

**THE 2004 REAUTHORIZATION
OF THE
INDIVIDUALS WITH
DISABILITIES EDUCATION ACT**

**NATIONAL SCHOOL
BOARDS ASSOCIATION
COUNCIL OF SCHOOL ATTORNEYS
AUDIO CONFERENCE**

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Costa Mesa, California**

December 16, 2004

THE 2004 REAUTHORIZATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

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THE 2004 IDEA REAUTHORIZATION

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**SUMMARY OF H.R. 1350
PASSED BY CONGRESS NOVEMBER 19, 2004
SIGNED BY THE PRESIDENT DECEMBER 3, 2004**

**I.
RELATED SERVICES**

Section 602(26)¹ amends the term “related services” by adding “school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the Individualized Education Program of the child . . .”. Previously, the term “school nurse services” was not included in the definition of related services.² It is unclear whether the addition of this language will change the law. There have been several court cases which have held that school nurse services are a related service under the IDEA.³

**II.
TRANSITION SERVICES**

Section 602(34)⁴ amends the definition of the term “transition services” to state that it is a coordinated set of activities for a child with a disability that is designed to be within a results oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child’s movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. The main change in language is from the phrase “outcome-orientated process” to “results-orientated process.” Whether this will be interpreted as a significant change in the law is difficult to determine at this time.

**III.
MISCELLANEOUS DEFINITIONS**

Sections 602(35)⁵ and 602(36)⁶ of the legislation add definitions for “universal design” and “ward of the state.”

Universal design is given the same meaning as Section 3 of the Assistive Technology Act of 1998.⁷ That Act defines “universal design” as a concept or philosophy for designing and delivering products and services that are usable by people with the widest possible range of functional capabilities, which include products and

¹ 20 U.S.C. § 1401(26).

² See 20 U.S.C. § 1401(22).

³ See, Irving Independent School District v. Tatro, 104 S.Ct. 3371 (1984); Cedar Rapids Community School District v. Garrett; 526 U.S. 66, 119 S.Ct. 992 (1999).

⁴ 20 U.S.C. § 1401(34).

⁵ 20 U.S.C. § 1401(35).

⁶ 20 U.S.C. § 1401 (36).

⁷ 29 U.S.C. § 3002.

services that are directly usable (without requiring assistive technologies) and products and services that are made usable with assistive technologies.

A ward of the state is defined as a child who, as determined by the state where the child resides, is a foster child, is a ward of the state, or is in the custody of a public child welfare agency. This definition is similar to definitions in California law.

IV. PAPERWORK REDUCTION PILOT PROGRAM

Section 609⁸ establishes a pilot program that will allow states to identify ways to reduce paperwork burdens and other administrative duties that are directly associated with the requirements of the IDEA in order to increase the time and resources available for instruction and other activities aimed at improving educational and functional results for children with disabilities. States will be given the opportunity to apply for a waiver to participate in the program. A maximum of 15 states may apply. It is unknown at this time whether the State of California intends to apply for the waiver.

V. LOCAL EDUCATIONAL AGENCY RISK POOL

Section 611(e)(3)⁹ establishes a local educational agency risk pool for the purpose of assisting local educational agencies in addressing the needs of high need children with disabilities. This section authorizes each state to reserve up to 10% of the state's allocation of federal funds to establish a high cost fund and make disbursements from the high cost fund to local educational agencies for high need children. The disbursements from the fund may not be used for legal fees, court costs, or other litigation costs. A high need child is to be defined by the State in consultation with local educational agencies and must, at a minimum be a child with a disability that costs three times the average per pupil expenditure in that State.¹⁰

The State plan for the high cost fund must include all of the following:

⁸ 20 U.S.C. § 1409.

⁹ 20 U.S.C. § 1411(e)(3).

¹⁰ The definition of "average per pupil expenditure" is set forth in the NCLB, 20 U.S.C. § 7801(2) which states: "The term "average per-pupil expenditure" means, in the case of a State or of the United States – (A) without regard to the source of funds –

(i) the aggregate current expenditures, during the third fiscal year preceding the fiscal year for which the determination is made (or, if satisfactory data for that year are not available, during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the State or, in the case of the United States, for all States (which, for the purpose of this paragraph, means the 50 States and the District of Columbia); plus

(ii) any direct current expenditures by the State for the operation of those agencies; divided by (B) the aggregate number of children in average daily attendance to whom those agencies provided free public education during that preceding year."

1. The financial impact of the high need child with a disability on the budget of the child's local educational agency.
2. Eligibility criteria for the participation of a local educational agency that, at a minimum, takes into account the number and percentage of high need children with disabilities served by a local educational agency.
3. A funding mechanism that provides distributions each fiscal year to local educational agencies that meet the criteria developed by the State.
4. An annual schedule by which the State educational agency will make its distributions from the high cost fund each fiscal year.

The State is required to make its final State plan available to the public no less than 30 days before the beginning of the school year, including dissemination and posting on the State website. Funds in the pool that are not expended in a fiscal year must be allocated to local educational agencies for the succeeding fiscal year.

VI. AUTHORIZED FUNDING

Section 611(i)¹¹ increases the federal funds authorized for special education but does not actually appropriate funds and does not make appropriations mandatory. The intent of this section is to increase funding to the promised 40% level by fiscal year 2011, but Congress is not required to do so.

VII. CHILDREN ENROLLED IN PRIVATE SCHOOLS BY THEIR PARENTS

Section 612(a)(10)¹² amends the requirements for providing services to children enrolled in private schools by their parents. This section, as amended, authorizes the use of federal funds for direct services to parentally placed private school children by the local educational agency. The amount expended for providing these services is required to be equal to a proportion of the amount of federal funds made available by the federal government.

In calculating the proportionate amount of federal funds, the local educational agency, after timely and meaningful consultation with representatives of private schools, shall conduct a thorough and complete child find process to determine the number of parentally placed children with disabilities attending private schools located in the local educational agency. The child find process is required to ensure the equitable

¹¹ 20 U.S.C. § 1411(i).

¹² 20 U.S.C. § 1412(a)(10).

participation of parentally placed private school children with disabilities and an accurate account of such children.

The consultation with private school representatives during the design and development of special education and related services for private school children must include the following:

1. The child find process and how parentally placed private school children suspected of having a disability can participate equitably, including how parents, teachers, and private school officials will be informed of the process;
2. The determination of the proportionate amount of federal funds available to serve parentally placed private school children with disabilities, including the determination of how the amount was calculated;
3. The consultation process among the local educational agency, private school officials, and representatives of parents of parentally placed private school children with disabilities, including how the process will operate throughout the school year to ensure that parentally placed private school children with disabilities identified through the child find process can meaningfully participate in special education and related services;
4. How, where, and by whom special education and related services will be provided for parentally placed private school children with disabilities, including a discussion of the types of services, including direct services and alternate service delivery mechanisms, how such services will be apportioned if funds are insufficient to serve all children, and how and when these decisions will be made; and
5. How, if the local educational agency disagrees with the views of the private school officials on the provision of services or the types of services, whether provided directly or through a contract, the local educational agency shall provide to the private school officials a written explanation of the reasons why the local educational agency choose not to provide services directly or through a contract.

When timely and meaningful consultation has occurred, the local educational agency shall obtain a written affirmation signed by the representatives of participating private schools, and if such representatives do not provide such affirmation within a reasonable period of time, the local educational agency shall forward the documentation of the consultation process to the state educational agency. A private school official shall

have the right to submit a complaint to the state educational agency if the local educational agency did not engage in consultation that was meaningful and timely, or did not give due consideration to the views of the private school official. If the private school official wishes to submit a complaint, the private school official shall provide the basis of the noncompliance by the local educational agency to the state educational agency, and the local educational agency shall forward the appropriate documentation to the state educational agency. If the private school official is dissatisfied with the decision of the state educational agency, such official may submit a complaint to the United States Secretary of Education by providing the basis of the noncompliance by the local educational agency to the Secretary of Education, and the state educational agency shall forward the appropriate documentation to the Secretary of Education.

The provision of equitable services to parentally placed private school children shall be provided by employees of the public agency or through contract by the public agency with an individual, association, agency, organization or other entity. Special education and related services provided to parentally placed private school children with disabilities, including materials and equipment, must be secular, neutral and nonideological. The control of funds used to provide special education and related services, title to materials, equipment and property purchased with those funds, shall be in a public agency for the uses and purposes provided by the IDEA and a public agency shall administer the funds and property.

The changes to this Section will require more extensive consultations with private schools.

VIII. STATE PERFORMANCE GOALS AND INDICATORS

Section 612(a)(15)¹³ requires states to establish goals for the performance of children with disabilities that promote the purposes of the IDEA, are the same as the State's definition of adequately yearly progress, including the State's objectives for progress by children with disabilities under the NCLB,¹⁴ address the graduation rates and dropout rates, as well as such other factors as the State may determine and are consistent, to the extent appropriate, with any other goals and standards for children established by the State. The State is also required to establish performance indicators that the State will use to assess progress toward achieving the goals set forth in the NCLB, including measurable annual objectives for progress by children with disabilities under the NCLB and will annually report to the United States Secretary of Education and the public on the progress of the State and of children with disabilities in the State, toward meeting the goals established under the IDEA and the NCLB.

¹³ 20 U.S.C. § 1412(a)(15).

¹⁴ 20 U.S.C. § 6311(b)(2)(C).

IX.
PARTICIPATION OF SPECIAL EDUCATION
STUDENTS IN STATEWIDE ASSESSMENTS

Section 612(a)(16)¹⁵ requires that all children with disabilities are included in all general state and districtwide assessment programs, including assessments described in the NCLB,¹⁶ with appropriate accommodations and alternative assessments where necessary and as indicated in their respective individualized education programs (IEPs). The State (or, in the case of a districtwide assessment, the local educational agency) is required to develop guidelines for the provision of appropriate accommodations. The State (or, in the case of a districtwide assessment, the local educational agency) must develop and implement guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in regular assessments with accommodations as indicated in their respective individualized education programs (IEPs).

The guidelines for alternate assessments must provide that:

1. The alternate assessment is aligned with the State's challenging academic content standards and challenging student academic achievement standards; and
2. If the State has adopted alternate academic achievement standards permitted under the NCLB regulations,¹⁷ the alternate standards measure the achievement of children with disabilities against those standards.

The State is required to conduct the alternate assessments and make available to the public, with the same frequency and in the same detail as it reports on the assessment of non-disabled children, the following:

1. The number of children with disabilities participating in regular assessments, and the number of those children who are provided accommodations in order to participate in those assessments.
2. The number of children with disabilities participating in alternate assessments that are aligned with the State's challenging academic content standards and challenging student academic achievement standards.
3. The number of children with disabilities participating in alternate assessments that include alternate academic achievement standards and measure disabled children against those standards.

¹⁵ 20 U.S.C. § 1412(a)(16).

¹⁶ 20 U.S.C. § 6311.

¹⁷ 20 U.S.C. § 6311(b)(1).

4. The performance of children with disabilities on regular assessments and on alternate assessment (if the number of children with disabilities participating in those assessments is sufficient to yield statistically reliable information and reporting that information will not reveal personally identifiable information about an individual student), compared with the achievement of all children, including children with disabilities, on those assessments.

The state educational agency (or, in the case of a districtwide assessment, the local educational agency) shall, to the extent feasible, use universal design principles in developing and administering any alternate assessment.

X.

MAINTENANCE OF STATE FINANCIAL SUPPORT

Section 612(a)(20)¹⁸ added language that a state may not use IDEA funds to satisfy state law mandated funding obligations to local educational agencies, including funding based on student attendance or enrollment, or inflation. The exact meaning of this language is unclear, but it may mean that a state may not use federal funds to satisfy state law mandated funding obligations for growth in average daily attendance. If this language is interpreted in this manner, it may prohibit the State of California from using federal funds to fund growth in the number of special education students in California.

XI.

STATE ADVISORY PANEL

Section 612(a)(21) adds requirement that the state and local education officials on the state advisory panel include officials who carry out activities for homeless students.

The legislation clarified the requirement relating to parents of children with disabilities by indicating that the children may be ages birth through 26.

XII.

BLIND STUDENT ACCESS TO INSTRUCTIONAL MATERIALS

Section 612(a)(23)¹⁹ adds requirements that states must adopt the National Instructional Materials Accessibility Standard for the purposes of providing instructional materials to blind persons or other persons with print disabilities, in a timely manner after the publication of the National Instructional Materials Accessibility Standard in the Federal Register. The state educational agency is required, to the maximum extent possible, to work collaboratively with the state agency responsible for assistive technology programs for blind students.

¹⁸ 20 U.S.C. § 1412(d)(20)

¹⁹ 20 U.S.C. § 1412(a)(23).

XIII.
**OVER-IDENTIFICATION OF MINORITY STUDENTS
IN SPECIAL EDUCATION**

Section 612(a)(24)²⁰ requires states to adopt policies and procedures designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a particular impairment described in Section 602 (e.g. mental retardation, emotional disturbance).

XIV.
PROHIBITION ON MANDATORY MEDICATION

Section 612(a)(25)²¹ requires the state educational agency to prohibit state and local educational agency personnel from requiring a child to obtain a prescription for a controlled substance²² as a condition of attending school, receiving an evaluation or receiving services under the IDEA. However, nothing in this section shall be construed to create a federal prohibition against teachers or other school personnel consulting or sharing classroom based observations with parents regarding their student's academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services under the child find requirements of the IDEA.

XV.
PERMISSIVE USE OF IDEA FUNDS

Sections 613(a)(4)²³ and 613 (f)²⁴ permit a local educational agency to use IDEA funds for early intervening services up to 15% of the amount the agency receives to develop and implement coordinated early intervening services which may include interagency financing structures for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade 3) who have not been identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment.

In implementing coordinated, early intervening services, a local educational agency may carry out activities that include:

1. Professional development for teachers and other school staff to enable such personnel to deliver scientifically based academic instruction and behavioral interventions, including scientifically

²⁰ 20 U.S.C. § 1412(a)(24).

²¹ 20 U.S.C. § 1412(a)(25).

²² See, the Controlled Substances Act, 21 U.S.C. §§ 801 et. seq.

²³ 20 U.S.C. § 1413(a)(4).

²⁴ 20 U.S.C. § 1413(f).

based literacy instruction, and, where appropriate, instruction on the use of adaptive and instructional software; and

2. Educational and behavioral evaluations, services, and supports, including scientifically based literacy instruction.

The legislation specifically states that nothing in the subsection relating to early intervening services shall be construed to limit or create a right to a free appropriate public education. Each local educational agency that develops and maintains coordinated early intervening services shall annually report to the state educational agency on the number of students served and the number of students served who subsequently receive special education and related services. The funds must be used to supplement, not supplant funds made available under the NCLB and may be used to carry out programs aligned with NCLB requirements and may be used to carry out programs aligned with NCLB requirements.

XVI. INITIAL EVALUATION

Section 614(a)(1)²⁵ states that a parent of a child, a state educational agency, other state agency or local educational agency may initiate a request for an initial evaluation to determine if the child is a child with a disability. The initial evaluation to determine the educational needs of the child and whether the child is a child with a disability shall be completed within 60 days of receiving parental consent for the evaluation, or if the state establishes a time frame within which the evaluation must be conducted within the state's timeframe.²⁶

The applicable timeframe does not apply to a local educational agency if a child enrolls in a school served by the local educational agency after the relevant timeframe has begun, and prior to a determination by the child's previous local educational agency as to whether the child is a child with a disability, but only if the subsequent local educational agency is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent local educational agency agree to a specific time when the evaluation will be completed, or the parent of a child repeatedly fails or refuses to produce the child for the evaluation.

The agency proposing to conduct an initial evaluation to determine if the child qualifies as a child with a disability shall obtain informed consent from the parent of such child before conducting the evaluation. Parental consent for evaluation shall not be construed as consent for placement for receipt of special education and related services. An agency that is responsible for making a free appropriate public education available to a child with a disability shall seek to obtain informed consent from the parent of such child before providing special education and related services to the child.

²⁵ 20 U.S.C. § 1414(a)(1).

²⁶ California Education Code § 56344 requires that the evaluation be completed within 50 days, not counting intersessions or school vacations in excess of five schooldays.

If the parents of a child refuse to consent to an initial evaluation, the local educational agency may continue to pursue an evaluation by utilizing the mediation and due process procedures under 20 U.S.C. Section 1415, except to the extent inconsistent with state law relating to parental consent. If the parent of a child does not provide informed consent or fails to respond to a request to provide consent, the local educational agency shall not provide special education and related services by utilizing the due process hearing procedures and shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide the special education and related services for which the local educational agency requests such informed consent. In addition, the local educational agency is not required to convene an IEP meeting or develop an IEP under the IDEA for the child for the special education and related services for which the local educational agency requests such consent.

If the child is a ward of the state and is not residing with the child's parent, the local educational agency shall make reasonable efforts to obtain informed consent from the parent of the child for an initial evaluation to determine whether the child is a child with a disability. The agency shall not be required to obtain informed consent from the parent of a child for an initial evaluation to determine whether the child is a child with a disability if:

1. Despite reasonable efforts to do so, the agency cannot discover the whereabouts of the parent of the child;
2. The rights of the parent of the child have been terminated in accordance with state law; or
3. The rights of the parent to make educational decisions have been subrogated by a judge in accordance with state law and consent for an initial evaluation has been given by an individual appointed by the judge to represent the child.

The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services.

A local educational agency is required to ensure that a reevaluation of each child with a disability is conducted in accordance with IDEA procedures if the local educational agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation or if the child's parents or teacher request a reevaluation. A reevaluation shall occur not more frequently than once a year unless the parent and the local educational agency agree otherwise, and at least once every three years, unless the parent and local educational agency agree that a reevaluation is unnecessary.

XVII. ELIGIBILITY FOR SPECIAL EDUCATION

Section 614(b)²⁷ states that in making a determination of eligibility for special education and related services, a child shall not be determined to be a child with a disability if the determinant factor for such a determination is a lack of appropriate instruction in reading, including in the essential components of reading instruction, as defined in Section 1208(3)²⁸ of the No Child Left Behind Act, lack of instruction in math, or limited English proficiency.

When determining whether a child has a specific learning disability, as defined in Section 602,²⁹ a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation or mathematical reasoning. In determining whether a child has a specific learning disability, a local educational agency may use a process that determines if the child responds to scientific research based intervention as a part of the evaluation procedures.

Generally, a local educational agency is required to evaluate a child with a disability before determining that the child is no longer a child with a disability. This legislation added an exception that states that the local educational agency is not required to reevaluate the child before the termination of a child's eligibility due to graduation from secondary school with a regular diploma, or due to exceeding the age eligibility for a free appropriate public education under state law. Rather, the local educational agency is required to provide the child with a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's post-secondary goals.

XVIII. IEP REQUIREMENTS

A. Annual Progress

Section 614(d)³⁰ adds a requirement that 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.

²⁷ 20 U.S.C. § 1414(b).

²⁸ 20 U.S.C. § 6368(3), which defines the "essential components of reading instruction" as explicit and systemic instruction in phonemic awareness, phonics, vocabulary development, reading fluency, including oral reading skills and reading comprehension strategies.

²⁹ 20 U.S.C. § 1401(30).

³⁰ 20 U.S.C. § 1414(d).

The requirement for benchmarks or short-term objectives is now limited to children with disabilities who take alternative assessments aligned to alternate achievement standards. Benchmarks or short-term objectives in addition to annual goals will not be required for all other children with disabilities.

B. Alternate Assessment

If the IEP team determines that the child will take an alternate assessment on a particular state or districtwide assessment of student achievement, the IEP team must draft a statement of why the child cannot participate in the regular assessment and the particular alternate assessment selected is appropriate for the child must be included in the IEP.

C. Transition Services

The legislation repealed the requirements that beginning at age fourteen, a statement of transition service needs of the child must be included in the IEP. The legislation now requires that beginning not later than the first IEP to be in effect when the child is sixteen, and updated annually thereafter, the IEP should include appropriate measurable post-secondary 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 those goals. Beginning not later than one year before the child reaches the age of majority under state law, a statement that the child has been informed of the child's rights under the IDEA, if any, that will transfer to the child on reaching the age of majority under state law should be included in the IEP.

If a participating agency, other than the local educational agency, fails to provide the transition services described in the IEP, the local educational agency shall reconvene the IEP team to identify alternate strategies to meet the transition objectives for the child set out in the IEP.

D. Additional Information

The legislation adds a provision that states that nothing in Section 614³¹ shall be construed to require that additional information be included in a child's IEP beyond what is explicitly required under Section 614 and nothing in Section 614 should be construed to require the IEP team to include information under one component of a child's IEP that is already contained under another component of the child's IEP.

E. Attendance at IEP Meetings

Section 614 also states that a member of the IEP team shall not be required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the

³¹ 20 U.S.C. § 1414.

local educational agency agree that the attendance of that IEP team member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting. A member of the IEP team may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to, or a discussion of the member's area of the curriculum or related services, if the parent and the local educational agency consent to the excusal and the member submits, in writing to the parent and the IEP team, input into the development of the IEP prior to the meeting. The parent's agreement to excuse a member of the IEP team must be in writing.

F. Preschool Children

In the case of a child who has previously served under Part C of the IDEA (preschool programs), an invitation to the initial IEP meeting shall, at the request of the parent, be sent to the Part C service coordinator or other representatives of the Part C system, to assist with the smooth transition of services.

At the beginning of each school year, each local educational agency, state educational agency, or other state agency, as the case may be, shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program. In the case of a child with a disability age 3-5 (or, at the discretion of the state educational agency, a 2 year old child with a disability who will turn age 3 during the school year), the IEP team shall consider the individualized family service plan that contains the material that is developed in accordance with Section 636,³² and the individualized service plan may serve as the IEP of the child if using that plan as the IEP is consistent with state policy and agreed to by the agency and the child's parents.

G. Transfer of Students and Records

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same state, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with federal and state law.

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who has an IEP that was in effect in another state, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation, if determined to be necessary by such agency, and develops a new IEP, if appropriate, that is consistent with federal and state law.

³² 20 U.S.C. § 1436.

To facilitate the transition for a child who transfers from another school, the new school in which the child enrolls shall take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous school in which the child was enrolled, and the previous school in which the child was enrolled shall take reasonable steps to promptly respond to such requests from the new school.

H. Changes to the IEP

In developing each child's IEP, the IEP team, in addition to considering the strengths of the child and the results of the initial evaluation or most recent evaluation of the child, the IEP team is required to also consider the concerns of the parents for enhancing the education of their child and the academic, developmental, and functional needs of the child.

In making changes to a child's IEP after the annual IEP meeting for a school year, the parent of a child with a disability and the local educational agency may agree not to convene an IEP meeting for the purposes of making such changes, and instead may develop a written document to amend or modify the child's current IEP. To the extent possible, the local educational agency shall encourage the consolidation of reevaluation meetings for the child and other IEP team meetings for the child. Changes to the IEP may be made either by the entire IEP team or by amending the IEP rather than redrafting the entire IEP. Upon request, a parent shall be provided with a revised copy of the IEP with the amendments incorporated.

I. Pilot Program – Multi-Year IEPs

In those states that have applied for a waiver to participate in the pilot program authorizing multi-year IEPs, there are certain requirements. The purpose of the program is to provide an opportunity for states to allow parents and the local educational agencies the opportunity for long-term planning by offering the option of developing a comprehensive multi-year IEP, not to exceed three years, that is designed to coincide with the natural transition points for the child. In order to carry out the purpose of the pilot program, the United States Secretary of Education is authorized to approve not more than fifteen proposals from states to carry out the activity.

A state desiring to participate in the program must submit a proposal to the Secretary of Education at such time and in such manner as the Secretary may reasonably require. The proposal must include the following:

1. Assurances that the development of a multi-year IEP is optional for parents.
2. Assurances that the parent is required to provide informed consent before a comprehensive multi-year IEP is developed.

3. A list of required elements for each multi-year IEP, including measurable goals, coinciding with natural transition points for the child, that will enable the child to be involved in and make progress in the general education curriculum and that will meet the child's other needs that result from the child's disability and measurable annual goals for determining progress toward meeting the goals coinciding with natural transition points for the child.
4. A description of the process for the review and revision of each multi-year IEP, including:
 - a. A review by the IEP team of the child's multi-year IEP at each of the child's natural transition points;
 - b. In years other than a child's natural transition points, an annual review of the child's IEP to determine the child's current levels of progress and whether the child's annual goals for the child are being achieved, and a requirement to amend the IEP, as appropriate, to enable the child to continue to meet the measurable goals set out in the IEP;
 - c. If the IEP team determines on the basis of a review that the child is not making sufficient progress toward the goals described in the multi-year IEP, a requirement that the local educational agency shall ensure that the IEP team carries out a more thorough review of the IEP within 30 calendar days; and
 - d. At the request of the parent, a requirement that the IEP team shall conduct a review of the child's multi-year IEP before rather than after or subsequent to an annual review.

Beginning two years after the date of enactment of this legislation, the Secretary of Education is required to submit an annual report to the Committee on Education and the Workforce of the House of Representatives and the Committee on Health, Education, Labor and Pensions of the Senate, regarding the effectiveness of the pilot program and any specific recommendations for broader implementation of the program, including:

1. Reducing the paperwork burden on teachers, principals, administrators and related service providers and

noninstructional time spent by teachers in complying with the pilot program;

2. Enhancing longer term educational planning;
3. Improving positive outcomes for children with disabilities;
4. Promoting collaboration with the IEP team members; and
5. Ensuring satisfaction of family members.

The term “natural transition points,” is defined as those periods that are close in time to the transition of a child with a disability from preschool to elementary grades, from elementary grades to middle or junior high school grades, from middle or junior high school grades to secondary school grades, and from secondary school grades to post-secondary activities, but in no case a period longer than three years.

J. Video Conferences and Conference Calls

When conducting IEP team meetings and placement meetings and carrying out administrative matters (such as scheduling, exchange of witness lists, and status conferences), the parent of a child with a disability in a local educational agency may agree to use alternate means of meeting participation, such as video conferences and conference calls.

XIX. DUE PROCESS PROCEDURES

A. Surrogate Parent

Section 615(b)³³ states that when the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the state, including the assignment of an individual to act as a surrogate for the parents, the local educational agency, or any other agency that is involved in the education or care of the child. In the case of a child who is a ward of the state, such surrogate may alternatively be appointed by the judge overseeing the child’s care, provided that the surrogate meets the requirements of Section 615(b)(2)³⁴ and in the case of an unaccompanied homeless youth, as defined in Section 725(6) of the McKinney-Vento Homeless Assistance Act,³⁵ the local agency shall appoint a surrogate in accordance with Section 615(b)(2).³⁶ The state shall make reasonable efforts to ensure the assignment of a surrogate not more than thirty days after there is a determination by the agency that the child needs a surrogate.

³³ 20 U.S.C. § 1415(b).

³⁴ 20 U.S.C. § 1415(b)(2).

³⁵ 42 U.S.C. § 11434a(6).

³⁶ 20 U.S.C. § 1415(b)(2).

B. Two Year Statute of Limitations for Compliance Complaints

Section 615(b)(3)³⁷ states that parents shall have an opportunity to present a complaint to the state educational agency with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child, which sets forth an allegation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the state has an explicit time limitation for presenting such a complaint under this part, in such time as the state law allows, except that the exceptions to the timeline described in Section 615(f)(3)(D) shall apply to the timeline described in Section 615(b)(6).

C. Filing Due Process Complaints

The legislation amends Section 615(b)(7)³⁸ with respect to the filing of a due process complaint and, in addition to requiring a description of the nature of the problem, including facts relating to such problem, and any proposed resolution to the problem, the due process complaint notice must now also include a requirement that a party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the requirements of Section 615(b)(7)(A).³⁹

The state educational agency is required to develop a model form to assist parents in filing a complaint and due process complaint notice.

XX. NOTICE REQUIREMENTS

A. Written Notice to Parents

Section 615(c)⁴⁰ states that the contents of the written prior notice to the parents which is required whenever a local educational agency proposed to initiate or change or refuses to initiate or change the identification, evaluation, or educational placement of a special education child, or the provision of a free appropriate education to the child has been modified to include the following:

1. A description of the action proposed or refused by the agency;

³⁷ 20 U.S.C. § 1415(b)(3).

³⁸ 20 U.S.C. § 1415(b)(7).

³⁹ 20 U.S.C. § 1415(b)(7)(A). These requirements require the party to include the name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending, and in the case of a homeless child or youth, available contact information for the child and the name of the school the child is attending.

⁴⁰ 20 U.S.C. § 1415(c).

2. An explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
3. A statement that the parents of a child with a disability have protection under the procedural safeguards of the IDEA, and if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
4. Sources for parents to contact to obtain assistance in understanding the provisions of the IDEA;
5. A description of other options considered by the IEP team and the reasons why those options were rejected;
6. A description of the factors that are relevant to the agency's proposal or refusal.

B. Sufficiency of Due Process Complaint

The due process complaint notice filed by either party shall be deemed to be sufficient unless the party receiving the notice notifies the hearing officer and the other party in writing that the receiving party believes the notice has not met the requirements of Section 615(b)(7)(A).⁴¹

If the local educational agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint notice, the local educational agency shall, within ten days of receiving the complaint, send to the parent a response that shall include:

1. An explanation of why the agency proposed or refused to take the action raised in the complaint.
2. A description of other options that the IEP team considered and the reasons why those options were rejected.
3. A description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action.
4. A description of the factors that are relevant to the agency's proposal or refusal.

⁴¹ 20 U.S.C. § 1415(b)(7)(A).

A response filed by a local educational agency shall not be construed to preclude such local educational agency from asserting that the parents' due process complaint notice was insufficient where appropriate. The non-complaining party shall, within ten days of receiving the complaint, send to the complainant a response that specifically addresses the issues raised in the complaint. The party providing a hearing officer notification (i.e. that the due process complaint was not sufficient) shall provide the notification within fifteen days of receiving the complaint. Within five days of receipt of the notification alleging insufficiency, the hearing officer shall make a determination on the face of the notice of whether the notification meets the sufficiency requirements of Subsection (b)(7)(A) (i.e. a sufficient description of the nature of the problem and the underlying facts), and shall immediately notify the parents in writing of such determination.

A party may amend its due process complaint notice only if the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to subsection (f)(1)(B) or the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than five days before a due process hearing occurs.

The applicable timeline for a due process hearing shall recommence at the time the party files an amended notice, including the timeline under Subsection (f)(1)(B).⁴²

XXI. PROCEDURAL SAFEGUARDS NOTICE

Section 615(d) modifies the procedural safeguards notice requirements to state that it shall be given to parents only one time a year, except that a copy also shall be given to the parents upon initial referral, parent request for evaluation, upon the first occurrence of the filing of a complaint, or upon the request of a parent. A local educational agency may place a current copy of the Procedural Safeguards Notice on its Internet website if such website exists.

The contents of the Procedural Safeguards Notice requirements has been modified slightly to require that they include the opportunity to present and resolve complaints including the time period in which to make a complaint, the opportunity for the agency to resolve the complaint, and the availability of mediation.

With respect to mediation, the legislation clarifies that the written agreement resolving the complaint through the mediation process must be legally binding and state that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding. The written agreement must also be signed by both the parent and the representative of the agency who has the authority to bind such agency and must be enforceable in any federal or state court.

⁴² 20 U.S.C. § 1415(f)(1)(B).

XXII. DUE PROCESS HEARING

Section 615(f)⁴³ states that prior to the opportunity for an impartial due process hearing, the local educational agency shall convene a meeting with the parents and the IEP team within fifteen days of receiving notice of the parents' complaint, that includes a representative of the public agency who has decisionmaking authority on behalf of such agency (without an attorney for the local educational agency, unless the parent is accompanied by an attorney), where the parents of the child may discuss their complaint, the specific issues that form the basis of their complaint and the local educational agency is provided the opportunity to resolve the complaint, unless the parents and the local educational agency agree in writing to waive such meeting or agree to use the mediation process. If the local educational agency has not resolved the complaint to the satisfaction of the parents within thirty days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing shall commence. If an agreement is reached to resolve the complaint at the meeting, the parties shall execute a legally binding agreement that is signed by both the parent and a representative of the local educational agency who has the authority to bind such agency and is enforceable in state or federal court.

Either party may void the legally binding agreement that has been executed within three business days of the agreement's execution.

Not less than five business days prior to a hearing, each party shall disclose to all other parties all evaluations completed by that date, and recommendations based on the offering party's evaluations, that the party intends to use at the hearing. A hearing officer may bar any party that fails to comply with this requirement from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

A hearing officer conducting a hearing shall, at a minimum, not be an employee of the state educational agency or the local educational agency involved in the education or care of the child or a person having a personal or professional interest that conflicts with the person's objectivity in the hearing. The hearing officer shall possess knowledge of, and the ability to understand, the provisions of the IDEA, federal and state regulations pertaining to the IDEA, and legal interpretations of the IDEA by federal and state courts. The hearing officer shall possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice and possess the knowledge and ability to render and write decisions in accordance with appropriate standard legal practice.

The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the due process notice unless the other party agrees otherwise. A party or agency shall request an impartial due process hearing within two years of the date the party or agency knew or should have known about the

⁴³ 20 U.S.C. § 1415(f).

alleged action that forms the basis of the complaint, or, if the state has an explicit time limitation for requesting such a hearing under the IDEA, in such time as the state law allows.⁴⁴ The two year timeline shall not apply to a parent if the parent was prevented from requesting the hearing due to specific representations by the local educational agency that it had resolved the problem forming the basis of the complaint, or the local educational agency's withholding of information from the parent that was required under the IDEA to be provided to the parent.

The decision of the hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies impeded the child's right to a free appropriate public education, significantly impeded the parent's opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parent's child or caused a deprivation of educational benefits. A hearing officer, however, is not precluded from ordering a local educational agency to comply with procedural requirements under the IDEA, nor is a parent prohibited from filing a compliance complaint with the state educational agency, alleging procedural violations.

Any party bringing a civil action in court must file the action within ninety days from the date of the decision of the hearing office, or if the state has an explicit time limitation for bringing such action under the IDEA, in such time as the state law allows.⁴⁵

XXIII. ATTORNEYS FEES

Section 615(i)⁴⁶ states that an award of reasonable attorneys fees may be made to a prevailing party that is a state educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation, or to a state or local educational agency against the attorney of a parent or against the parent, if the parents' complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

The legislation also expanded the limitation on the award of attorneys fees for mediation at the discretion of the state. Previously, Section 1415(i)(3)(D)(ii) stated that a court could not award attorneys fees for a mediation that was conducted prior to the filing of a due process complaint. Section 1415(i)(3)(D)(ii), as amended, now states that

⁴⁴ Under California law, Education Code § 56505(j) authorizes a three year timeline for requesting a hearing.

⁴⁵ Cal. Education Code § 56505(i) states that civil actions must be filed within 90 days from the date of the decision of the hearing officer.

⁴⁶ 20 U.S.C. § 1415(i).

attorneys fees may not be awarded relating to any meeting of the IEP team unless such meeting is convened as the result of an administrative proceeding or judicial action, or, at the discretion of the state, for all mediations. Therefore, it will be necessary to obtain state legislation to prohibit a court from awarding attorneys fees for mediations.

In addition, a meeting conducted prior to the filing of a due process complaint shall not be considered as a meeting convened as a result of an administrative hearing or judicial action or an administrative hearing or judicial action for the purposes of awarding attorneys fees. Therefore, attorneys fees cannot be awarded for attending these meetings.

XXIV. DISCIPLINE OF SPECIAL EDUCATION STUDENTS

A. Change of Placement

Section 615(k)⁴⁷ states that school personnel may consider any unique circumstances on a case by case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.

School personnel may order a change in the placement of a child with a disability who violates a code of student conduct, to an appropriate interim alternative educational setting, another setting, or suspension for not more than ten school days, to the extent that such alternatives are applied to children without disabilities.

If school personnel seek to order a change in placement that would exceed ten school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which the procedures would be applied to children without disabilities except that services to suspended or expelled students must be provided, although such services may be provided in an interim alternative educational setting.

A child with a disability who is removed from the child's current placement, irrespective of whether the behavior is determined to be a manifestation of the child's disability, shall continue to receive educational services so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP and receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

B. Manifestation Determination

The legislation requires a manifestation determination within ten school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct. The IEP team shall review all relevant information in the

⁴⁷ 20 U.S.C. § 1415(K).

student's file, any information provided by the parents, and teacher observations, to determine if the conduct in question was caused by, or had a direct and substantial relationship to the child's disability or if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

If the local educational agency, the parent, and relevant members of the IEP team determine that the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability, or if the conduct in question was the direct result of the local educational agency's failure to implement the IEP, the conduct shall be determined to be a manifestation of the child's disability.

If the local educational agency, the parent and the relevant members of the IEP team make the determination that the conduct was a manifestation of the child's disability, the IEP team shall:

1. Conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such an assessment prior to such determination before the behavior that resulted in a change of placement.
2. In the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior.
3. Return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan, except if the child's conduct involved carrying or possessing a weapon, knowingly possessing or using illegal drugs, or selling or soliciting the sale of a controlled substance, or the student inflicted serious bodily injury upon another person while at school.

C. Interim Alternative Educational Setting

School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child:

1. Carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a state or local educational agency;

2. Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a state or local educational agency; or
3. Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a state or local educational agency.

The legislation adds to the IDEA a definition of “serious bodily injury.” “Serious bodily injury,” for purposes of the IDEA, is defined as bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.⁴⁸

Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and all of the procedural safeguards accorded under Section 1415(k).

The alternative educational setting shall be determined by the IEP team. The parent of a child with a disability who disagrees with any decision regarding disciplinary action, placement, or the manifestation determination, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing. The hearing officer may order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others or may return the child to the placement from which the child was removed.

When a parent or local educational agency requests a hearing regarding the interim alternative educational setting or a manifestation determination, the child shall remain in the interim educational setting pending the decision of the hearing officer, or until the expiration of the 45 day time period, whichever occurs first, unless the parent and the state or local educational agency agree otherwise. In such cases, the state or local educational agency shall arrange for an expedited hearing which shall occur within 20 school days of the date the hearing is requested and a decision shall be made within 10 school days after the hearing.

D. Child Not Yet Eligible for Special Education

A child who has not been determined to be eligible for special education and related services under the IDEA and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for under the IDEA if the local educational agency had knowledge that the child was a child with a disability before

⁴⁸ See, 18 U.S.C. § 1365(h)(3).

the behavior that precipitated the disciplinary action occurred.⁴⁹ A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred:

1. The parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
2. The parent of the child has requested an evaluation of the child; or
3. The teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the Director of Special Education of such agency or to other supervisory personnel of the agency.

The legislation deleted a fourth basis of knowledge that was in previous law which stated, “The behavior or performance of the child demonstrates the need for such services.” The deletion of this criteria is a positive one, since this criteria was vague and overly broad.

If a local educational agency does not have knowledge that a child is a child with a disability prior to taking disciplinary measures against the child, the child may be subjected to disciplinary measures applied to children without disabilities who engaged in comparable behaviors. However, if a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures, the evaluation shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with the IDEA, except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

XXV. MISCELLANEOUS PROVISIONS

Section 1415(n) states that a parent of a child with a disability may elect to receive notices under the IDEA by electronic mail, if the agency makes such option available.

Section 1415(o) states that nothing in Section 1415 shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

⁴⁹ 20 U.S.C. § 1415(K)(5).