

TWO STEPS FORWARD, ONE STEP BACK

IDEA

Reauthorization

by Matthew D. Cohen, J.D.

Last November, the U. S. Congress passed the Individuals with Disabilities Education Improvement Act of 2004 (IDEA), a revision of the already existing Individuals with Disabilities Education Act, which governs special education in the United States. The new law is the result of conflicting pressures from education and disability rights organizations. It has produced dramatic changes in the special education law, and it will have profound effects on our special education system.

As this article goes to print, we await publication of the proposed federal regulations from the U.S. Department of Education. These regulations will provide some further definition and clarification of the meaning of the new law. Once this occurs, the states will need to take action to assure that their statutes and regulations conform to the requirements of the federal law. This process will likely take at least a year or more. At the same time, the courts will be called upon to resolve the law's ambiguities and provide direction to its on-

going implementation. In short, it will be a number of years before we clearly know how IDEA will actually operate. Ironically, although the new law was intended to discourage litigation, several aspects may actually result in an increase in disputes and growth in the number of cases that end up in court.

This article provides a brief overview of key provisions of the new law. CHADD will provide updates as the regulations are released and as the courts grapple with how the law should be interpreted.

There may be years of confusion and likely conflict over the scope of the new law and what it means.



Conference Notes

Matthew Cohen, J.D., will be conducting a pre-conference institute on behavioral issues for youth with AD/HD under the new IDEA as well as two breakout sessions on the reauthorization of IDEA during CHADD's Annual Conference in Dallas, Texas, October 27-29, 2005.

Editor's Note:

La traducción al español de este artículo comienza en la página 44.

The Spanish translation of this article begins on page 44.



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Scope of Evaluation and IEP Services

Under IDEA 2004, the requirements for evaluation and individualized education plan (IEP) content and services have been expanded to require that the child's developmental and functional needs be addressed along with his or her academic needs. This expansion should now make it clear that schools have an obligation to address how the child performs socially, behaviorally and with respect to a variety of other aspects of school functioning, including time management, organizational skills, interpersonal skills, dietary and eating habits at school, hygiene and communication, to name a few.

This is significant for children with attention-deficit/hyperactivity disorder (AD/HD) who may have other difficulties not directly tied to academics but have a significant impact on their functioning at school.

Procedures for Evaluation and Re-evaluation

A number of changes have been made to the procedures for evaluation and re-evaluation of students with disabilities. As before, a school is required to obtain informed parental consent for any individual evaluation or re-evaluation. Under the new law, however, schools may not re-evaluate a child more than one time annually unless both parties agree to additional re-evaluations.

Evaluation Using Child's Means of Communication.

In addition to the expansion of evaluation and re-evaluation to address a child's functional, developmental and academic needs, the evaluation/re-evaluation rules have also been expanded. Evaluation must be provided in the student's primary language or mode of communication and in a form likely to obtain accurate results about his or her functioning.

Parents May Refuse Special Education. When a child is being initially evaluated for special education, the school remains obligated to obtain parental consent for the evaluation. In the past, if a child was determined eligible based on the evaluation and the parent refused initial consent for placement in special education, the school had the option of bringing a due process hearing for the purpose of overriding the parent's refusal of special education services. Schools may no longer override the parent's refusal of special education for the child. If the parents* refuse special education services, that decision is binding, and the school district is relieved of any liability as a result of the child's failure to receive special education.

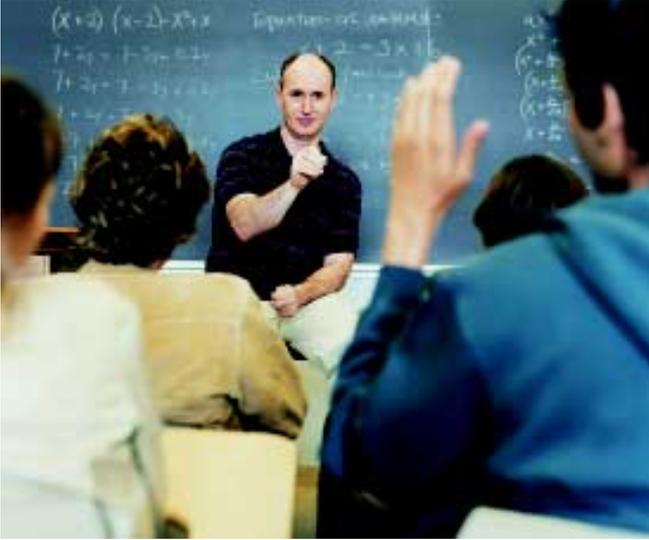
New IEP Rules

Elimination of Short-term Objectives. A number of important changes have been made to the IEP process. The law no longer requires schools to use short-term objectives or benchmarks in addition to annual goals. As a result, schools may have less obligation to provide detailed steps for the child to accomplish and will have less rigorous requirements with respect to what progress needs to be evaluated. However, the law says that the school must continue to use quarterly progress reports for providing information to the parents on the child's progress toward their annual goals. Although the requirement for short-term objectives has been eliminated, one strategy for maintaining accountability for schools in relation to the child's progress will be to have more detailed and numerous long-term goals with clear and measurable objectives for those goals. In addition, the quarterly reporting procedure should build in more detailed criteria for assessing the child's progress.

IEP Process Pilot Programs. In addition to changing the IEP process, Congress has developed a mechanism for up to 15 states to be selected for two separate pilot projects to (a) shift from annual IEPs to IEPs with three years' duration and (b) revise the IEP process altogether to reduce paperwork. Both of these initiatives are worrisome to parents because of the potential for reduction in accountability and access to meaningful information. Parents and educators in states that are selected for either of these pilot projects should be

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Awareness Day.
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IDEA Reauthorization



especially vigilant that the pilots maintain adequate protections for the children and preserve adequate information and accountability with respect to the staff.

IEP Attendance. There has also been a shift regarding the personnel who are required to be present during an IEP. Specifically, under some circumstances both regular and special education staff may be exempt from a meeting if there is mutual agreement by the parents and the school and a written report is provided by excused staff members. While this provision appears to promote efficiency and better use of school staff, it may also encourage parents to excuse an educator that would otherwise have important information to contribute.

IEP Changes by Agreement. The law will now allow for amendments of the IEP without an official IEP meeting if the parent and the school agree. Unfortunately, because the law provides no mechanism for identifying how the school will make decisions to propose amendments to the IEP, there is an increased likelihood that changes will be made without the parents having full understanding of or agreement with the proposed change. Further, because the paperwork for the proposed change will be completed after the fact, there is the potential that IEPs may be modified in ways that the parents did not understand or agree to.

Transition Planning. Transition planning is supposed to take place for children in high school who are preparing to move to some other setting after graduation or when the child turns 21. Historically, the transition plan had to be in place for children who were 14 or older. Under IDEA 2004, the transition plan needs to be in place when the child is 16. However, the transition plan requirements have been expanded to include all appropriate and necessary evaluations to identify the child's transitional needs, as well as identifying transitional services that the child requires, including the child's course of study. The addition of the course



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IDEA Reauthorization

of study is significant, because many transition plans did not link back to the child's educational program. Congress has made an important legal connection that should require schools to more deliberately integrate the child's transition needs with their overall educational program.

Behavior and Discipline

Preserves Key Discipline Safeguards. The law continues to require that the IEP process consider positive behavioral interventions and supports for children with behavioral challenges. It requires that a "manifestation determination" conference be held prior to long-term suspension or expulsion for children with disabilities to determine if the behavior was related to the child's disability and, as a consequence, whether the child should remain in school or be subject to regular and exclusionary procedures. Further, the law maintains the "No Cessation of Service Rule," which provides that children with disabilities who are subject to long-term suspension or expulsion are still entitled to receive special education services, even if there is a change of placement.

Changes in Discipline Procedures. While maintaining these key provisions, IDEA 2004 includes significant changes in the disciplinary rules, which make it easier for schools to transfer and/or exclude students. First, the new law changes the criteria that must be met to determine that the child's behavior is not related to his or her disability. When this determination is made, the school is able to use regular education disciplinary procedures rather than maintaining the child's existing program.

Second, the new law provides an expansion of the circumstances in which a child can be transferred to an interim alternative educational setting to include not only the child's involvement with dangerous weapons or drugs, but also circumstances where the child has caused a serious injury.

Third, when a child is transferred to an interim alternative educational setting, the length of that transfer has been changed from 45 calendar days to 45 school days, a substantially longer period.

Fourth, when a child is transferred to an alternative setting and the parent files for a due process hearing objecting to that transfer, the child remains in that setting even if the due process hearing procedure extends beyond the 45-day limit. Under the previous law, the child was to return to his or her prior educational setting, even if the hearing or dispute had not



been fully resolved. Under the new law, schools will have greater ability to keep students in alternative settings even when the parents object.

Finally, and most worrisome, the new law provides that the children may be subject to disciplinary exclusion and/or transferred to interim alternative educational settings for **any** violation of the school conduct code. Since most school conduct codes cover a wide range of behavior from very serious criminal behavior to minor infractions such as tardiness, talking out of turn or graffiti, the new law provides for a dramatic and undefined expansion of the circumstances when children can be transferred or excluded.

Changes in Due Process Procedures

A number of important changes have been made to the procedural safeguards in due process procedures of IDEA. First, the circumstance under which the parents must be given notice of their rights is substantially reduced. Second, the parents are required to submit a detailed statement of why they are requesting a due process hearing. The new law allows schools to request that the hearing be dismissed on the grounds that the parent's request is not sufficiently specific. Since many parents are unaware of the requirements of the law, this means that parents may be deprived access of a due process hearing based on their not knowing how to write a due process letter.

In addition, if parties do not agree to mediation, the law calls for the use of a "resolution" meeting

IDEA Reauthorization

which allows the school to have up to 30 days to resolve the dispute, prior to the starting of the 45-day timeline for a due process hearing. This provision is intended to reduce the circumstances where disputes have to go to due process, but it may actually increase conflicts. On a positive note, when the parties participate in mediation or arrive at a mediated or formal settlement agreement and the agreement is in writing, those agreements are now enforceable in court. Historically, there was confusion as to whether such agreements could be or were legally binding on the parties.

Finally, the law now provides if a parent is unsuccessful in a due process hearing and the courts determine that the due process request was frivolous or that the hearing was brought for the purposes of harassment, delay or intimidation, the parents may be held liable for the school district attorney's fees. Historically, there have been very few due process hearings and far fewer where there was an allegation that the hearing request was frivolous or for the purpose of harassment or delay. As a result, there should be very few circumstances where parents would be required to reimburse the school district for such costs.

However unlikely such rulings are, the new requirement will have an affect on the willingness of many families to initiate due process hearings.

Conclusion

In sum, IDEA 2004 provides a number of important changes in the law. Some of these changes may improve services to children and improve the process. Conversely, some of the changes may give schools greater discretion and lower the requirement for how and to what extent they are required to meet children's needs. Further, the law may make it harder for parents to protect the rights of their children and to use the due process procedures as a meaningful way of holding schools accountable. It will be a number of months before the federal regulations and state laws and regulations have been revised to conform to the federal law. We will have to wait for these additional changes to have a full understanding of the extent to which this law will change the way that special education operates in the United States. However, there may be years of confusion and likely conflict over the scope of the new law and what it means. ■

When this article was written, the regulations had not yet been made public. CHADD has since produced comments and recommendations. CHADD is also preparing more comprehensive comments that will be available on www.chadd.org when completed. Final regulations are expected around December 2005.

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* **Editor's Note:** The term "parents" is used in this article to denote parents as well as caregivers.