



State of New Jersey

DEPARTMENT OF EDUCATION
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June 3, 2005

TO: Chief School Administrator
Director of Special Education
Administrator of a State Facility
Administrator of a Charter School
Administrator of an Approved Private School
for the Disabled
Administrator of a College-Operated Program
Statewide Special Education Advisory Council
Agencies or Organizations Concerned with Special Education

FROM: Barbara Gantwerk, Director 
Office of Special Education Programs

SUBJECT: Guidance for Implementation of the Individuals with Disabilities
Education Improvement Act of 2004

I am writing with respect to the Individuals with Disabilities Education Improvement Act of 2004 (IDEA 2004), enacted and signed into law on December 3, 2004. As you are aware, IDEA 2004 contains numerous changes to the federal law governing the provision of special education and related services to students with disabilities. Almost all of the provisions of IDEA 2004 are effective July 1, 2005, with the exception of the provisions concerning highly qualified teachers, which were effective upon enactment of the law. The purpose of this guidance is to inform school districts and interested parties of the provisions of IDEA 2004 that the New Jersey Department of Education (NJDOE) has determined supercede state regulation, or for which there is no concomitant state regulation, and, as such, become effective in New Jersey July 1, 2005. In numerous other areas, state regulations confer rights consistent with, or in excess to, provisions of IDEA 2004 and, therefore, state regulations governing those areas remain applicable.

This guidance is not intended to interpret the provisions of IDEA 2004. Rather, it sets forth a description of the provisions of federal law that NJDOE has determined govern each area described as of July 1, 2005, and sets forth how the NJDOE will implement IDEA 2004. *N.J.A.C. 6A:14* still governs the provision of special education and related services to students in New Jersey and must be followed for all areas except those described below. State regulations must be amended to conform to the provisions of federal law in these areas by June 30, 2006. This guidance is subject to change by further

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guidance, amendment to state or federal statute or regulation or orders of courts of appropriate jurisdiction.

I. Highly Qualified Teacher Requirements

The requirements with respect to highly qualified teachers were designed to align IDEA 2004 to the Elementary and Secondary Education Act of 1965 (ESEA) as amended by the No Child Left Behind Act (NCLB). These provisions became applicable on December 3, 2004 and reaffirmed the requirement that all teachers must be highly qualified, as well as carving out two exceptions described below; one for teachers exclusively instructing students who participate in alternate assessments; and one allowing new teachers who are highly qualified in one core subject area but teaching in multiple areas two years to become highly qualified in the other core subjects. The NJDOE remains of the opinion that collaborative teaching between a special education teacher and teacher highly qualified in the area for which instruction is being provided is permitted, as is consultation by a special education teacher and a regular education teacher.

Requirements for special education teachers.

When used with respect to any public elementary school or secondary school special education teacher teaching in a state, highly qualified means that:

- The teacher has obtained full state certification as a special education teacher (including certification obtained through alternative routes to certification), or passed the state special education teacher licensing examination, and holds a license to teach in the state as a special education teacher;
- The teacher has not had special education certification or licensure requirements waived on an emergency, temporary or provisional basis; and
- The teacher holds at least a bachelor's degree.

[20 U.S.C. §1402(10)(B)]

Requirements for special education teachers teaching to alternate achievement standards.

When used with respect to a special education teacher who teaches core academic subjects exclusively to children who are assessed against alternate achievement standards established under the regulations promulgated under Section 1111(b)(1) of ESEA, highly qualified means the teacher, whether new or not new to the profession, may either:

- Meet the applicable requirements of Section 9101 of ESEA for any elementary, middle or secondary school teacher who is new or not new to the profession; or
- Meet the requirements of Section 9101(23)(B) or (C) of ESEA as applied to an elementary school teacher, or, in the case of instruction above the elementary level, has subject matter knowledge appropriate to the level of instruction being provided, as determined by the state, needed to effectively teach to those standards.

[20 U.S.C. §1402(10)(C)]

IDEA 2004 Guidance, June 3, 2005. Subject to change by further guidance, amendment to state or federal statute or regulation, or orders of courts of appropriate jurisdiction.

Requirements for special education teachers teaching multiple subjects.

When used with respect to a special education teacher who teaches two or more core academic subjects exclusively to children with disabilities, highly qualified means that the teacher may either:

- Meet the applicable requirements of Section 9101 of ESEA for any elementary, middle or secondary school teacher who is new or not new to the profession;
- In the case of a teacher who is not new to the profession, demonstrate competence in all the core academic subjects in which the teacher teaches in the same manner as is required for an elementary, middle or secondary school teacher who is not new to the profession under Section 9101(23)(C)(ii) of ESEA, which may include a single, High Objective Uniform State Standard of Evaluation (HOSSE) covering multiple subjects; or
- In the case of a new special education teacher who teaches multiple subjects and who is highly qualified in mathematics, language arts, or science, demonstrate competence in the other core academic subjects in which the teacher teaches in the same manner as is required for an elementary, middle, or secondary school teacher under Section 9101(23)(C)(ii) of ESEA, which may include a single, HOSSE covering multiple subjects, not later than two years after the date of employment.

[20 U.S.C. §1402(10)(D)]

II. Peer-Reviewed Research

With respect to peer-reviewed research, IDEA 2004, in addition to the requirements of current regulations, requires that “special education and related services, including supplementary aides and services, [be] based upon peer-reviewed research to the extent practicable.” States have requested that USDOE, through regulations, clarify the means to fulfill this requirement.

[20 U.S.C. §1414(d)(1)(A)(i)(IV)]

III. Assistive Technology

(N.J.A.C. 6A:14-1.3)

IDEA 2004 altered the definition of “assistive technology” to specifically exclude medically implanted devices, or the replacement of such a device.

[20 U.S.C. §1402(1)(B)]

IV. Prohibition of Mandatory Medication of Students

IDEA 2004 prohibits LEAs from mandating that students obtain a prescription for a substance covered by the Controlled Substances Act (21 U.S.C. §801 *et seq.*) as a

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condition of attending school, receiving an evaluation or receiving special education and related services. However, IDEA 2004 cautions that this prohibition should not be construed as prohibiting teachers and other school personnel from consulting or sharing classroom based observations with parents or guardians regarding a student's academic or functional performance, behavior in the classroom or school, or regarding the need for evaluation for special education and related services.

[20 U.S.C. §1412(a)(25)(A)]

V. Surrogate Parents and Wards of the State (N.J.A.C. 6A:14-1.3; 6A:14-2.2 and 6A:14-2.3(a))

IDEA 2004 provides that with respect to a "ward of the state," an LEA must make reasonable efforts to obtain parental consent for an initial evaluation. If, after reasonable efforts, the parent cannot be found, or parental rights have been terminated, or subrogated for purposes of consenting to eligibility by a court of competent jurisdiction and consent has been given by an individual the court has appointed, parental consent need not be obtained for an initial evaluation. However, a district must assign a surrogate parent for any student determined a ward of the state, or, if the district fails to appoint a surrogate parent for a ward of the state, a judge may appoint a surrogate if the judge determines a surrogate is necessary for such student.

IDEA 2004 also altered the procedures for appointing surrogate parents. IDEA 2004 provides that, when it is necessary to appoint a surrogate parent, an LEA must make reasonable efforts to do so within 30 days after the determination that a surrogate is needed. In addition, surrogates may be appointed by a judge. Finally, a surrogate parent must be appointed for a student who is an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. §11434(a)(6)). Every time a surrogate is appointed, the district must document when the need for a surrogate was determined, when the surrogate was appointed, and the person appointed as surrogate, including their qualification to so serve. These provisions must be followed in addition to the provisions of N.J.A.C. 6A:14-2.2.

[20 U.S.C. §1414(a)(1)(D)(iii); 20 U.S.C. §1415(b)(2)(A)(i)]

VI. Excusal from IEP Meetings (N.J.A.C. 6A:14-2.3(i)2)

Current New Jersey regulations do not permit excusal of team members from IEP meetings. IDEA 2004 provides that, for any team member whose area of the curriculum or related services is not being discussed, IEP team members **shall not** be required to attend an IEP meeting, in whole or in part provided the **parent and LEA agree** that the IEP team member need not attend the meeting. Because this provision of IDEA 2004 is

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mandatory, it supercedes state regulation and goes into effect in New Jersey on July 1, 2005.

IDEA 2004 also provides that an IEP team member **may** be excused from an IEP meeting even if the team member's area of the curriculum or related services is being discussed, if the parent and LEA consent to the excusal and the member provides written input with respect to his or her area. Because this provision of IDEA 2004 is permissive, state regulation, which exceeds the provisions of IDEA 2004, still controls and such excusals may not occur unless New Jersey's regulations are amended to permit such excusals.

IDEA 2004 does not indicate whether more than one IEP team member whose area is not being discussed may be excused from the same IEP meeting. Clarification should be provided by the USDOE in its regulations implementing IDEA 2004. The department recommends that districts not seek to excuse multiple participants from a meeting until such clarification is provided.

[20 U.S.C. §1414(d)(1)(C)]

VII. Academic Achievement and Functional Performance

(N.J.A.C. 6A:14-3.7)

IDEA 2004 requires a description of present levels of academic achievement and functional performance in students IEPs, rather than the current requirement in *N.J.A.C. 6A:14-3.7* to set forth present levels of educational performance. In addition, measurable annual academic and functional goals are also required by IDEA 2004 in students' IEPs. Both of these requirements are applicable for IEPs developed on or after July 1, 2005.

[20 U.S.C. §1414(d)(1)(A)(i)(I) and (II)]

VIII. Benchmarks or Short-Term Objectives

(N.J.A.C. 6A:14-3.7(d)2)

IDEA 2004 eliminated the requirement that benchmarks and short-term objectives be included in IEP, except for students participating in alternate assessments. However, state regulations exceed this requirement in IDEA 2004. Therefore, unless New Jersey's regulations are amended, the requirement to include benchmarks and short-term objectives in all IEPs continues to be in effect.

[20 U.S.C. §1414(d)(1)(A)(i)(I)]

IX. Amendment of an IEP Without a Meeting
(N.J.A.C. 6A:14-2.3(i)2 and 6A:14-3.7)

N.J.A.C. 6A:14 permits amendment of IEPs only after a meeting of the full IEP team. IDEA 2004 permits amendment or modification of an IEP by agreement of the parent and LEA without the need for an IEP meeting. Because state regulation exceeds this provision of IDEA 2004, and this provision of IDEA 2004 is not mandatory, amendments to an IEP may only be made in a meeting of the team conducted pursuant to applicable rules in N.J.A.C. 6A:14. Such amendments to IEPs would only become permissible if New Jersey's regulations are changed to allow amendment without a meeting. Therefore, no change will occur to the procedures for amending an IEP on July 1, 2005
[20 U.S.C. §1414(d)(3)(D) and (F)]

X. IEP Meetings for Students Transitioning from Part C
(N.J.A.C. 6A:14-2.3(i)2)

For students transitioning from Part C to Part B, IDEA 2004 requires LEAs, at the request of the parent, to invite the Part C service coordinator or a representative of the Part C system to participate in the IEP meeting to assist in ensuring a smooth transition of services. This provision is applicable for all IEP meetings scheduled for a date on or after July 1, 2005.
[20 U.S.C. §1414(d)(1)(D)]

XI. Students Who Transfer From Another District
(N.J.A.C. 6A:14-4.1(g))

IDEA 2004 alters the requirements for students who transfer from in-state and from out-of-state school districts, and must be followed for students who transfer on or after July 1, 2005. For students who transfer from another district within the state, the student must be provided, in consultation with the parents, a program that is comparable to the program described in the previously held IEP, until such time as the LEA adopts the previously held IEP as the student's IEP, or develops and implements a new IEP in accordance with law.

For students who transfer from an out-of-state district, the student must be provided, in consultation with the parents, a program that is comparable to the program described in the previously held IEP, until such time as the LEA develops and implements a new IEP in accordance with law. For out-of-state transfer students, implementation of the previously held IEP is no longer an option for the LEA, as IDEA 2004 mandates development of a new IEP for the student.

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IDEA 2004 also requires that districts take reasonable steps to promptly obtain the student records of students with disabilities who transfer into the district, and requires the district where the student was previously enrolled to take reasonable steps to promptly respond to such requests for student records. The latter provision provides a basis for seeking to compel prompt release of student records from out-of-state districts, which cannot be accomplished through New Jersey's student records regulations, as such regulations apply only to in-state districts.

[20 U.S.C. §1414(d)(2)(C)(i)]

XII. Transition **(N.J.A.C. 6A:14-3.7(d))**

IDEA 2004 provides that for transition, beginning at age 16 an IEP include "appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills." Transition services needed to assist a student in achieving such goals must be provided to each student. This altered standard for provision of transition services becomes applicable for IEPs developed on or after July 1, 2005.

In addition, while IDEA 2004 changed the initial transition age to 16, New Jersey's regulations provide for transition services beginning in the IEP for the year in which a student will turn 14 years of age. Because that provision exceeds the requirements of IDEA, the requirement to provide transition planning and services will remain at age 14 in New Jersey on July 1, 2005. Transition services for students who are age 14 or 15 must be provided in accordance with the provisions of N.J.A.C. 6A:14 as they currently exist, rather than pursuant to the new standard in IDEA 2004 set forth above, as such transition services are beyond the scope of those set forth in IDEA 2004 for students age 16 or over.

[20 U.S.C. §1414(d)(1)(A)(i)(VIII)]

XIII. Graduation or Exceeding the Age of Eligibility **(N.J.A.C. 6A:14-4.12)**

IDEA 2004 requires that, when a student graduates or reaches age 21 and is no longer eligible for special education and related services, a summary of the student's academic achievement and functional performance must be provided to the student. The summary must include recommendations on how to assist the student in meeting the student's post-secondary goals. Such summaries are required for students who graduate or turn 21 on or after July 1, 2005.

[20 U.S.C. §1414(c)(5)(B)(i)]

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XIV. Assessment in Appropriate Language or Form, Rather than Native Language
(N.J.A.C. 6A:14-2.5(b)1(ii))

Current regulations, at *N.J.A.C. 6A:14-2.5(b)1(ii)*, require that all evaluation procedures, including tests and other evaluation materials be provided and administered in the student's native language or other mode of communication unless clearly unfeasible. IDEA 2004 provides that, when assessing a student, such assessments must be "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." This requirement takes the place of the requirement in *N.J.A.C. 6A:14-2.5(b)1(ii)* and is applicable for all assessments conducted on or after July 1, 2005.

[20 U.S.C. 1414(b)(3)(A)]

XV. Specific Learning Disability
(N.J.A.C. 6A:14-3.4(f)4 and 6A:14-3.5(c)11)

IDEA 2004 permits an LEA, beginning July 1, 2005, to use a methodology for determining a learning disability based on response to scientific, research-based intervention. The department has asked the USDOE, through its regulations implementing IDEA 2004, to indicate whether it may set parameters for development and implementation of such methodologies by LEAs.

As of July 1, 2005, when such response to scientific, research-based intervention methodologies may begin to be utilized, the department urges caution in adopting a response to scientific, research-based intervention methodology unless a district can assure that it is utilizing a valid and reliable method for determining eligibility in accordance with IDEA 2004.

[20 U.S.C. §1414(b)(6)]

XVI. Frequency of Reevaluations
(N.J.A.C. 6A:14-3.8(a))

IDEA 2004 provides that reevaluations may occur not more frequently than once a year, unless the district and parent agree otherwise. This requirement supercedes state regulation for reevaluations after July 1, 2005. However, the state regulation requiring a reevaluation within three years of the previous evaluation will remain in effect.

[20 U.S.C. §1414(a)(2)(B)]

XVII. Equitable Participation Services
(N.J.A.C. 6A:14-6.1)

IDEA 2004 altered the requirements for provision of equitable participation services to require that the district where a private school is located provide such services and adhere to the provisions for doing so. Because available data will not allow districts to identify and serve the greatest number of students possible under the amended system, the department has determined the state will continue to have the district of residence of the student's parent provide equitable participation services through the 2005-2006 school year. For the 2006-2007 school year, necessary data will be collected on December 1, 2005 and the district where the private school is located will provide equitable participation services in accordance with IDEA 2004. To aid in this data collection, the child find requirement moves to the district where a private school is located as of July 1, 2005 as required by IDEA 2004. This will enable districts to identify all students for whom they will be responsible beginning July 1, 2006. Other requirements of IDEA with respect to consultation with private schools and parent representatives and appeals by private schools are also effective July 1, 2005 for all districts providing equitable participation services.

[20 U.S.C. §1412(a)(10)]

XVIII. Dispute Resolution
(N.J.A.C. 6A:14-2.6 and 6A:14-2.7)

IDEA 2004 effectuated numerous changes with respect to dispute resolution that are effective July 1, 2005. Because of the length and complexity of such provisions, and the need to fully develop procedures for implementing them, details concerning these provisions will be the subject of a separate guidance from the department. Among the new provisions governing dispute resolution are:

- a provision setting forth a 2 year period in which to file for mediation or due process after the event giving rise to the dispute occurs (e.g. implementation of an IEP);
- a provision setting forth a 90 day period for appealing final decisions in due process hearings;
- a requirement that the other party file an answer to due process petitions within 10 days of the filing of the petition;
- a provision requiring LEAs to provide prior written notice within 10 days of the filing of a petition for a due process hearing when the subject matter of the request for due process was not the subject of prior written notice;
- a provision allowing the responding party to object to the notice in the request for a due process hearing as inadequate within 15 days of the filing of the petition, and that a administrative law judge will determine whether the notice is adequate within 5 days of the filing of the objection;

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- a provision prohibiting amendment of petitions for a due process hearing unless the other party consents or an ALJ permits the requested amendment;
- except when a district files for a due process hearing or when an expedited due process hearing (involving discipline issues only) is filed, a provision calling for a “resolution session” or mediation during the first 30 days, unless waived by both parties;
- provisions establishing parameters for resolutions sessions, including that they must be scheduled within 15 days and completed within 30 days, that attorneys cannot attend such sessions unless the parent brings an attorney, and that, if a resolution is reached, a legally binding written agreement - which can be voided within three days of the agreement – be executed setting forth the terms of the agreement;
- a provision stating that due process may not be utilized to contest whether a teacher or other provider of services is highly qualified; and
- a provision allowing LEAs to seek attorney fees when the petition of a parent is frivolous or is filed to harass or cause delay.

[20 U.S.C. §1415]

XIX. Discipline
(N.J.A.C. 6A:14-2.8)

IDEA effectuates the following changes with respect to discipline which are effective July 1, 2005. New Jersey’s regulations at *N.J.A.C. 6A:14* incorporate IDEA and its implementing regulations by reference in setting forth disciplinary procedures. The provisions of IDEA 2004 superceded such incorporated provisions on July 1, 2005.

New authority for school personnel.

School personnel may consider any unique circumstances on a case-by-case basis when deciding to order a change in placement for a child with a disability who violates a student conduct code. This provides districts flexibility to decline to impose discipline with respect to students whose conduct violates a student code of conduct when the conduct is a result of their disabling condition.

[20 U.S.C. § 1415(k)(1)(A)]

New standard for manifestation determinations.

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 LEA, parent and relevant members of the IEP team (as determined by the parent and LEA) 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 if conduct was:

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- Caused by, or was in direct and substantial relationship to, the child's disability; or
- A direct result of the LEA's failure to implement the IEP.

[20 U.S.C. §1415(k)(1)(E)(i)]

New provision when there is a determination that a behavior was a manifestation of the disability.

If the LEA, parent and relevant members of the IEP team determine that the conduct was a manifestation of the child's disability, the IEP team shall:

- Conduct a functional behavioral assessment and implement a behavioral intervention plan for the child; or
- If a behavioral intervention plan has been developed, review the existing plan and modify it as necessary to address the behavior.

If the behavior is a manifestation of the child's disability, the child is returned to the placement from which he or she was removed, unless the parent and LEA agree otherwise.

[20 U.S.C. §1415(k)(1)(F)]

New standard for special circumstances.

A school is permitted to remove a child with a disability to an 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:

- Carries or possesses a weapon to or at school, on school premises, or to or at a school function under jurisdiction of a state educational agency (SEA) or LEA;
- 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 an SEA or LEA; or
- Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or LEA.

[20 U.S.C. §1415(k)(1)(G)]

New definition.

Serious Bodily Injury is defined to mean a bodily injury that 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 faculty.

[20 U.S.C. § 1415(k)(7)(D)]

Authority of the Hearing Officer.

In making the determination under 20 *U.S.C.* § 1415(k)(3)(B)(i), the hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer may return a child with a disability to the placement from which the child was removed or 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.

[20 *U.S.C.* § 1415(k)(3)(B)(ii)]

Placement during appeals.

When an appeal under 20 *U.S.C.* § 1415(k)(3) has been requested by either the parent or the LEA, the child shall remain in the interim alternative educational setting pending the decision of the hearing officer, or until the expiration of the time period provided for in 20 *U.S.C.* § 1415(k)(1)(C) **[which is the period of the ordered removal from school]**, whichever occurs first, unless the parent and the SEA or LEA agree otherwise.

[20 *U.S.C.* § 1415(k)(4)(A)]

Standard for a basis of knowledge for children not yet eligible for special education and related services.

An LEA is deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred, a:

- Parent expressed concern in writing to an administrator or a teacher;
- Parent of the child has requested an evaluation of the child pursuant to 20 *U.S.C.* §1414(a)(1)(B); or
- The teacher or other school or LEA personnel expressed specific concerns about a pattern of behavior demonstrated to an administrator.

[20 *U.S.C.* § 1415(k)(5)(B)]

BG/CK/JW

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