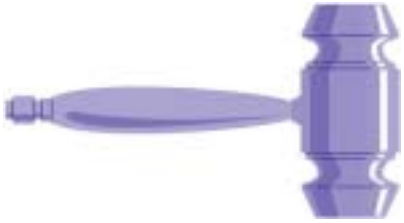
Legal Corner



By Michael Levin, Esq., PAESSP Chief Legal Counsel

The IDEA 2004 Amendments – What You Need To Know

In November of 2004, Congress reauthorized the Individuals with Disabilities Education Act ("IDEA") for the first time since 1997, instituting many changes to the law. The reauthorized IDEA went into effect July 1, 2005, and while much of the impact is yet to be determined, one thing is certain — some aspect of the changes will affect all levels of school district personnel, particularly the building level staff.

The changes in IDEA 2004 from the previous version can roughly be divided into two categories, philosophical and procedural. Beginning with the philosophical, in revising IDEA, Congress attempted to align it with the 2001 No Child Left Behind Act ("NCLB"). Similar to the reasoning behind NCLB, the President's Commission Report determined that the implementation of IDEA had been "impeded by low expectations." Focusing on raising expectations and outcomes for disabilities is the philosophy behind the IDEA 2004 amendments. Section 601(c)(5)(A) summarizes this effort:

> Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible.

To accomplish this task, Congress set forth a list of requirements for improving IDEA outcomes, such as:

- Coordination of IDEA and NCLB so that students benefit from NCLB efforts and "special education can become a service for such children rather than a place where such children are sent."
- Providing special education and related services and supports in the regular classroom when appropriate.
- "Supporting high quality, intensive" preservice training and professional development, including, to the maximum extent possible, training in scientifically-based instructional practices for personnel who serve students with disabilities, to provide them with the tools necessary to improve student achievement and performance.
- Providing incentives for interventions for all students including scientifically-based, early reading programs, positive behavioral intervention and supports and early intervention services "to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children."
- Focusing resources on teaching and learning by reducing paperwork and other requirements that do not improve educational results.
- Supporting the development and use of technology to maximize accessibility for students with disabilities.

While not a true change, because educating disabled students in the least restrictive environment has been a long standing requirement, the evolution of this mandate in IDEA 2004 sounds a resounding

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theme of increased inclusion of disabled students in the regular education classroom across the board, regardless of disability or severity of need. Inclusion at this scale requires school districts to reorganize, largely at the building level, to ensure that physical space, personnel and supports are all available and designed to meet the needs of disabled students in the classroom. Here are some examples of what this may entail:

- Class schedules and the placement of classrooms must facilitate inclusion where students are not already fully included in a regular education classroom;
- Regular education teachers must be provided the training and supports to educate students whose learning needs may be radically different from the general population;
- Regular and special education teachers must work together and understand both the need and benefit of a team approach;
- Curricular modifications must be made and understood to accommodate differentiated instruction; and
- The requirement for scientifically based instructional practices requires not only that these instructional programs are purchased, but also that the teachers implementing them are sufficiently trained to properly use them.

Much of the above involves extensive staff training. In addition to training to facilitate inclusion, IDEA 2004 also addresses and continues NCLB's highly qualified requirement, applying it to special education teachers, and holding them to the same deadline of 2005-2006. There is an exception to this rule. This is where a teacher is new to the profession and is highly qualified in one area, if the teacher teaches multiple academic classes, that teacher has two years from the date of hire to become highly qualified in all areas in which he or she teaches.

The philosophical change to a more inclusive mindset will undoubtedly be smoother for some schools more than others, and some teachers more than others. As the captains of each proverbial ship, the burden to encourage and direct positive change towards inclusion falls on the building principals and assistant principals. Do not be lulled into believing that because the word "philosophy" is used to describe the drive towards inclusion for all, this is an area where participation is voluntary. Litigation will most certainly ensue over the issue of inclusion and inclusionary practices. In order to protect your districts from compensatory awards at due process hearings, the process of increasing inclusion must be put in place and actively nurtured.

The procedural amendments to IDEA 2004 are significant. As most principals and assistant principals play some role in special education practices in their buildings, whether it is by acting as the LEA at an IEP meeting, or in meting out discipline to a disabled student, it is imperative that you have a working knowledge of the process and procedures the personnel in your buildings are required to follow.

In amending IDEA, Congress tweaked a number of procedures. Starting with the beginning of the process, identifying children who may be eligible for special education and related services, informed parental consent is required in order to complete an initial evaluation of a student. As a practical matter, principals and assistant principals may be among the first to suspect a student may be eligible, or more likely may be the first to have contact with a parent who asks that the district evaluate his or her child for eligibility. Make sure your staff knows what to do with such a request, and that a procedure is in place to respond in a timely manner. If a parent will not agree to an evaluation, it is up to the district to request a hearing at which a hearing officer will make the decision. To leave a child unevaluated because of parent refusal is a sure path to compensatory education.

IDEA 2004 for the first time places a timeline on the evaluation procedure of sixty (60) calendar days. Section 614(a)(1)(C)(i)(II). This is shorter than Pennsylvania's deadline of 60 school days, however Congress has left it up to the states to determine their own timelines. Until Pennsylvania issues new regulations to reflect the changes, 60 school days remains the time line. In addition to the creation of a timeline, IDEA 2004 also provides two exceptions to this rule: Parental delay and transfer students. As to the first exception, parents cannot attempt to hold districts to the timeline, while at the same time delaying the process. The second exception recognizes that transfers may occur mid-evaluation, and requires the new district to make "sufficient progress to ensure a prompt completion of the evaluation process."

Evaluations of students who are considered English as a second language has been a large concern

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because of the over-identification of these students as disabled. To address the issue, Congress amended IDEA from language that required testing to be in the child's native language, to requiring assessments that are "provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally and functionally, unless it is not feasible to so provide or administer." Section 614(b)(3)(A)(ii). The change is designed to provide the flexibility necessary to get the most accurate picture of a student's functioning.

Another change to the evaluation process is the way in which we define a learning disabled student. Until IDEA 2004, a learning disability was defined as a discrepancy between ability and achievement as evidenced by the difference in IQ and academic achievement standard scores. This model is under attack, largely because of the tremendous increase in the percentage of students labeled learning disabled (36% in 10 years). Pushed to make a change to another model, Congress chose to give individual districts the choice of staying with the discrepancy model or using the Response to Intervention model ("RTI"). RTI looks for eligibility to be determined by the student's response to sound interventions. If a student continues to struggle after being provided a **scientifically-based**, proven intervention, the student is considered learning disabled. The change to RTI emphasizes the need for all of the changes discussed above in terms of inclusion. If all students, struggling or not, are to be provided with scientifically-based, proven teaching methods prior to being determined eligible, teachers will need to be able to provide this type of instruction to a group that will be far more varied in their ability than the typical regular education class.

Some of the changes to the evaluation process are purely linguistic, and again emphasizes the notion that all students should be educated with their regular education peers to the maximum extent possible. In stating the requirements of conducting an evaluation, Congress emphasized the need to determine information relevant to developing an IEP enabling the child to be involved in and progress in the general education curriculum. Similarly, instead of only evaluating to determine if a student has a disability, IDEA 2004 added that the team must also determine the educational needs of the child. Section 602(3)(A)(ii).

There are also changes with respect to reevaluations. The duty to reevaluate is triggered when

(1) the LEA determines the need; **(2)** the parent requests a reevaluation; and **(3)** not less than every three years, unless the parent and team agree it is not necessary. Section 614(a)(2)(A) and (B). Congress added a limitation on reevaluations stating that reevaluation shall not occur more than once a year, unless parent and LEA agree otherwise. Finally, in addressing the general rule that eligibility cannot be removed absent a current evaluation justifying the change and the end of services pursuant to graduation or aging out, Congress added a provision that an evaluation is not required prior to a student graduating. Section 614(c)(5)(A). This issue also arises as public school districts are pressured by parents and post-secondary providers to do updated psycho-educational testing prior to graduation to facilitate changes to SAT testing and the provision of post-graduate accommodations.

After the initial evaluation is completed and eligibility determined, the next step is the development of the IEP. The most helpful change to the old process is the ability of the team to make a change without convening the team after the initial yearly IEP meeting has occurred. Section 614(d)(3)(D). Common sense dictates that a procedure be put into place to memorialize such changes, and that major changes, such as to eligibility or a manifestation determination, be made by the team at an actual meeting. Along the same vein, Congress also allowed for team members to be excused or provide their contribution to the meeting in writing rather than in person. Consistent with the push toward placement in regular education environments, a regular education teacher must still be a member of the team that develops as well as reviews and revises the IEP.

A change that occurred in 2001 by administrative fiat, but is only now formalized in IDEA 2004, is the

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requirement that parents give consent for the initial placement into special education. Without parental consent, a student remains a regular education student, and a district may not initiate due process procedures to have a hearing officer determine otherwise. On the flip side of this coin, if a parent rejects services under IDEA, they also forfeit the protections provided by IDEA. For example, whereas a student previously "thought to be exceptional" was to be afforded the protections of IDEA in considering discipline, under the changes, once the student has been offered a program and parent has rejected same, the parents have forfeited the protections and that student may be disciplined just as any other regular education student would, including expulsion.

Changes to the IEP itself will be addressed by the change in the format of the forms the Pennsylvania Department of Education issues, however here are some of the highlights:

- Present education levels should reflect academic achievement and functional performance.
- Short-term objectives and benchmarks are no longer required, except in the case of students that take alternative assessments.
- Measurable annual goals must meet the students needs *and* enable the child to be involved in and make progress in the general education curriculum.
- IEP must include a statement of the special education and related services and supplementary aides and services, **based on peer-reviewed research,** to the extent practicable and a statement of the program modifications or supports for school personnel that will enable the child to advance appropriately towards annual goals, be involved in and make progress in the general education curriculum and to be educated and participate with other children with disabilities and non-disabled students.
- Procedural safeguards are only required to be handed out once a year, or upon an initial referral for evaluation, upon the first complaint filing or at the parent's request.

With regard to due process hearings, Congress developed a detailed set of procedures which make the process far more "court-like." The party wishing to initiate a hearing must file a complaint with the state and opposing party, which contains a list of specific information and is intended to give notice of the problem. Section 615(b)(7)(A)(ii). The responding party must then file a response within ten (10) days that specifically addresses the issues raised in the complaint. Section 615(c)(2)(B)(ii). The complaint may only be amended if the responding party agrees or the hearing officer orders same, and the hearing officer may only hear the issues delineated in the complaint. Section 615(c)(2)(E)(i).

One last issue with regard to claims made against the district by parents for compensatory education, is the issue of a statute of limitations. Over the last two years or so, the terms "statute of limitations" or "equitable limitations" have been bandied about, and their application debated. In revising IDEA, Congress added a statute of limitations period on a parental request for a due process hearing of two years from when the parents knew or should have known of the action that is the basis of the complaint. Section 615 (b)(6)(B). Congress also included exceptions to this rule if parents were "prevented' from requesting a hearing due to misrepresentations by the district such as the problem was solved or the withholding of information from the parent. Even though IDEA 2004 took effect on July 1, 2005, it remains to be seen whether or not this section is in full force and effect at this point. However, there is an argument that the Congressional language is only intended to allow states to adopt a two-year statute of limitations if they desire and that a longer statute of limitations in a particular state will override the IDEA 2004 standard. Currently, Pennsylvania's statute of limitations may be longer for this purpose.

Perhaps one of the most important changes to IDEA 2004 from the perspective of the principal or assistant principal is the changes to student discipline. Indeed, over the last year of waiting for the reauthorization, few topics have generated as much debate and comment as discipline. In IDEA 2004, Congress clearly attempted to balance the right to a free and appropriate public education ("FAPE") and the need for schools to be able to enforce discipline policies and maintain a safe learning environment. In seeking to afford districts more control over their own disciplinary policies three important changes were made to IDEA, which are reviewed below.

The first important change is to the manifestation

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determination process. Prior to July 1, 2005, when making a manifestation determination, a student's conduct was related to his disability if his/her disability impaired his/her ability to understand the impact and consequences of the behavior or his/her ability to control the behavior. 20 USC 1415(k)(4)(C)(ii). There was also a look at the IEP, and whether or not it was appropriate and implemented as it related to the behavior, which as a practical matter made the manifestation determination turn on whether or not the IEP as a whole was appropriate and implemented in its entirety. IDEA 2004 requires a much closer nexus between the behavior and the disability. IDEA 2004 states as follows:

> (E) MANIFESTATION DETERMINATION. —
> (i) IN GENERAL. — Except as provided in subparagraph (B), within 10 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 local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations and any relevant information provided by the parents to determine —
> (I) if the conduct in question was caused by, or ***had a direct and substantial relationship to, the child's disability***; or
> (II) if the conduct in question ***was the direct result*** of the local educational agency's failure to implement the IEP.
> (ii) MANIFESTATION. — If the local educational agency, the parent and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.

Section 615 (k)(1)(E)(i). (bold added)

The important change in language is highlighted in the previous paragraph, and reflected the intention that a manifestation determination requires a close relationship between the behavior and the disability. Additionally, instead of requiring the whole IEP team as well as other qualified personnel to complete the manifestation determination, IDEA 2004 states the determination is made by the school, parent and "relevant members" of the IEP team. Thus, gone are the days in which teachers and therapists with no information must attend a manifestation determination. Keep in mind, however, that if an alternative setting is being contemplated, this is a decision that requires the full IEP team.

Another change to discipline under IDEA 2004 involves the stay put provision and is two fold: First, it includes the addition of a new exception to the stay put provision in the form of another way to make a 45-day alternative placement. Prior to July 1, 2005, a 45-day alternative placement could only be made where the student brought a weapon to school or a school function, or knowingly used, possessed or sold/solicited the sale of illegal drugs. IDEA 2004 clarifies that the law is referring to 45 *school* days, and adds to that list a third exception, which is where the student has inflicted serious bodily injury upon another while at school or a school function. While at first glance, this may seem like a significant change, the manner in which the term "serious bodily injury" is defined proves otherwise. The term "serious bodily injury" is defined very tightly and requires a cut, abrasion, bruise, burn, disfigurement, physical pain, illness, impairment of function or injury to the body and must involve a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of function.

The authority of hearing officers to order a 45-day interim alternative placement has also been changed. Rather than requiring the district to demonstrate the need for removal by "substantial evidence," a hearing officer may now order the change of placement where maintenance in the current placement is "substantially likely to result in injury to the child or others." Section 615 (k)(3)(B)(ii)(II).

As stated earlier the full extent to which the revisions to IDEA 2004 will affect districts and their personnel is up in the air, awaiting the revisions to the federal and state regulations. *As building administrators, however, it is incumbent upon all principals and assistant principals to be aware of the changes, how they are being interpreted and the needs of your staff to ensure effective implementation.*

Author's note: *Andria Saia, Esq., Levin Legal Group, contributed to this article.*