



## State of New Jersey

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**October 20, 2006**

**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:** Roberta Wohle, Acting Director   
Office of Special Education Programs

**SUBJECT:** Guidance with Respect to State and Federal Regulations Implementing the Individuals with Disabilities Education Act of 2004

I am writing with respect to the regulations adopted by the New Jersey State Board of Education on August 2, 2006 (effective September 5, 2006) and regulations of the United States Department of Education (USDOE) published August 14, 2006 (effective October 13, 2006). As you are aware, the Individuals with Disabilities Education Act of 2004 (IDEA 2004), enacted and signed into law on December 3, 2004, contained numerous changes to the federal law governing the provision of special education and related services to students with disabilities. After adoption of IDEA 2004, the New Jersey Department of Education began the process of reviewing and amending its regulations to conform to the new federal law. At the same time, the USDOE undertook a review of its regulations and enacted changes to those regulations to conform to the provisions of IDEA 2004. The Department's review of the new federal regulations (codified at 34 C.F.R. Part 300) reveals several areas where the federal regulations contain requirements not included in the Department's regulations. In addition, some provisions in New Jersey's regulations (codified at N.J.A.C. 6A:14) conflict with the provisions of the final federal regulations implementing IDEA 2004 and thus, are superseded by the federal regulations.

The purpose of this guidance is to inform school districts and interested parties of provisions in the USDOE regulations that supersede New Jersey regulations, as well as those provisions that provide additional regulatory requirements not contained in New Jersey's regulations. In

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addition, this guidance also provides clarification of some provisions in New Jersey's regulations that the Department determined require clarification. This guidance is not intended to interpret the provisions of IDEA 2004 or the federal regulations. Rather, it sets forth a description of the provisions of federal regulations that are not included in New Jersey's regulations or supersede provisions in New Jersey's regulations. N.J.A.C. 6A:14 still governs the provisions of special education and related services to students in New Jersey and must be followed for all areas except where indicated below. This guidance is subject to change by further guidance, amendment to state or federal statute or regulation or orders of courts of appropriate jurisdiction.

### **I. Parental Consent**

The federal regulations include provisions with respect to obtaining parental consent that are **in addition to** the requirements in New Jersey's regulations. New Jersey's regulations, at N.J.A.C. 6A:14-2.3(c), provide that a school district **may**, but is not required to, request a due process hearing when a parent refuses to provide consent for an initial evaluation or reevaluation of a student. The federal regulations clarify that, if a parent refuses to provide consent for an initial evaluation or reevaluation, the district is not in violation of its child find responsibilities or its obligation to conduct an initial evaluation or reevaluation when the school district declines to seek a due process hearing to compel parental consent for the initial evaluation or reevaluation. This provision eliminates any uncertainty as to the repercussions of accepting a parent's refusal to provide consent in these circumstances. 34 *C.F.R.* §300.300(a)(3)(ii); 34 *C.F.R.* §300.300(c)(1)(iii).

In addition, the federal regulations provide that, for home schooled students and students placed in a private school by their parents, a school district **may not** file for mediation or a due process hearing to compel parental consent for an initial evaluation or reevaluation if the parent fails to respond to a request for consent or refuses to provide the requested consent. The federal regulations also provide that, if a parent of a home schooled or parentally placed private school student refuses to provide consent for an initial evaluation or reevaluation, the school district is not required to consider the child as eligible for services. 34 *C.F.R.* §300.300(d)(4)(i) and (ii).

Finally, the federal regulations provide that a school district must make reasonable efforts to obtain parental consent for an initial evaluation, reevaluation, initial implementation of an IEP and services, and to discover the whereabouts of the parent or a ward of the State when consent is needed. Reasonable efforts for purposes of these requirements means that the school district must document its attempts to obtain parental consent by: keeping detailed records of telephone calls made or attempted and the results of those calls; maintaining copies of correspondence sent to the parents and any responses received; and maintaining detailed records of visits made to the parent's home or place of employment and the results of those visits. 34 *C.F.R.* §§300.300(a)(1)(iii), 300.300(a)(2)(i), 300.300(b)(2), 300.300(c)(2)(i), 300.300(d)(5); 34 *C.F.R.* §300.322(d).

## II. Use of Insurance

The federal regulations contain several provisions concerning the use of benefits or insurance covering a student with a disability. The Department's regulations, at N.J.A.C. 6A:14-2.3(a)5, provide that parental consent must be obtained each time a school district seeks to access private insurance covering a student with a disability. The federal regulations provide additional detail with respect to the use of insurance covering students with disabilities. First, the federal regulations require parental consent to utilize both public **and** private insurance or benefits covering a student with a disability. In addition, the federal regulations place several restrictions on the use of public or private insurance or benefits covering a student with a disability.

With respect to **public benefits or insurance** (such as Medicaid) the following requirements have been imposed by the federal regulations:

- A school district may not require the parent to sign-up for or enroll in the public benefits or insurance program;
- A school district may not require parents to incur out-of-pocket expenses such as the payment of a deductible or co-pay for the services provided (but may pay the cost that the parents otherwise would be required to pay);
- A school district may not use the benefits under a public benefits or insurance program if that use would:
  - Decrease the available lifetime coverage or any other insured benefit;
  - Result in the family paying for services that would otherwise be covered by the public benefits or insurance program and that are required for the child outside the time the child is in school;
  - Increase premiums or lead to the discontinuation of benefits or insurance; or
  - Risk loss of eligibility for home and community-based waivers, based on aggregate health-related expenditures.
- A school district must obtain parental consent each time access to public benefits or insurance is sought. This means if an IEP requires physical therapy to be provided one hour per week for 30 weeks, consent must be obtained one time for the provision of those 30 hours of physical therapy and not for the 30 separate times the service is provided. Thereafter, if the IEP is amended to provide for occupational therapy one hour per week for 30 weeks, consent to utilize insurance would then have to be obtained one time for the provision of those 30 hours of services.
- The school district must inform the parents that their refusal to permit the public agency to access their private insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents. 34 *C.F.R.* §300.154(d)

With respect to **private insurance** the following requirements have been imposed by the federal regulations:

- Parental consent, as described above, must be obtained each time the school district seeks to access the private insurance covering a student with disabilities; and
- The school district must inform the parents that their refusal to permit the public agency to access their private insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents. 34 *C.F.R.* §300.154(e)

### **III. Procedural Safeguards Statement**

N.J.A.C. 6A:14-2.3(g)7 requires that parents be provided the procedural safeguards statement (PRISE) upon referral for an initial evaluation, one time per year, upon request by the parent, and when a request for a due process hearing is submitted to the Department. The federal regulations expand the instances when the procedural safeguards statement must be provided to parents. The federal regulations also require provision of the procedural safeguards statement to parents upon receipt of the first request for a complaint investigation in a school year and on the date a decision is made to initiate a removal of a student that constitutes a change in placement of a student with a disability because of a violation of a code of student conduct. 34 *C.F.R.* §300.504(a); 34 *C.F.R.* §300.530(h).

### **IV. Independent Educational Evaluations**

The federal regulations include a provision limiting parents to one independent educational evaluation with respect to each initial evaluation or reevaluation with which the parent disagrees. New Jersey's regulations, at N.J.A.C. 6A:14-2.5(c), permit parents to seek "**an independent evaluation.**" The federal regulations clarify that such requests are limited to only **one** independent educational evaluation with respect to each initial evaluation or reevaluation conducted by the school district. The request for an independent evaluation may include any assessment(s) the parent chooses to request. However, once a request has been made, and the assessments that were part of the independent evaluation have been provided or denied by an administrative law judge (if a district seeks a due process hearing to deny the evaluation), the parent's right to an independent educational evaluation at public expense has been met. This means that the parent cannot request and obtain another independent educational evaluation at public expense until a new reevaluation has been completed by the school district. 34 *C.F.R.* §300.502(b)(5).

### **V. Dispute Resolution Procedures**

The federal regulations have added provisions with respect to the resolution period for due process hearings. The federal regulations provide that, if a school district did not adhere to the 15 day time period for holding a resolution meeting and the parties did not agree to mediate the matter, the parent may assert that the school district failed to meet its obligation for holding a

resolution meeting. The parent may file a request for the intervention of an administrative law judge (ALJ) to move the matter from the resolution period to a due process hearing and to start the 45 day clock to complete the due process hearing. If the ALJ determines that the parent's assertion is valid, the judge may order that the hearing process begin. If the ALJ determines that the parent's assertion is not valid, the judge may direct the parties to hold a resolution meeting or participate in mediation within a specified time period. 34 *C.F.R.* §300.510(b)(5).

In addition, the federal regulations permit school districts to request that an ALJ dismiss a parent's petition for a due process hearing if the parent fails to attend a resolution meeting as required by federal and state law and regulations. If the ALJ determines that the parent did not have a valid reason for not attending the meeting, the case may be dismissed. If the ALJ determines that the parent had a valid reason for not attending the resolution meeting, the judge may direct the parties to hold a resolution meeting or participate in mediation within a specified time period. 34 *C.F.R.* §300.510(b)(4).

Also, the federal regulations permit the parties, after either a mediation or resolution meeting commences, but before the end of the 30 day resolution period, to state in writing that no agreement is possible. Once such a written statement is received by the Department, the case will be transmitted for a due process hearing and the 45 day period to complete the hearing will commence. 34 *C.F.R.* §300.510(c)(2).

The federal regulations also allow for extension of mediation by agreement in order to continue efforts to resolve a dispute. If mediation is extended past day 30, the 45 day clock to complete due process proceedings does not begin to run until it is determined that the mediation will not resolve the matter and the case is transmitted for a due process hearing. The Department has historically permitted such extensions when appropriate, and will continue to do so in accordance with federal regulation. 34 *C.F.R.* §300.510(c)(3).

## **VI. Discipline Procedures**

The federal regulations amended the disciplinary procedures in some areas. As set forth in N.J.A.C. 6A:14-2.8, both the provisions of IDEA 2004 and federal regulations are specifically incorporated by reference in Appendix A of N.J.A.C. 6A:14. Therefore, IDEA 2004 and the federal regulations, in conjunction with the provisions of N.J.A.C. 6A:14-2.8, govern discipline requirements for students with disabilities. School districts must adhere to the provisions in State regulations as well as the provisions included in the Final federal regulations that are set forth below.

The federal regulations provide that a behavioral intervention plan (BIP) may be utilized to change a student's placement if the parent and school district agree to the change of placement in the BIP in lieu of returning the student to his or her previous placement. This is in accord with previous procedures which have historically permitted parents and school district staff to agree to an alternate placement in lieu of placing the student in an interim alternative educational setting (IAES) or returning the student to his or her current placement. The distinction is that this may

occur both when a disciplinary sanction is being imposed or at the conclusion of mandated disciplinary procedures including development of the BIP. 34 *C.F.R.* §300.(f)(2).

In addition, the federal regulations now provide that when a student is removed from his or her current placement for more than 10 consecutive school days or is placed in an IAES because of drugs, weapons or serious bodily injury, the student must continue to receive educational services so as to enable the student to continue to **participate** in the general education curriculum, although in another setting, and to progress toward meeting the goals in the student's IEP. Previous federal regulations required that students progress in the general education curriculum. 34 *C.F.R.* §300.530(d)(1)(i).

Also, the provisions in federal regulations addressing determinations of whether a series of short-term removals constitutes a pattern were supplemented to include consideration of whether the child's behavior was substantially similar to the child's behavior in previous incidents that resulted in the series of short-term removals. If so, a series of removals may be considered to constitute a pattern of removals, which triggers additional requirements, including a requirement to make a determination whether the pattern of removals constitutes a change of placement for the student. 34 *C.F.R.* §300.536(a)(2)(ii).

The federal regulations also clarify that conducting a functional behavioral assessment (FBA) and developing or amending a student's BIP is required when a student's behavior is determined to be a manifestation of the student's disability. When a student is removed from his or her current placement for more than 10 consecutive school days or because of drugs, weapons or serious bodily injury, the school district will conduct an FBA and develop or amend the student's BIP as appropriate. 34 *C.F.R.* §300.530(d)(1)(ii).

## **VII. Transition from Part C to Part B**

The federal regulations contain a provision that indicates that, if a due process petition is filed, and the petition involves application for initial services under Part B of IDEA 2004 for a child transitioning from Part C of IDEA 2004 because the child has turned three years of age, the school district is not required to provide the Part C services the child had been receiving. Instead, if the child is determined eligible for services and the parents consent to the provisions of special education and related services, the child must be provided those services for which consent has been provided until the due process hearing is concluded. However, in *Pardini v. Allegheny Intermediate Unit*, 420 *F.3d* 181(3d Cir. 2005), the Third Circuit Court of Appeals determined that, when a student is transitioning from Part C to Part B and the parents file for a due process hearing to contest the initial services to be provided the child, there is a stay put in the Part C program until the due process hearing is resolved. The Department will seek to determine whether the federal regulations or *Pardini* is controlling on this issue and will provide further information as to a school district's responsibility when a request for a due process hearing is filed by parents contesting the initial services for a student transitioning from Part C to Part B.

### **VIII. Evaluation Reports and Documentation**

In order to conform with the provisions of N.J.A.C. 6A:14-3.5(a), the Department amended N.J.A.C. 6A:14-3.6(c) and N.J.A.C. 6A:14-3.8(f)1 to provide that a copy of the evaluation report(s) and documentation of eligibility shall be given to the parent not less than 10 calendar days prior to the meeting in N.J.A.C. 6A:14-2.3(k). These regulations do not require district personnel to determine eligibility prior to the eligibility meeting. Rather, for purposes of clarification, the documentation of eligibility refers to documents that will be utilized by the team at the eligibility meeting to make a determination with respect to eligibility of the student.

### **IX. IEP**

The federal regulations added a provision that supplements the procedures in N.J.A.C. 6A:14-3.7(d) with respect to amendment of an IEP without a meeting. The Department's regulations, at N.J.A.C. 6A:14-3.7(d), require that a new IEP or addenda be provided to the parent after consent to amend the IEP has been obtained. The federal regulations require that, in addition to providing the amended IEP or addendum to the IEP to the parents, the IEP team members must also be informed of the changes to the IEP. Therefore, districts must inform all members of the IEP team that participated in the development of the IEP that was amended of the change(s) to the IEP. This should be documented in writing in order to allow districts to demonstrate compliance with this requirement. In addition, districts must, pursuant to the requirement in N.J.A.C. 6A:14-3.7(a)3, inform all teachers and providers whose duties are altered by an amendment of an IEP of their new responsibilities for implementation of the IEP. 34 *C.F.R.* §300.224(a)(4)(ii).

### **X. Least Restrictive Environment**

The federal regulations as originally proposed included a provision stating that, if the parent agrees, a student's placement is not required to be as close as possible to the student's home. This provision was eliminated from the final federal regulations. Therefore, the requirement to place students as close as possible to their home remains in place. 34 *C.F.R.* §300.116(b)(3).

### **XI. Transfer Students**

The provisions in N.J.A.C. 6A:14-4.1(g) with respect to students who transfer from one public school district to another public school district during a school year, have been clarified by the provisions of the federal regulations. The federal regulations require that, when a student transfers from an out-of-state district, the new district must provide the student a free, appropriate public education (including services comparable to those in the IEP from the previous school district) while it conducts an initial evaluation of the student, if determined necessary, and develops, adopts and implements a new IEP for the student. While the Department's regulations already require that comparable services be provided to the student and that any necessary assessments be conducted, the federal regulations clarify that such

assessments are part of an initial evaluation of the student. This is because eligibility criteria can vary from state to state, and thus, the district must first determine if the student is eligible for special education and related services in New Jersey and then develop and implement an IEP for the student. This determination may be made either based on new assessments of the student, or based on a review of the student's available records, or both. The requirement in N.J.A.C. 6A:14-4.1(g)2 to conduct necessary assessments and develop an IEP within 30 days remains applicable. 34 *C.F.R.* §300.323(f).

## **XII. Specialists in behavior modification or other disciplines for which there is no license or certification**

New Jersey's regulations, at N.J.A.C. 6A:14-5.1(c)1iii(3), provide that:

- (3) Specialists in behavior modification or other disciplines for which there is no license or certification shall hold, at a minimum, a bachelors degree in education, psychology or a related field from an accredited institute of higher education and shall work under the supervision of certified district board of education personnel;

For purposes of clarification, this regulation permits specialists in behavior modification or other disciplines for which there is no license or certification to develop and implement programs for students. These individuals must work under the supervision of appropriately certified school district staff. In addition, specialists in behavior modification or other disciplines for which there is no license or certification may work with paraprofessionals in implementing the programs they develop for students. Such paraprofessionals also must work under the supervision of appropriately certified school district staff.

## **XIII. Complaint Procedures**

The Department's regulations, at N.J.A.C. 6A:14-9.2(d), provide that, if a request for a complaint is also the subject of a request for a due process hearing, the entire complaint will be set aside until the due process hearing is concluded. The final federal regulations were altered from the original proposed regulations and provide that only those issues in the request for a complaint investigation that are also part of the request for a due process hearing are to be set aside, and that all other issues must be resolved in accordance with complaint procedures. Therefore, the Department will only set aside issues in a complaint that are part of a request for a due process hearing, rather than setting aside the entire request for a complaint when a request for a due process hearing is filed. 34 *C.F.R.* §300.152(c)

#### XIV. NIMAS

The federal regulations require that states adopt the National Instructional Materials Accessibility Standard (NIMAS), published as Appendix C to Part 300 of Title 34 of the federal Regulations, for purposes of providing instructional materials to blind persons or other persons with print disabilities. In accordance with this federal requirement, New Jersey is adopting the required standard and providing the appropriate assurance to the United States Department of Education. Therefore, the NIMAS standard in Appendix C to the federal regulations is the standard that must be followed by school districts for purposes of providing instructional materials to blind persons or other persons with print disabilities.

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