

ADDITIONAL AREAS IMPACTED BY NEW 2006 IDEA PART B REGS

The 2006 IDEA Part B regulations, which took effect on October 13, 2006, impact numerous areas of the regulations. Two of these areas, resolution sessions and IEP meetings, are addressed in the Winter 2007 edition of MBM's Education News. Additional areas impacted by the 2006 Part B regs include:

Child find requirements

Under the 2006 final IDEA Part B regulations, the district where a private school is located has the responsibility to evaluate parentally placed private school students. Section 300.131(f), regarding child find for out-of-state parentally placed private school children with disabilities, clarifies that each LEA, in which a private, including religious, elementary school and secondary school is located, must include parentally placed private school children who are attending the school from another state.

If found eligible for special education services, the District must then consider the student in its analysis of which students require service plans. The district of residence is responsible for developing an IEP and offering FAPE to that child, unless the parents have made it clear that they are not interested in enrolling their child in a public school. With regard to student privacy, the LEA where the private schools are located has an obligation to protect the privacy of children placed in private schools by their parents. A change in the 2006 final IDEA regs requires districts to obtain parental consent before they can share information about parentally placed private school students. This would also require FERPA consent as information about the student is likely to be disclosed. The LEA, where a non-resident child is enrolled in a private school, should take steps to comply with all legal requirements, including providing child find and evaluations, engaging in the consultation process with private schools and parents and applying the proportionate share of funding properly.

The final Part B regs provide that if a child is enrolled, or is going to enroll, in a private school that is not located in the LEA of the parents' residence, parental consent must be obtained before any personally identifiable information about the child is released between officials in the LEA where the private school is located and officials in the LEA of the parents' residence. New Section 300.300(d)(4) provides that if a parent of a child who is homeschooled, or placed in a private school by the parent at the parent's expense, does not provide consent for an initial evaluation or a re-evaluation, or the parent fails to respond to a request to provide consent, the LEA cannot override the lack of consent. Also, the LEA is not required to consider the child eligible for services under the other regulation requirements relating to parentally placed private school children with disabilities.

Further, when parents place a student in a private school in a different state than where they reside, the 2006 final IDEA Part B regs require a district to follow the special education eligibility procedures of the state and district where the private school is located. The LEA where the private school is located would apply the eligibility standard that applies to all the students in that LEA, not the eligibility standard of the LEA of residence.

IEE requests

The 2006 final IDEA Part B regulations outline different scenarios when a parent requests an Independent Educational Evaluation (IEE) at public expense because the parent disagrees with an evaluation obtained by the district. The final regs clarify that a parent is entitled to only one IEE at public expense each time the public agency conducts an evaluation with which the parent disagrees. However, there are no restrictions in IDEA or its regulations regarding how many times the parents may submit new evaluation data which they obtain privately. Under the final regulations, the district is still required to consider the results of a parent's IEE if that evaluation fulfills the district's criteria.

If the district receives a request for an IEE, the district should immediately review its own

evaluation to determine if it is comprehensive based upon the reasons provided in the request for the IEE. Also, the District should give serious consideration to approving the IEE at public expense if the district staff has concerns about the comprehensiveness of the district's evaluation. If the district decides not to accept the parent's request for an IEE at public expense, the district must file a due process complaint to request a hearing to show that the district's evaluation is appropriate or to show that the evaluation obtained by the parent did not fulfill the criteria of the district for an independent evaluation. If the district files a due process complaint and it is determined that the district's evaluation is appropriate, the parent nevertheless has the right to an IEE, but not at public expense.

Other areas impacted by the final regulations

- Disciplinary change of placement. The final regulations reiterate the requirement that a child's behavior must have been a manifestation of the disability before determining whether a series of removals constitutes change in placement. The regulations specify that on the day a decision is made to make a removal which constitutes a change of placement because of violation of the code of student conduct, the district must notify the parents of the decision and provide them with procedural safeguard notices.
- Manifestation Determination Review. The manifestation determination review must be conducted with the student's parents and "relevant members" of the IEP team who must review all of the relevant information "in the student's file." Behavior is considered a manifestation of a child's disability if the conduct in question was either caused by, or had a direct and substantial relationship to, the child's disability or was a direct result of the district's failure to implement the IEP. If the district, parent and team members determine that the child's behavior is the direct result of the district's failure to implement the IEP, then

the district must take immediate steps to remedy identified deficiencies.

- Stay put provisions. If the complaint involves an application for initial services for a child transitioning from Part C to Part B, and the child is no longer eligible for Part C services because the child has turned three years of age, the district is not required to provide the Part C services which the child has been receiving. If the child is found eligible under Part B and the parent consents to the services, the district must provide those services that are not in dispute.
- FAPE. Section 300.101(c) clarifies that FAPE must be available to any child with a disability who needs special education and related services, “even though the child has not failed or been retained in a course, and is advancing from grade to grade.” Section 300.102(a)(3), regarding exceptions to FAPE, further clarifies that a regular high school diploma does not include an alternative degree that is not fully aligned with the state’s academic standards, such as a certificate or a GED credential.
- Severe Learning Disability (SLD). The previously proposed regulation permitting the state to prohibit the use of a severe discrepancy between intellectual ability and achievement for determining if a child has an SLD has been removed. Section 300.307(a)(2) now clarifies that the criteria adopted by the state must permit the use of a process based on the child’s response to scientific, research-based intervention.
- Least Restrictive Environment. Section 300.116(b)(3) and (c) regarding placements removes the qualification “unless the parent agrees otherwise” from the requirements that the child’s placement be as close as possible to the child’s home and that the child is educated in the school he would attend if not disabled.
- Attorney Fees. The court currently has the discretion to award reasonable attorney fees to

prevailing party parents. Now, the court also may award fees to the SEA or LEA against a parent's attorney who files or continues to litigate an action that is frivolous, unreasonable or without foundation. SEAs and LEAs can recover fees from the attorney or parent if the complaint is presented for any improper purpose, such as to harass, cause unnecessary delay or needlessly increase the cost of litigation.

- Highly qualified teachers. The final regulations permit states to develop a HOUSSSE for special education teachers. The final regulation requirements do not apply to private school teachers, even if hired or contracted by districts to provide services to students with disabilities in private schools. The final regs also explain that special education teachers in charter schools must meet certification or licensing requirements in the state's public charter school law.
- Early Intervention. Districts may spend not more than 15% of IDEA monies to provide coordinated, early intervention services for students in grades K-12 who have not been identified as requiring special education and related services, but who otherwise need additional academic and behavioral support to succeed in the regular education environment.

As is evident from the above, the 2006 IDEA final Part B regulations impact a wide spectrum of the special education programs and services currently provided by school districts. Therefore, it is again stressed and strongly recommended that each district's special education department consult with their respective solicitor to ensure that the 2006 final regs are properly implemented. Our school attorneys are available to provide guidance and assistance in all areas of special education, including implementation of the 2006 IDEA final Part B regulations.

