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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**

(August 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); 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

NJ 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 NJAC 6A:10A-3.1 must be implemented for all students who have reading as their primary are 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 the evaluation. If a parent requests an *independent evaluation*, the Code now allows the district to have the opportunity to conduct the requested re-evaluation. Within ten days of receipt of the

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.

request, the district must decide whether it will conduct the evaluation and notify the parents, and then has 45 calendar days to conduct the evaluation. For *reevaluations*,

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." (NJAC 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 (20 U.S.C. §1214(d); IDEA 2004 Regul

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, paper 9(rim)8(altem)8y 0rya4ticupa*

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); 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); 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