



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

DATE: SEP 26 1997

TO: The Secretary
Through: DS____
ES____

THROUGH: OGC_____

FROM: Judith E. Heumann,
Assistant Secretary for Special
Education and Rehabilitative Services

SUBJECT: Regulatory Action Memorandum: Notice of Proposed Rulemaking--Assistance to States for Education of Children with Disabilities program, Preschool Grants Program, and the Early Intervention Program for Infants and Toddlers with Disabilities

ISSUE

Whether to approve the attached Notice of Proposed Rulemaking (NPRM) to revise the existing regulations that implement the three formula grant programs in the Individuals with Disabilities Education Act (IDEA): (1) 34 CFR Part 300--the Assistance to States for Education of Children with Disabilities program under Part B of the Act; (2) 34 CFR Part 301--the Preschool Grants program under section 619 of the Act; and (3) 34 CFR Part 303--the Early Intervention Program for Infants and Toddlers with Disabilities under Part C (formerly Part H) of the Act.

BACKGROUND

On June 4, 1997, the President signed into law the Individuals with Disabilities Education Act Amendments of 1997 (IDEA Amendments of 1997, Pub. L. 105-17). The regulations are needed to implement statutory provisions amending the three formula grant programs in the IDEA that are described above. The amendments reauthorize and fundamentally change IDEA to better: (1) ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living; (2) ensure that the rights of children with disabilities and parents of those children are protected; (3) assist States, localities, educational services agencies, and Federal agencies to provide for the education of all children with disabilities; (4) assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families; (5) ensure

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that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting systemic-change activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and (6) assess, and ensure the effectiveness of, efforts to educate children with disabilities.

FISCAL HISTORY OF PROGRAMS

The Congress appropriated for fiscal year (FY) 1997 \$3,109,395,000 for the Assistance to States for the Education of Children with Disabilities program, \$360,409,000 for the Preschool grants program, and \$315,754,000 for the Early Intervention Program for Infants and Toddlers with Disabilities. The Administration's budget request for FY 1998 for each program is \$3,248,750,000, \$374,825,000, and \$323,964,000, respectively.

SUMMARY OF MAJOR POLICIES OR CHANGES

The following is a brief description of the significant provisions in the NPRM relating to the IDEA-Part B program (34 CFR Part 300). The NPRM for the Preschool Grants program (34 CFR Part 301) includes only statutory provisions relating to the allotment formula and use of funds; and the NPRM for the Early Intervention Programs for Infants and Toddlers with disabilities under Part C of the Act (34 CFR Part 303) contains only conforming changes relating to certain provisions under the Part B NPRM. Most of the items described below were included in my memorandum to you submitted prior to the September 4 meeting with you on the Part B NPRM.

As you recall from our September 4 meeting, this is an extraordinarily long regulatory package. However, as discussed at that meeting, only a very small portion of the document is comprised of new regulations that the Department is proposing to add. I appreciate the concern of groups such as the National Governors Association about these regulations. I am also sensitive to your commitment to those groups that the Department will not over-regulate; and I want to assure you that this NPRM does not violate your commitment. We are currently preparing a statement that describes the nature and scope of this NPRM and identifies the few major areas (such as those described below) in which we are actually proposing to regulate.

1. Discipline/FAPE for Suspended or Expelled Students

This was one of the most controversial issues during the reauthorization. The position we are taking in the proposed regulations will be seen adversely by some education groups. It will likely be seen by some of the disability advocacy groups for parents and children as providing flexibility for school districts that is not authorized by the law. We believe it is a reasonable approach that maintains the balance intended by Congress. The NPRM proposes the following:

- o School officials can remove a child with a disability from the child's current educational placement for not more than 10 school days without violating the

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statutory right of the child to remain in his or her current placement if the parents contest a change.

- o Continuing educational services must be provided whenever a child is removed from the child's regular placement for more than 10 school days in a school year.
- o These services must include regular and special education services and address the behavior that resulted in the removal or suspension.
- o If an action that involves the removal of a child with a disability from the child's current educational placement for more than ten school days in a given year is contemplated: (1) a behavioral assessment plan must be developed, and (2) a manifestation determination must be conducted. Education services (FAPE) must be provided on day 11.

School districts have expressed concern that the law might require that educational services be provided for any removal from the regular placement (as well as requiring a behavioral assessment and manifestation determination in these cases), so they should approve of the limitation of these obligations to cases where a removal is for more than 10 school days in a school year. However, they would prefer that the required activities apply only to removals of more than 10 consecutive school days, and not to short term removals that cumulate to more than 10 school days in a school year. Conversely, parents and their advocates will be unhappy that the requirements are not applicable to all removals, regardless of length.

2. Removal by a Hearing Officer

IDEA '97 gives school personnel the option of going to a hearing officer to remove a child with disabilities to an interim alternative educational setting for up to 45 days, if the child is substantially likely to injure themselves or others in their current placement. Some attorneys have interpreted this to mean that a hearing officer could issue a bench ruling, review records, or discuss the matter over the phone and order a removal.

We do not agree. Since the standard to be applied by the hearing officer is whether the school district has proved its case "beyond a preponderance of the evidence," we believe that both sides to the dispute must be given the opportunity to present evidence. The proposed regulations make clear that the removal by a hearing officer must be a ruling after a due process hearing has been conducted. The regulations, however, provide that it will be an expedited hearing.

3. Extended School Year Services

The current regulations do not specifically use the phrase "extended school year." However, both IDEA '97 and the previous statute require that FAPE be made available to eligible disabled children. For some children, this may mean services beyond the regular school year. Policy letters have been used to communicate the Department's interpretation of the statutory requirements. Case law supports the Department's interpretation.

The proposed regulations make clear that extended school year services must be available to those children whose IEP teams determine the services are necessary to ensure FAPE.

Parents will agree that extended school year services should be addressed in the regulations. However, they will likely think the Department has not been prescriptive enough to ensure services. School officials, on the other hand, will most likely say we should not regulate on this issue. We believe, however, that the regulations codify long-standing Department policy that balances the need for clarity and the protection of the rights of disabled children with that of minimizing regulations and allowing flexibility at the State and local levels.

4. Effective Date of IEP Provisions

The statute sets the effective date for the new requirements of IEP development and content as July 1, 1998. We will be clarifying in this regulation that this means as of July 1, 1998 all IEPs must meet these new requirements. This will be controversial because some school districts and States are asking us to read this as allowing States to continue to implement IEPs that were developed prior to July 1, 1998 even if they do not meet these new requirements.

5. The Receipt of a Regular Diploma Ends Right to FAPE

The Department's long-standing policy is that a student's right to FAPE continues until the student is no longer in the eligible age range or receives a regular high school diploma. This means that students who receive a certificate of attendance or other certificate of graduation that is not a regular diploma are still entitled to FAPE while they are in the eligible age range. However, the current regulations do not specifically address this issue. The Department's position has been included in the proposed regulations.

School districts that disagree with the Department's policy may object to the provision in the regulations.

6. Use of Public and Private Insurance

The statute requires that States have a method to allow LEAs to seek reimbursement from noneducational agencies such as Medicaid that are obligated under other law to provide or pay for services that are considered special education or related services under Part B of the Act. In addition to including this statutory requirement, the NPRM would reflect the Department's long-standing position that it would violate the FAPE requirement under Part B for LEAs to require parents to use private insurance proceeds to pay for services under Part B if doing so would result in a financial loss to the parents. (The NPRM includes a definition of financial loss adapted from the Department's 1980 Notice of Interpretation on the use of insurance proceeds.)

The preamble to the NPRM states that the basic principle that services be available at no cost to parents would be equally applicable to parents whose children are eligible for public insurance, but adds that there is no current need to regulate on the public insurance issue because there is no risk of financial loss to parents under current public insurance programs such as Medicaid. (Comments are invited on whether a policy on public insurance similar to that on private insurance should be added to the final regulation.)

7. Change of Placement Based on Hearing Officer Decision

The statute provides in a case of a dispute between a parent and a public agency that the child remains in the child's current placement unless the parent and agency agree otherwise. We are proposing to add a provision that if a hearing officer's decision is in agreement with the parent's position in a due process hearing, the decision be implemented at that point even though the public agency may be appealing that decision. We are taking this position to ensure that children not remain in inappropriate placements for prolonged periods of time. The only Federal appeals court decision on this issue supports the Department's proposed interpretation.

8. Removing Secretarial Reviews from the State Complaint Procedures

The requirements relating to State complaint procedures in the existing regulations for both the Part B and Part C programs provide that a complainant or the public agency has the right to request a Secretarial review of the SEA's final decision relating to the complaint. In the NPRM, we are proposing to remove the Secretarial review provision from the regulations. This proposed change reflects a recommendation by the Department's Inspector General in his report of August, 1997 on the utility and efficiency of the Secretarial review process under the IDEA. In that report, the Inspector General noted that in the Secretarial review process, the Department's limited resources are being diverted for an activity that is providing minimal benefits to children with disabilities or to the program.

This change will be paired with other changes in this NPRM to help make the State complaint system a more effective process (e.g., ensuring that parents are fully informed of these procedures as a more effective, less costly means to seek redress of their grievances than requesting a due process hearing, providing that complaints generally must be received within one-year of the alleged violation, etc.).

We expect that removing the provision will allow the Department, and specifically this Office, to spend more of its time and attention on ensuring compliance with program requirements, which will have benefit for all parties interested in special education. We anticipate that most SEAs will agree with the proposed change, while some parents and advocates may feel that an important provision has been taken away from them.

9. Students with Disabilities Incarcerated in Adult Prisons

The rights of students with disabilities who are incarcerated in adult prisons under Part B of the IDEA and the role of the SEA and other State and local agencies in serving these students are addressed in new statutory provisions that were added by the IDEA Amendments of 1997. Even though the requirements are statutory, this topic is of sufficient interest that we anticipate receiving public comment about it.

ANTICIPATED REACTIONS TO THE REGULATIONS

As noted above, we expect mixed reaction to this NPRM from major constituencies and other important parties. Some parents and advocate associations will believe that we have not gone far enough in these proposed regulations, whereas some representatives of States and LEAs will likely express concern that the NPRM goes too far in regulating.

COMMENTS BY PRINCIPAL OFFICES

This NPRM has been reviewed by appropriate principal offices of the Department. This folder includes, on the left, a summary sheet reflecting the completion of the Department's review.

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DECISION

The Office of Management and Budget (ORB) has not waived review of this document. If you approve transmittal to ORB, please sign the NPRM. If you do not approve transmittal, please advise of any alternative action you wish to be taken and sign below.

Other/Comments:

Signature

Date

PREPARED BY: T.Irvin:OSERS:Date:205-5803

CONTACT: OGC/DRS:M.Smith:401-8300

ATTACHMENT

Tab A - Notice of Proposed Rulemaking



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

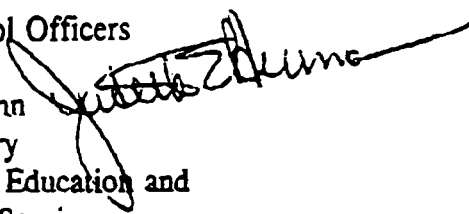
SEP 19 1997

Contact Persons
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Rhonda Weiss
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OSEP 97-7

MEMORANDUM

TO : Chief State School Officers

FROM : Judith E. Heumann 
Assistant Secretary
Office of Special Education and
Rehabilitative Services

Thomas Hehir 
Director
Office of Special Education Programs

SUBJECT: Initial Disciplinary Guidance Related to Removal of Children with Disabilities
from their Current Educational Placement for Ten School Days or Less

INTRODUCTION

The purpose of this memorandum is to provide initial guidance on the requirements of the Individuals with Disabilities Education Act Amendments of 1997 (IDEA '97) as they relate to the removal of children with disabilities from their current educational placement for ten school days or less. The Department has received numerous requests for guidance concerning the discipline provisions of IDEA '97. The Department plans to regulate in each of the areas where clarification is needed.

Four basic themes run throughout the statute concerning discipline:

- (1) All children, including children with disabilities, deserve safe, well-disciplined schools and orderly learning environments;
- (2) Teachers and school administrators should have the tools they need to assist them in preventing misconduct and discipline problems and to address these problems, if they arise;

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- (3) There must be a balanced approach to the issue of discipline of children with disabilities that reflects the need for orderly and safe schools and the need to protect the right of children with disabilities to a free appropriate public education (FAPE); and
- (4) Appropriately developed IEPs with well developed behavior intervention strategies decrease school discipline problems.

With regard to discipline for children with disabilities, IDEA '97:

- Brings together for the first time in the Statute the rules that apply to children with disabilities who are subject to disciplinary action and clarifies for school personnel, parents, students, and others how school disciplinary rules and the obligation to provide FAPE fit together by providing specificity about important issues such as whether educational services can cease for a disabled child; how manifestation determinations are made; what happens to a child with disabilities during parent appeals; and how to treat children not previously identified as disabled.
- Includes the regular education teacher of a child with a disability in the child's IEP meetings to help ensure that the child receives appropriate accommodations and supports within the regular education classroom, and gives the regular teacher an opportunity to better understand the child's needs and what will be necessary to meet those needs, thus decreasing the likelihood of disciplinary problems.
- Allows school personnel to move a student with disabilities to an interim alternative educational setting for up to 45 days, if that student has brought a weapon to school or a school function, or knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance while at school or a school function.
- Gives school personnel the option of asking a hearing officer to move children with disabilities to an interim alternative educational setting for up to 45 days, if they are substantially likely to injure themselves or others in their current placement.

**INITIAL GUIDANCE REGARDING REMOVAL OF CHILDREN WITH
DISABILITIES FROM THEIR CURRENT PLACEMENT**

We recognize that the statute is susceptible to a number of interpretations in some areas related to discipline, but the position enunciated below represents what we believe is the better reading of the statute. We are providing this information (in a question and answer format) to assist States and school districts in implementing IDEA '97 prior to publication of Department regulations. To the extent these questions and answers provide information not

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specifically addressed in the Statute, the information is being provided as non-binding/non regulatory guidance. We will be issuing proposed regulations in the near future that reflect the positions taken in this document.

QUESTION 1: Under IDEA, do public agencies have a responsibility, as part of the IEP process, to consider a child's behavior?

ANSWER: Yes. Section 614(d)(2)(B) requires the IEP team "in the case of a child whose behavior impedes his or her learning or that of others, [to] consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior." In addition, school districts should take prompt steps to address misconduct when it first appears. Such steps could, in many instances, eliminate the need to take more drastic measures. These measures also could be facilitated through the individualized education program (IEP) and placement processes required by IDEA. For example, when misconduct appears, a functional behavioral assessment could be conducted, and determinations could be made as to whether the student's current program is appropriate and whether the student could benefit from the provision of more specialized instructional and/or related services, such as counseling, psychological services, or social-work services in schools. In addition, training of the teacher in effective use of conflict management and/or behavior management strategies also could be extremely effective. In-service training for all personnel who work with the student, and, when appropriate, other students, also can be essential in ensuring the successful implementation of the above interventions.

QUESTION 2: Does the right to a free appropriate public education extend to children with disabilities who are suspended or expelled?

ANSWER: Yes. A free appropriate public education must be made available to all eligible children with disabilities, including children with disabilities who have been suspended or expelled from school. (Section 612(a)(1))

QUESTION 3: What is the meaning of the phrase "children with disabilities who have been suspended or expelled from school"?

ANSWER: The Department believes that the phrase means children with disabilities who have been removed from their current educational placement for more than ten school days in a given school year.

QUESTION 4: Must educational services be continued during the removal of a child with a disability from his or her educational placement for ten school days or less?

ANSWER: No. The Department does not believe that it was the intent of Congress to require that FAPE be provided when a child is removed for ten school days or less during a given school year. However, there is nothing in the IDEA '97 that would prevent the provision of FAPE during this time.

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QUESTION 5: Must there be a manifestation determination before a student with disabilities can be removed from his or her current education placement for a period of ten school days or less during a given school year?

ANSWER: No. The Department does not believe that the statute requires a manifestation determination prior to a removal for a period of ten school days or less in a given school year. However, if an action that involves the removal of a child with a disability from his or her current educational placement for more than ten school days in a given school year is contemplated, the Department believes that a manifestation determination would be required, and the manifestation determination must take place as soon as possible but in no case later than ten school days after the decision to take that action is made. (615(k)(4)(A))

QUESTION 6: Must a functional behavioral assessment be conducted prior to a removal of ten school days or less during a given school year?

ANSWER: No. The Department does not believe the statute requires a functional behavioral assessment, if a child with a disability is removed from his or her current educational placement for ten school days or less in a given school year, and no further disciplinary action is contemplated.

QUESTION 7: Are there any specific actions that a school district is required to take during a removal of a child with a disability from his or her educational placement for ten school days or less?

ANSWER: If no further removal is contemplated, the Department does not believe that other specific actions are required during this time period. However, school districts are strongly encouraged to review as soon as possible the circumstances that lead to the child's removal and consider whether the child was being provided services in accordance with the IEP and whether the behavior could be addressed through minor classroom or program adjustments, or whether the IEP team should be reconvened to address possible changes to the IEP.

QUESTION 8: Does IDEA continue to allow a school district to seek a court order to remove a student with a disability from school or otherwise change the student's placement? If so, under what circumstances?

ANSWER: Yes. IDEA continues to allow a school district to seek to obtain a court order to remove any student with a disability from school or to change the student's current educational placement if the school district believes that maintaining the student in the current educational placement is substantially likely to result in injury to the student or to others.¹

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~~In addition, the new statute allows school authorities to ask a hearing officer to move children with disabilities to an interim alternative educational setting for up to 45 days if they are substantially likely to injure themselves or others in their current placement.~~ The hearing officer may move the child to an alternative educational setting if the public agency demonstrates by evidence that is more than a preponderance of the evidence that maintaining the child in the child's current placement is substantially likely to result in injury to the child or others. The hearing officer must consider the appropriateness of the child's placement, whether the school district has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services, and determine that the interim alternative educational setting meets the requirements of section 615(k)(3) of the Act.

cc: State Directors of Special Education
RSA Regional Commissioners
Regional Resource Centers
Federal Resource Center
Special Interest Groups
Parent Training Centers
Independent Living Centers
Protection and Advocacy Agencies