguards***

The protections and safeguards for young children with disabilities and their parents in the Procedural Safeguards section of Part C are similar to those in Part B, but with some important differences. Parents of young children have a right to accept or decline any early intervention service without jeopardizing their right to other early intervention services.<sup>119</sup> The law includes a procedure to protect the rights of the child when the parents are not known or cannot be found by appointing an individual to act as a surrogate for the parents.

## **Part D – National Activities to Improve Education of Children with Disabilities**

Part D has been revised and reorganized into four subparts. Subpart 1 about State Personnel Development Grants includes purpose, definition of personnel, eligibility, applications, and how funds may be used. Subpart 2 about Personnel Preparation focuses on improving educational outcomes and results by improving teacher training and professional development. Subpart 3 describes requirements for Parent Training and Information Centers and Community Resource Centers. Subpart 4 contains General Provisions.

### ***Findings***

Congress made significant changes to Findings in Part D. Section 1450 describes the critical need for adequately trained personnel<sup>120</sup> and for “high quality, comprehensive professional development programs . . . to ensure that the persons responsible for the education or transition of children with disabilities possess the skills and knowledge necessary to address the needs of those children.”<sup>121</sup>

### ***Personnel Development***

Section 1462 about Personnel Development to Improve Services and Results for Children with Disabilities focuses on the need to ensure that all teachers “have the necessary skills and knowledge, derived from practices that have been determined, through scientifically based research, to be successful in serving those children . . .”<sup>122</sup>

### ***Parent Training and Information Centers (PTI) and Parent Resource Centers (CPRC)***

The Education Department shall award grants to at least one parent organization in each state for a Parent Training and Information Center. These Centers are to help parents learn about their children’s disabilities and educational needs, their legal rights and responsibilities, how to communicate effectively with school personnel, and how to participate in educational decision-making.<sup>123</sup>

The Education Department may also award grants to parent organizations that do not meet the criteria for a PTI but focus on helping under-served parents. For example, a center may focus on helping low-income parents, parents with limited English proficiency, and parents with disabilities.

## **Part E – National Center for Special Education Research**

Part E is new in IDEA 2004 and establishes the National Center for Special Education Research, referred to as the Special Education Research Center. The duties of the Center include improving services, identifying

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118 20 U. S. C. § 1436

119 20 U. S. C. § 1439

120 20 U. S. C. § 1450(5)

121 20 U. S. C. § 1450(6)

122 20 U. S. C. § 1462(a)

123 20 U. S. C. § 1471

scientifically based educational practices that improve academic achievement and educational results, and identifying scientifically based related services and interventions that promote participation and progress in general education.<sup>124</sup>

## **In Summation**

In this chapter, you learned how the Individuals with Disabilities Education Act is organized. You learned about important changes Congress made when the law was reauthorized. The next chapter includes the full text of the Individuals with Disabilities Education Act of 2004 with commentary and analysis.

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124 20 U. S. C. § 9567