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**Parents' Resource Guide to Key Changes in
Special Education under IDEA 2004,
the IDEA 2004 Regulations,
and the Revised State Code**

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IDEA 2004 Regulations and the Revised State Code
(rev. September 2006)¹**

Pre-Referral Interventions

Early Intervening Services

IDEA 2004 permits each school district to use up to 15% of the IDEA Part B federal funding it receives to provide “early intervening services” to students who have not been identified as needing special education but who appear to need “additional academic and behavioral support to succeed in a general education environment.” While these funds may be used for students in kindergarten through 12th grade, there is a particular emphasis on students in kindergarten through 3d grade. (20 U.S.C. 1413(f); 34 C.F.R. 300.226(a)) These early intervening services are to be based on peer-reviewed research, such as reading programs using the criteria developed by the National Reading Panel for students who are experiencing difficulty with reading, and positive behavior supports for students demonstrating behavioral difficulties. If a district is identified by the state as having significant racial disproportionality in special education, the district *must* use 15% of its IDEA Part B federal funding to provide “early intervening services.”

Intervention & Referral Services Program

The State Code indicates that interventions in the general education setting, using strategies identified through the Intervention and Referral Services program (as well as other general education strategies), shall be provided to students exhibiting academic difficulties and shall be utilized, as appropriate, prior to referring a student for evaluation. Within Abbott districts, the system of assessment and interventions within general education according to N.J.A.C. 6A:10A-3.1 must be implemented for all students who have reading as their primary area of difficulty. General educators must maintain written documentation, including data setting forth the types of interventions used, the frequency and duration of each intervention, and the effectiveness of each intervention. When analysis of this written documentation reveals that interventions haven't adequately addressed the difficulties and that the student may have a disability, the student must be referred for a special education evaluation. (Parents may make a referral at any time, and school personnel may make a referral without going through this process if the nature of the student's learning difficulties are such that evaluation is warranted without delay, such as the student having a clear disability like Down syndrome.)

Evaluations, Independent Evaluations, and Reevaluations

Evaluations must be conducted and an IEP developed and implemented within 90 calendar days of parental consent, unless the parent repeatedly fails or refuses to produce their child for the evaluation. If the child moves to another district in the middle of being evaluated by their previous district, and the district is making progress to ensure a prompt completion of the evaluation, then the district and parent may agree on a specific modified timeframe to complete

¹ This Resource Guide was developed by the Statewide Parent Advocacy Network, 35 Halsey Street, Newark, NJ 07102. For more information, call 800-654-SPAN or go to www.spannj.org.

the evaluation. If a parent requests an *independent evaluation* in an area not assessed by the district, such as a psychiatric evaluation, the Code now grants the district 10 calendar days in which to decide whether to conduct the evaluation and to notify the parent of its determination; if the district opts to conduct the evaluation, it must complete it within 45 calendar days of receipt of the parent's request. If the parent requests an independent evaluation in an area that was previously evaluated by the district (such as an educational, psychological or speech-language evaluation), the district either must either initiate a due process hearing within 20 calendar days of receipt of the parent's request or pay for the independent evaluation. Whenever an independent evaluation is conducted, the district must allow the independent evaluator to observe the student in the educational setting. For *reevaluations*, NJ will now have a timeframe within which reevaluations must be conducted. N.J.A.C. 14A-3.8(e) requires that, unless a parent and a district agree to waive a child's reevaluation, the reevaluation must be completed *the sooner of* 60 days after the parent has consented to the reevaluation or the expiration of the 3 year timeframe for reevaluations.

Eligibility

Identification of "Specific Learning Disabilities"

Under IDEA 2004, a state *may* permit districts to use a "discrepancy model" (a severe discrepancy between a child's intellectual ability, as measured by standard testing, and his or her achievement, in terms of the child's age or State-approved grade level standards) - the current method of identification, *which has been characterized as the "wait to fail" method* - and *must* permit districts to use a process based on the child's response to "scientific, research-based intervention" ("response to intervention," otherwise known as "RTI") to determine whether a child has a specific learning disability in the areas of oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, math calculation, and math reasoning. (20 U.S.C. 1414(b)(6); 34 C.F.R. 300.309)

The State Code adds an area – reading fluency – in which a specific learning disability may manifest itself. NJ will continue to permit districts to use the discrepancy model (which must include assessment of current academic achievement and intellectual ability) and authorizes districts to use RTI, provided that the interventions involve scientifically based instruction by highly qualified instructors and multiple assessments of student progress. (N.J.A.C. 6A:14-3.5(c)(12)(i)(8) and 6A:14-3.4(h))

Preschool Children with Disabilities (300.8(b))

NJ will now define "preschool child with a disability" as a "child between the ages of three and five experiencing developmental delays" in the child's physical development (including gross motor, fine motor and sensory [vision and hearing]), cognitive development, communication development, social and emotional development or adaptive development, as measured by "appropriate diagnostic instruments." When using a standardized assessment or criterion-referenced measure to determine eligibility under this category, a developmental delay is defined to mean a 33% delay in one developmental domain or a 25% delay in two or more domains. (N.J.A.C. 6A: 14-3.5(c)(10), consistent with 34 C.F.R. 300.8(b))

Consent and Revocation of Consent

If a parent refuses to provide consent for implementation of the initial IEP, then the district may not request a hearing to override that consent, but then the district no longer has an obligation to provide a free, appropriate public education to that student. The NJ Administrative Code clarifies that parents may revoke written consent at any time, in writing, but that revocation of consent is not retroactive, and does not negate any action that occurred after consent was provided or before consent was revoked. The Code also now indicates that, if consent for services is revoked by the parent, the district may file for a due process hearing.

IEP

IEP Meeting

A copy of reevaluation reports and documentation of eligibility must be provided to the parents at least *ten days prior to the IEP meeting*. State Code now requires that notice be provided to the participants prior to the start of a meeting if a participant intends to use an audio-tape recorder.

As in the previous Code, State law requires IEP meetings to be conducted at mutually agreed upon times and places. However, if a mutually agreeable time and place can't be determined, the Code now allows parents to participate in the meeting through alternative means such as videoconferencing and conference calls. *This does not mean that districts are freed of their obligation to accommodate working parents by holding meetings outside of school hours.*

At the end of the IEP meeting, either a copy of the IEP or written notes setting forth the agreements reached at the meeting must be provided to the parent.

Excusal of IEP Team Members

Under IDEA 2004 and the State Code, if a member of the IEP Team (general or special educator, a representative of the school district, or a person who can interpret the instructional implications of evaluations) or a related service provider's area of the curriculum or related services is not being modified or discussed at the meeting, *that IEP Team member or related service provider may be excused only if the parent consents to his or her absence in writing*. If the IEP Team member or related service provider's area is being discussed or is being modified at the IEP meeting, that IEP Team member may be excused only if (i) *the parent consents to his or her absence in writing and* (ii) *the Team member submits input to the Team and the parents prior to the meeting*. (20 U.S.C. §1414(d)(1)(C); 34 C.F.R. 300.321(e)(1) and (2))

NJ requires that, for all requests for excusals and, in the case of a Team member of service provider whose area is being discussed or modified, the written input of that Team member or service provider, be included with the notice of the meeting date to "ensure sufficient time for the parent to review and consider the request." (N.J.A.C. 14-2.3(k)(9) and (10)) This will mean in practice that it will be very difficult for districts to secure the consent of parents for an excusal

since the request for excusal and the written input, if required, must be provided to parents at least fifteen days before the IEP meeting.

IEP Contents

IDEA 2004 and the federal regulations (20 U.S.C. 1214(d); 34 C.F.R. 300.320(a)) now require a child's IEP to describe the child's present levels of academic achievement *and functional performance...* The IEP must also contain "*measurable* annual goals, including academic and functional goals, designed to... enable the child to be involved in and make progress in the general education curriculum..." and meet the child's other educational needs resulting from his or her disability. Short-term objectives or benchmarks are required *only for children who take alternate assessments aligned to alternate achievement standards*. The special education and related services and supplementary aids and services to be provided to a child *must be "based on peer-reviewed research to the extent practicable."*

NJ has adopted the federal requirements for the IEP in terms of stating a student's present levels of "academic achievement and functional performance" and mandating peer-reviewed research to the extent practicable as the basis for all education and services to be provided to the child. (N.J.A.C. 6A:14-3.7(e)(2)) Unlike some other states, *NJ has retained short-term objectives and benchmarks for all children, to enable parents of all children receiving special education to measure incremental progress toward their children's annual goals and to guide educators in the steps needed to reach a child's IEP goals!* Moreover, State Code requires annual goals to be "detailed" as well as measurable, and "apprise parents and educational personnel providing special education and related services...of the expected level of achievement attendant to each goal." The district must maintain documentation that it has informed each of the child's teachers and service providers of their specific responsibilities in implementing the IEP.

Implementation of IEP for Transferring Students

If a student transfers from another district in NJ, the Child Study Team in the new district must conduct an immediate review of the evaluation information and IEP. If it is not available, the new district must take reasonable steps to promptly obtain the student's records from the previous district. The new district either must implement the IEP as written (if the parent and district agree), or the district must conduct all necessary assessments and within 30 days of the student's enrollment, develop and implement a new IEP for the student. In the interim, the student must be provided with a program comparable to his or her current IEP.

IEP Amendments

IDEA 2004 permits a parent and district to agree to change an IEP after the annual IEP meeting has been held *without convening an IEP meeting, if the parent consents*. The changes must be documented in a separate writing, and the district must provide a revised copy of the IEP with the amendments upon a parent's request. (20 U.S.C. 1414(d)(3)(D) and (F); 34 C.F.R. 300.324(a)(4) and (6)). Anyone with responsibility for implementing the IEP must be informed of the changes.

*N.J.A.C. 6A:14-3.7(d) affords parents greater protection than the federal law by permitting changes to an IEP without an IEP meeting only if (1) the parent makes a written request for a specific amendment and the district agrees; or (2) the school district provides the parent with a written proposal to amend the IEP, and the parent consents *in writing* to the proposed amendment within 15 days. In all cases, the amendments have to be incorporated in an amended IEP or addendum, which must be provided to the parent within 15 days of the district's receipt of parental consent of the change. (Parents do not have to ask for the revised document).*

State code now provides that the IEP of a student placed in a receiving school (a public or private out-of-district placement) may be amended only by the IEP team of the district of residence.

Program Options – Least Restrictive Environment

In the IEP of a preschooler with disabilities, the IEP Team is now required to review the preschool day to determine what accommodations and modifications may be required to allow the preschooler to participate in a general education classroom and activities. N.J.A.C. 6A: 14-3.7(c)(11).

N.J.A.C. 6A:14-4.3 has been revised to strengthen the requirement that districts consider placement in the general education class with supplementary aids and supports, such as curricular modification, instructional modifications or specialized strategies, assistive technology, teacher aides, related services, integrated therapies, consultation services and in-class resource programs. The IEP Team may consider alternative program options *only if* a student with a disability can not remain in the general education setting with supplementary aids and services for all or a portion of the school day. A student may not be removed from the general education classroom solely because of needed modifications to the general education curriculum.

Further, the Code mandates that the IEP include “a statement, as appropriate, of any integrated therapy services to be provided addressing the student’s individualized needs in his or her educational setting,” to support the concept of providing related services in the classroom as opposed to pull-out services.

Teacher aides may provide supplementary support to a student with disabilities when the IEP team determines that the student requires assistance in areas including but not limited to prompting, cueing, and redirecting student participation; reinforcing of personal, social, behavioral, and academic learning goals; organizing and managing materials and activities; and implementation of teacher-designed follow-up and practice activities. The district must provide regular time for consultation between the teacher aide and the appropriate general or special educators, and districts must adopt policies regarding consultation time. Consultation may also be provided as a service by a related services provider, special educator, or child study team member to the general educator and/or teacher aide, and such consultation must be specified on the IEP including frequency and duration. Consultation may include but isn’t limited to the development and demonstration of techniques and strategies, data collection on the effectiveness of techniques and strategies, and development of positive behavioral supports.

For students in out-of-district placements, the IEP now must set forth how the student will participate with non-disabled peers in extracurricular and nonacademic activities and delineate how this will be achieved, including, if necessary, returning the student to the district to effectuate their participation. For those students in separate settings, the IEP team must consider each year the activities necessary to transition the student to a less restrictive placement.

Transition & Graduation

IDEA 2004 eliminates all age 14 activities that were required pursuant to IDEA '97. Under the new law, the IEP for *the school year in which a student will be 16* must contain “appropriate secondary goals,” and identify the transition services (including the course of study) needed to assist the student in reaching those goals. (20 U.S.C. 1414((d)(1)(A)(VIII); 34 C.F.R. 300.320(b))

NJ, however, has retained the requirement that districts begin transition planning at age 14! (N.J.A.C. 6A:14-3.7(3)(11) The IEP for the year during which the student turns 14 must include a statement of the student’s strengths, interests and preferences; identification of a course of study and related strategies/activities that are consistent with their strengths, interests and preferences, and are intended to help students develop or attain post-secondary goals related to training, education, employment, and independent living if appropriate; a description of the need for consultation from other agencies that provide services to individuals with disabilities such as the Division of Vocational Rehabilitation Services in the Department of Labor; a statement of any needed interagency linkages and responsibilities. The IEP for the school year during which the student turns 16 must include appropriate measurable post-secondary goals based upon age-appropriate transition assessments and appropriate transition services designed within a “results-oriented” process to facilitate the student’s movement from school to post-school activities including post-secondary education, vocational education, integrated employment, continuing and adult education, adult services, independent living, and community participation. For students with disabilities who are potentially eligible to receive services from the Division of Developmental Disabilities, the district must provide the necessary materials to the parent to apply for those services pursuant to the Uniform Application Act, N.J.S.A. 30:4-25.10 et seq.

When a student graduates or “ages out,” the student must be provided with a written summary of his or her academic achievement and functional performance prior to the date of the student’s graduation or the conclusion of the school year in which he or she exceeds the age of eligibility. The summary must include recommendations to help the child in meeting post-secondary goals.

Discipline/Manifestation Determination

IDEA 2004 provides that if a student with a disability inflicts serious bodily injury on another person, or is in possession of drugs or weapons, the student may be removed to an interim alternative educational setting for up to **45 school days** (9 weeks) regardless of whether the conduct was a manifestation of the student’s behavior. *NJ has limited the time of removal to 45 calendar days (a little more than 6 weeks, which is the current law)!*

For any other violation of the student code of conduct, federal law permits the school to remove or suspend a student with disabilities for up to **10 school days** (2 weeks) “to the extent such alternatives are applied to children without disabilities.” *NJ has limited the removal period for these violations to up to 10 calendar days and requires that services be provided during that period if the school district provides services to students without disabilities during that timeframe.*

Federal and NJ law require school personnel to conduct a manifestation determination if the school wants to remove the student for more than 10 days, to determine whether the student’s conduct was “caused by, or had a direct and substantial relationship to” the student’s disability or was a “direct result of the [district’s] failure to implement the IEP.”

If the conduct is not found to be a manifestation of the student’s disability, the student is subject to the same disciplinary actions that apply to non-disabled students “in the same manner and for the same duration,” which may involve placement in an interim alternative educational setting. In that case, if the student is placed in an interim alternative educational setting, the student must receive educational services to enable him or her to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting his or her IEP goals. The student must also receive a functional behavioral assessment, behavioral intervention services and modifications designed to prevent the recurrence of the behavior.

If, on the other hand, the conduct is found to be a manifestation of the student’s disability, the IEP Team is required to conduct a functional behavioral assessment, implement a behavioral intervention plan (or, if a plan has already been developed, modify it as necessary), and return the student to his current class and school (unless the parent and the district agree to a change of placement as part of the behavioral intervention plan).

Parents must be notified of the disciplinary action taken against their child no later than the day on which the decision to take disciplinary action is made. A parent may elect to appeal the disciplinary action OR the school district may initiate a hearing if it believes that maintaining the child in his or her current placement is “substantially likely to result in injury to the child or to others.” During the appeal by either party, the “stay put” for the child is the interim alternative educational setting until a decision has been rendered by the hearing officer or the time period has expired. *This is directly contrary to IDEA ’97 and prior NJ law, which called for “stay put” in the student’s current placement.* (20 U.S.C. 1215(k); 34 C.F.R. 300.530 - 533; N.J.A.C. 6A:14-2.8)

Remember that students with disabilities are also entitled to the due process protections of students without disabilities in discipline cases, including the right to a hearing before the School Board if the student is going to be removed for more than 10 consecutive days. This hearing is to determine whether or not the student committed the offense for which they are charged and, if so, the appropriate penalty. Students with disabilities may not receive more stringent penalties than students without disabilities, and both federal law and state code further provide that school officials may consider extenuating circumstances on a case-by-case basis to provide no penalty or a lesser penalty for students with disabilities than the maximum penalty allowed.

Dispute Resolution

Mediation

Previously, federal law only required public agencies to make voluntary mediation available as a means of informally resolving disputes between parents and school districts when a hearing had been requested. IDEA 2004 now requires states to do what NJ has long done – provide mediation whether or not a due process hearing has been requested.

State Code requires that the mediation be scheduled within 15 calendar days from receipt of the request and completed within 30 calendar days from request. All discussions during the mediation are confidential and may not be used later in a due process hearing or a civil proceeding. IDEA 2004 (20 U.S.C. 1215(e); 34 C.F.R. 300.506) and the NJ State Code (N.J.A.C. 6A:14-2.6) provide that if the parties reach agreement through mediation, they must execute a legally binding agreement that sets forth the resolution they have reached, which is enforceable in state or federal court. Mediation agreements may not address special education for more than one school year. Once an agreement is reached, either party may request enforcement of the mediation agreement within 90 days from when they believe that a component of the agreement was not implemented as required by the agreement.

Due Process

Federal and state law have long permitted parents and school districts to file due process complaints as a more formal means of dispute resolution. IDEA 2004 and the revised State Code establish a 2-year period in which the complaint must be filed (2 years from the time that the parent knew or should have known about the act or omission that is the subject of the complaint) and a 30-day period for the school district to try to resolve a complaint filed by a parent. If the district has not already sent prior written notice to the parent regarding the issue(s) addressed in the parent's request for a hearing, the district must send a written response to the parent within 10 days of receiving the petition including why the district proposed or refused to take the action involved in the dispute, the options considered by the IEP team and why those options were rejected, each evaluation procedure, assessment, record or report used as the basis for the district's decision, and the factors that are relevant to the district's proposal or refusal. The district is then required to convene a "resolution session" within 15 days of receiving notice of the parent's complaint. *The district may bring an attorney to the resolution session only if the parent is accompanied by an attorney. The State Code clarifies that in NJ, an advocate is **not** considered an attorney for purposes of determining whether a district can bring an attorney to the resolution session. The parent and district may agree to mediation instead of the resolution session or they may agree to waive the resolution session and move directly to a hearing.*

If the person receiving the request for a hearing feels that the petition is not sufficient, they may challenge the sufficiency within 15 days of receipt of the request for a hearing and the Office of Administrative Law will make a determination as to sufficiency.

If the dispute is resolved within the 30-day resolution period (15 days, in NJ, in the case of disciplinary appeals), the parties are required to execute a legally binding agreement setting forth

the resolution they have reached, which is enforceable in state or federal court. If the matter is not resolved within 30 days after the petition has been filed (15 days in NJ in the case of disciplinary appeals), the complaint proceeds to hearing before an impartial hearing officer.

Federal regulations allow the parent to move forward to a due process hearing if the district does not convene a resolution session within the 15 day timeline, and they allow the district to ask the hearing officer to dismiss the complaint if the parent refuses to participate in the resolution session. (20 U.S.C. 1215(f); 34 C.F.R. 300.507 and 300.510; N.J.A.C. 6A:14-2.7)

Emergent relief under the state Code is now only available for issues that involve a break in the delivery of services, disciplinary action, placement pending the outcome of due process proceedings, and graduation or participation in graduation ceremonies.

Any appeal of a due process hearing decision must be filed within 90 calendar days of receipt of the hearing officer's decision.

Attorneys' Fees

Under IDEA 2004, attorneys' fees are awarded to the parent if he or she is the "prevailing party." Applying the standards already contained in the Federal Rules of Civil Procedure and in other federal laws, IDEA 2004 states that if the State Department of Education or the school district is the prevailing party, *and* the parent's attorney is found to have filed a complaint that is *frivolous, unreasonable, or without foundation* or has continued to litigate after the litigation has become frivolous, unreasonable or without foundation, the court may require the parent's attorney to pay the fees charged to the district by its lawyers. Similarly, if the State Department of Education or a school district is the prevailing party *and* the court finds that the *parent's complaint was presented for an improper purpose*, such as to harass, cause unnecessary delay or needlessly increase litigation costs, the court may require the parent *or* the parent's attorney to pay the attorneys' fees of the public entity. (20 U.S.C. 1215(i)(3)(B); 34 C.F.R. 300.517)

Other Significant Changes

Special Education Parent Advisory Groups

NJ will now require each board of education to ensure that a "special education parent advisory group" is in place to provide input to the district on issues concerning students with disabilities. (N.J.A.C. 6A: 14-1.2(h))

Medication

N.J.A.C. 6A:14-1.1 prohibits a district from requiring a child to obtain a prescription (such as medication for ADHD) as a condition of attending school, receiving an evaluation, or being provided with special education and related services.

Use of Electronic Mail

The State Code now allows districts to allow parents to use electronic mail (e-mail) to submit requests to school officials regarding referral, identification, evaluation, classification, and the provision of a free, appropriate public education. If this is permitted by the district, the district must inform parents of the procedures to access the e-mail system.

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This resource guide does not describe all of the changes under IDEA 2004, the IDEA regulations or the NJ Administrative Code. SPAN will develop and distribute more detailed fact sheets and guides, so please watch our website for new developments!