

New Jersey Special Education Practitioners

c/o Education Law Center
60 Park Place, Suite 300
Newark, NJ 07102
(973) 624-1815
TTY (973) 624-4618
Fax (973) 624-7339

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Barbara Gantwerk, Director
Office of Special Education Programs
New Jersey Department of Education
Trenton, New Jersey 08625

Dear Ms. Gantwerk:

Thank you for disseminating your guidance to school districts and others regarding those features of the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) that must be implemented effective July 1, 2005, as well as the “highly qualified teacher” requirements that should already be in place.

In most respects, your guidance is consistent with our understanding of those aspects of IDEA that must be implemented by July 1, 2005, regardless of any existing state policy or regulations. In addition, we appreciate the fact that you have taken this opportunity to highlight strategies that are best practices that are also consistent with the new IDEA requirements. For example, in the section on “Highly Qualified Teacher Requirements,” you note 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.” Hopefully this will redirect the attention of school districts toward complying with the highly qualified teachers requirements by developing effective collaboration strategies to ensure that every classified student has a highly qualified teacher.

There are several areas where additional clarification is needed immediately from your office to districts and parents to ensure appropriate implementation of IDEA changes:

- We would like to request that future correspondence from your office to school districts highlight the fact that the only teachers who are excepted from the “highly qualified teacher” requirements are teachers who exclusively instruct students who participate in alternate assessments tied to alternate achievement standards. Current guidance is not specific enough and might result in districts believing that students who participate in alternate assessments

tied to the state's achievement standards (not alternate achievement standards) do not need to have teachers who meet the "highly qualified teacher" requirements.

- Future correspondence should provide information to districts regarding sources of information on "peer-reviewed research," particularly research performed by US DOE OSEP-funded projects, such as research on positive behavior supports, the benefits of inclusion, etc., and should clarify that this provision (as well as the provision regarding the altered definition of "assistive technology") are effective July 1.
- It is also important to inform districts that parents must give "informed written consent" to excuse an IEP team member whose area of the curriculum or related services is not being discussed. Otherwise, there will undoubtedly be situations where families are not given the information they need to make an informed decision, or conflicts where districts indicate that parents gave them verbal consent, parents disagree, and there will be nothing in writing to prove that consent was actually given by the parents.
- There should be additional written guidance to districts indicating that student IEPs must not only include present levels of academic achievement and functional performance, but also any levels that the district would interpret as included within "present levels of educational performance" that go beyond "academic achievement and functional performance." Nothing in IDEA 2004 prohibits New Jersey from requiring more than federal law in this regard.
- The guidance regarding students who transfer from another district should be rewritten to clarify that the new IEP developed by the new district may be consistent in all respects with the previously held IEP, in effect, resulting in implementation of the previous IEP.
- Finally, the guidance regarding assessment in "appropriate language or form" should be rewritten to clarify that, in many instances, "the language and form most likely to yield accurate information on what the child knows and can do" is likely to be the child's native language.

There are also significant areas where your guidance is not consistent with our interpretation and we ask that you reconsider your position:

- The first area involves re-evaluation. It is our position that state code may require re-evaluations more frequently than federal law, since compliance with a state mandate of more frequent re-evaluations perforce assures compliance with a federal mandate of less frequent re-evaluations. Moreover, state code may provide that a hearing officer maintains the authority to require a re-evaluation more frequently than once a year in a due process situation. This should be clarified in written guidance to districts.
- The second area involves parental rights in dispute resolution. It is our position that state code could authorize filing of complaints in the state Office of Administrative Law and state courts beyond the IDEA 2-year "statute of limitations" or the 90 day period for appeal, if the dispute is based on state code or state law as opposed to IDEA itself.

- With respect to discipline, our reading of IDEA indicates that school personnel may consider unique circumstances to decline to discipline students *whether or not* their conduct is a result of their disabling condition. This must be the case, because, in a situation where a student may be removed to an interim alternative educational setting, no manifestation determination is required to be held, and thus, the district would not know whether or not the behavior was a manifestation, and in other circumstances, a student may not be disciplined for behavior that is a manifestation of their disability. Thus, this language must mean that school personnel may decline to impose discipline whether or not their conduct represents a manifestation of their disability. Further, it is our contention that the state may set a more lenient standard for determining whether or not a student's behavior was a manifestation of their disability, including continuing to require use of the previous criteria for making that determination in addition to the criteria in the current IDEA, particularly since the federal law does not require districts to impose a removal to an interim alternative educational setting but merely permits it.
- Further, we disagree that schools (or hearing officers) in New Jersey may take advantage of the new provision allowing the removal of students with disabilities to an interim alternative educational setting for up to 45 school days, because New Jersey code still indicates 45 calendar days. The federal provision regarding removal is permissive, not mandatory, and therefore, in keeping with your June 3, 2005 guidance (*see, e.g.*, Section VI), the change to 45 school days should not supercede the state provision of 45 calendar days.
- Similarly, the provisions regarding the new authority for hearing officers to remove a child if it is determined that the child's placement is "substantially likely to result in injury to the child or to others," as well as the provision allowing LEAs to seek attorney's fees, are permissive in nature and therefore may not supercede the current state regulations in these areas.
- Finally, New Jersey code does not allow the removal of students to interim alternative settings except for weapons or drugs offenses. This section of the New Jersey code explicitly mentions these two types of offenses and does not merely refer to or incorporate IDEA. Therefore, New Jersey schools are prohibited from unilaterally removing students for offenses involving "serious bodily injury" unless and until the state code is revised consistent with IDEA.

We would very much like to meet with you in the very near future to discuss establishing a series of regional joint trainings for parents and professionals, including Directors of Special Services, parent support group leaders, parent advocacy groups and SPAN staff who provide training and technical assistance to families, to ensure that everyone is hearing the same message and that implementation of those provisions of IDEA that are effective July 1, 2005 can be as smooth as possible. We know that we share this commitment, and believe that this type of joint training will be very useful in achieving our shared goal.

Thank you.

Sincerely,

Elizabeth Athos, Esq. -- Education Law Center
Diana MTK Autin, Esq. – Statewide Parent Advocacy Network
Martha Brecher, Esq. -- Statewide Parent Advocacy Network
Mary Ciccone, Esq. – New Jersey Protection & Advocacy, Inc.
David R. Giles, Esq.
Ruth Lowenkron, Esq. – Education Law Center
Linda J. Robinson, Esq.
Harriet W. Rothfeld, Esq.
Richard E. Shapiro, Esq.
Elizabeth Shea, Esq. – The Arc of New Jersey
Rebecca K. Spar, Esq.
Stanley J. Troy, Esq.