

# 1 INTRODUCTION

The reauthorized Individuals with Disabilities Education Act of 2004 is confusing to most parents, educators, and even to many attorneys. Ignorance of the law can be as damaging as the child's disability.

What are the requirements for highly qualified special education teachers? When do these requirements go into effect? How can special education teachers meet the highly qualified teacher requirements?

What does the Individuals with Disabilities Education Act say about child find? Special education services to children who attend private schools and charter schools? What does the law say about least restrictive environment, mainstreaming and inclusion?

What does the law say about evaluations, reevaluations and parental consent? What does the law say the use of discrepancy formulas and response to intervention to identify children with specific learning disabilities?

What does the law say about Individualized Education Programs (IEPs) and IEP teams? Transition plans? What does the law say about reviewing and revising IEPs? Who may be excused from IEP meetings and under what circumstances? What are "multi-year IEPs"?

What are early intervening services? Who is eligible for early intervening services? What does the law say about who must be tested on state and district assessments? Who is entitled to accommodations? Alternate assessments? Who makes these decisions?

What does the law say about independent educational evaluations? Parent access to educational records? Mediation? Parent notice? Prior written notice? Due process complaint notice? What are the new requirements and timelines for due process hearings? Resolution sessions? Qualifications for hearing officers? Attorneys' fees?

What does the law say about discipline? Manifestation Review Hearings? Who decides whether a child will be placed into an interim alternative educational setting, why, and for how long? What does the law say about Functional Behavioral Assessments and Behavior Intervention Plans?

**Wrightslaw: IDEA 2004** will help you find answers to your questions in the reauthorized statute.

**Wrightslaw: IDEA 2004** includes the full text of Part A (General Provisions) and Part B (Assistance for Education of All Children with Disabilities) of the Individuals with Disabilities Education Act, with commentary, cross-references, strategies, and tips. Part C (Infants and Toddlers with Disabilities), Part D (National Activities to Improve Education of Children with Disabilities) and Part E (National Center for Special Education Research) were omitted from **Wrightslaw: IDEA 2004**, but will be included in **Wrightslaw: Special Education Law, 2<sup>nd</sup> Edition**.<sup>1</sup>

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<sup>1</sup> **Wrightslaw: Special Education Law, 2<sup>nd</sup> Edition**, is scheduled for publication in the winter of 2006.

## 2 LAW, REGULATIONS AND CASELAW

In this chapter, you will learn about law, regulations and caselaw. You will learn about legal research, legislative intent, and how law evolves through judicial interpretations.

Congress enacted the Individuals with Disabilities Education Improvement Act of 2004 (IDEA 2004) on November 17, 2004. The President signed the Act into law on December 3, 2004. The law went into effect on July 1, 2005.

When Congress reauthorized the Individuals with Disabilities Education Act in 2004, they made many significant changes to the law. **Purposes** is the mission statement of IDEA and the most important statute:

... to 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 **further education**, employment and independent living . . . [and] to ensure that the rights of children with disabilities and parents of such children are protected... (Section 1400(d))

The authorization of any new law brings about a spate of interpretations and questions. Self-styled experts may spread wrong interpretations, misinformation and disinformation. Do not rely on the opinions of others or advice you may find in articles or at training programs.

To find answers to your questions about the Individuals with Disabilities Education Act, you need to do your own legal research. The intention of this book is to bridge the gap between the law and one's understanding of the legal language within it, in an accurate, objective manner and through direct reference to the law itself.

In this book, you will read the law. In the beginning, this is more difficult than reading articles about the law or having the law explained to you. As you continue to read, the law will begin to fit together in your mind. When you learn how the law is organized, you can find sections or regulations that are relevant to your questions.

### STATUTES

Statutes are laws passed by federal, state and local legislatures. The original federal special education law was "The Education of All Handicapped Children Act of 1975." When Congress amended the law in 1990, they gave it a new name, "The Individuals with Disabilities Education Act." When Congress reauthorized the law in 2004, they renamed it again as "The Individuals with Disabilities Education Improvement Act of 2004." (IDEA 2004 is Public Law 108-446 and is cited as Pub. L. 108-446.)

Congress first publishes laws as an "Act" in the *Statutes at Large*, then organizes laws by subject in the *United States Code* (U.S.C.) The Individuals with Disabilities Education Act is printed in the *Statutes at Large* and in the *United States Code*. The numbering system used to categorize an Act in the *Statutes at Large* is different from the system used in the *United States Code*.

The *United States Code* has fifty subject classifications called Titles. For example, Title 20 is about education, Title 26 is the Internal Revenue Code, and Title 42 is about public health and welfare. In each title, laws are indexed and assigned section numbers. The Individuals with Disabilities Education Act is cited as 20 U.S.C. § 1400, *et. seq.* Statutes published in the *Statutes at Large* have sections (section 1, 2, 3, 4, etc.) and may have subsections ((a), (b), (c), (d), etc.).

# 3 AN OVERVIEW OF IDEA 2004

The Individuals with Disabilities Education Act of 2004 includes significant changes from the previous authorization, IDEA 97. This chapter will provide you with an overview of the law, how the law is organized, and new requirements in the law.

The Individuals with Disabilities Education Act of 2004 is divided into five parts:

Part A - General Provisions (Sections 1400 - 1409)

Part B - Assistance for Education of All Children with Disabilities (Sections 1411 - 1419)

Part C - Infants and Toddlers with Disabilities (Sections 1431 - 1444)

Part D - National Activities to Improve Education of Children with Disabilities (Sections 1450-1482)

Part E - National Center for Special Education Research

Parents, advocates, attorneys, and educators will refer most often to the following sections:

Section 1400 - Findings and Purposes

Section 1401 - Definitions

Section 1412 - State Responsibility (the Catch-all Statute)

Section 1414 - Evaluations, Eligibility, Individual Education Programs, Educational Placements

Section 1415 - Procedural Safeguards

## PART A – GENERAL PROVISIONS

Part A of the Individuals with Disabilities Education Act of 2004 includes Sections 1400 through Section 1409 of Title 20 of the United States Code (U.S.C.). The most important section in the law is Section 1400(d) that describes the Purposes of the law. Section 1401 includes the legal definitions in alphabetical order. Section 1403 advises that states are not immune from suit if they violate IDEA. Section 1406 describes the requirements and timelines for the federal special education regulations. Section 1408 is a new section about paperwork reduction. (Note: There is no Section 1410.)

### SECTION 1400: FINDINGS & PURPOSES

**Findings** in Section 1400(c) describe the events and findings that led Congress to pass the Education for All Handicapped Children Act of 1975 (Public Law 94-142) which is now the Individuals with Disabilities Education Improvement Act of 2004.

In Findings, Congress described obstacles to implementation of the law:

... implementation of this title has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities. (Section 1400(c)(4))

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# 5 THE INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT OF 2004

## PART A — GENERAL PROVISIONS

➔ **OVERVIEW:** Part A of the Individuals with Disabilities Education Improvement Act, General Provisions, includes Sections 1400 through Section 1409 of Title 20 of the United States Code (U.S.C.):

- 20 U.S.C. § 1400 - Congressional Findings and Purposes
- 20 U.S.C. § 1401 - Definitions
- 20 U.S.C. § 1402 - Office of Special Education Programs
- 20 U.S.C. § 1403 - Abrogation of State Sovereign Immunity
- 20 U.S.C. § 1404 - Acquisition of Equipment; Construction or Alteration of Facilities
- 20 U.S.C. § 1405 - Employment of Individuals with Disabilities
- 20 U.S.C. § 1406 - Requirements for Prescribing Regulations
- 20 U.S.C. § 1407 - State Administration
- 20 U.S.C. § 1408 - Paperwork Reduction
- 20 U.S.C. § 1409 - Freely Associated States

The most important statute in IDEA is Section 1400(d) which describes the purposes of the law. Section 1401 includes the legal definitions in alphabetical order. Section 1403 advises that states are not immune from suit if they violate IDEA. Section 1406 describes the requirements and timelines for the federal special education regulations. Section 1408 is a new section about paperwork reduction.

### 20 U.S.C. § 1400. Short Title; Table of Contents; Findings; Purposes.

➔ **OVERVIEW:** Section 1400 is Findings and Purposes. Section 1400(c) describes the history and findings that led Congress to pass the Education for All Handicapped Children Act of 1975 (Public Law 94-142) which is now the Individuals with Disabilities Education Improvement Act of 2004. The most important statute is Purposes in Section 1400(d): “to 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 **further education, employment and independent living**” and “to ensure that the rights of children with disabilities and parents of such children are protected . . .”

When you have questions about a confusing term or section in the law, re-read Section 1400, especially Purposes in Section 1400(d). This will help you understand how the confusing portion fits into the overall purpose of the law.

**(a) Short Title.** This title may be cited as the ‘**Individuals with Disabilities Education Act**’.

**(b) Table of Contents.**<sup>8 9</sup>

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<sup>8</sup> **The footnotes in this book are comments by the authors and are not a part of the statute.**

<sup>9</sup> Section 1400(b) lists the sections and subsections of Parts A, B, C, D, and E of the Individuals with Disabilities Education Act in a table of contents format. This Table of Contents is in Chapter 4.

## APPENDIX A

# SECTION 504 v. IDEA

You have learned that the “Purpose” is the most important section of any law because it describes the overall purpose of the law. If you have questions about a law, read the “Purpose” for answers to your questions.

Section 504 is a civil rights law that protects individuals from discrimination. The purpose of Section 504 of the Rehabilitation Act is “to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society..” (29 U.S.C. Chapter 16 Section 701(b)(1))

The Individuals with Disabilities Education Act provides educational rights and benefits for children with disabilities while also protecting these children from discrimination. The IDEA child has more rights and benefits, including the right to free appropriate public education, an IEP that is designed to meet the child’s unique needs, and procedural safeguards that are not available to the Section 504 child.

### *Free Appropriate Public Education*

The IDEA child has a right to a free appropriate public education (FAPE). Under IDEA, the child is entitled to an Individualized Educational Program (IEP) designed to meet the child’s unique needs and from which the child receives educational benefit (Section 1414(d)).

The 504 child is not entitled to an individualized educational program (IEP) designed to meet the child’s unique needs and from which the child receives educational benefit. The 504 child is entitled to a free appropriate public education that is defined as “the provision of regular or special education and related aids and services that . . . are designed to meet individual educational needs of persons with disabilities **as adequately as the needs of persons without disabilities are met...**” (34 C.F.R. § 104.33(b)(1))

The child may have a 504 Plan that describes accommodations and/or modifications that the school may provide. The law does not require the school to develop a written plan. The parent should request a written 504 Plan, not a verbal agreement to help the child.

### *Eligibility and Protections*

If the child has a disability but the disability does not adversely affect educational performance, the child will not be eligible for special education and related services under the IDEA but may be eligible for protections under Section 504 of the Rehabilitation Act.

To be eligible for protections under Section 504, the child must have a physical or mental impairment that substantially limits at least one major life activity. Major life activities include walking, seeing, hearing, speaking, breathing, learning, reading, writing, performing math calculations, working, caring for oneself, and performing manual tasks. The key is whether the child has an “impairment” that “substantially limits . . . one or more . . . major life activities.”

## APPENDIX C

# DISCREPANCY, RESPONSE TO INTERVENTION & LEARNING DISABILITIES

### IDENTIFYING CHILDREN WITH SPECIFIC LEARNING DISABILITIES

Learning disabilities now account for more than half of all children enrolled in special education programs. The number of children identified with learning disabilities continues to grow at a fast pace. This has led experts in the field to question the current models for identifying children with learning disabilities.

Many experts in the field of learning disabilities believe that a majority of children identified with specific learning disabilities are “victims of poor teaching. The statement that many children identified as LD are actually “teaching disabled” is often accurate. Almost all children can learn to read if taught appropriately, but many do not get the help they need because teachers are not adequately prepared.<sup>199</sup>

The law about how to identify children with specific learning disabilities changed. IDEA 2004 says schools “shall **not** be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.” (Section 1414(b))

#### *Abandon Discrepancy Models*

In the *Commentary and Explanation* on the proposed special education regulations, the Department of Education describes reasons why discrepancy models should be abandoned.<sup>200</sup>

The IQ-discrepancy criterion is potentially harmful to students as it results in delaying intervention until the student’s achievement is sufficiently low that the discrepancy is achieved. For most students, identification as having an SLE occurs at an age when the academic problems are difficult to remediate with the most intense remediation efforts (Torgesen, et. al., 2001)... the “wait to fail” model does not lead to “closing the achievement gap for most students placed in special education. Many students placed in special education as SLD show minimal gains in achievement and few actually leave special education (Donovon & Cross, 2002).

#### *Adopt Response to Intervention Models*

IDEA 2004 states, “In determining whether a child has a specific learning disability, a local educational agency may use a process that determines if the child responds to scientific, research-based intervention...” (Section 1414(b)(6)(B).

The Department of Education “strongly recommends” that schools use a response to intervention model that “use a process based on systematic assessment of the student’s response to high quality, research-based general education instruction... that incorporate response to a research-based intervention... Identification models that

<sup>199</sup> Lyon, G. Reid and Jack M. Fletcher. Early Warning System. [www.educationnext.org/20012/22.html](http://www.educationnext.org/20012/22.html) (last visited on June 23, 2005)

<sup>200</sup> “Commentary and Explanation about the Proposed Regulations for IDEA 2004” published by the Department of Education is available at [www.wrightslaw.com/idea/law.htm](http://www.wrightslaw.com/idea/law.htm)

## APPENDIX D

# ROADMAP TO THE IEP

A roadmap to the IEP statute will come in handy if you need to find information quickly. IDEA 2004 changed the content of IEPs, transition, how IEPs may be amended without IEP meetings, how IEP team members may be excused.

### *Present Levels of Performance*

The child's IEP must include "a statement of the child's present levels of academic achievement and functional performance . . ." For children who take alternate assessments, the IEP must include "a description of benchmarks or short-term objectives"

### *Annual Goals*

Previously, IEPs were required to include a "statement of measurable annual goals, including benchmarks or short-term objectives." IDEA 2004 eliminated the requirements for "benchmarks and short-term objectives" and added language about "academic and functional goals." Now, the child's IEP must include "a statement of measurable annual goals, including academic and functional goals . . ."

### *Educational Progress*

Previously, IEPs were required to include a statement about how the child's progress toward the annual goals would be measured and how the child's parents would "be regularly informed about their child's progress toward the annual goals." Now, the IEP must include "a description of how the child's progress toward meeting the annual goals . . . will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided."

### *Special Education and Related Services*

Congress added new language about research based instruction to IDEA 2004. The child's IEP must now include "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child . . . and a statement of the program modifications or supports for school personnel that will be provided . . ."

### *Accommodations on High Stakes Tests*

IDEA 2004 requires that "**All** children with disabilities are included in **all** general State and districtwide assessment programs . . . with appropriate accommodations . . ." States and school districts must develop guidelines for appropriate accommodations on state and district tests.

The child's IEP must include: "a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments . . ."

## APPENDIX E

# DUE PROCESS PROCEDURES AND TIMELINES

Many of the pre-trial procedures and timelines for due process hearings are new in IDEA 2004.

### *Due Process Complaint Notice*

The party who requests a due process hearing must provide a detailed notice to the other party that includes identifying information about the child, the nature of the problem, facts, and proposed resolution. The party that requests the due process hearing may not have the hearing until they provide this notice.

The Due Process Complaint Notice must describe the nature of the problem, the facts, and the proposed resolution. (Section 1415(b)(7)(A)) A hearing is not permitted until after this Notice has been filed.

A Due Process Complaint Notice can be a letter to request a special education due process hearing that includes the required components. (Read Chapter 24, “Letter to the Stranger,” in *Wrightslaw: From Emotions to Advocacy* to learn how to write persuasive letters that make readers want to help.)

### *Timelines*

The requirements and timelines for the Due Process Complaint Notice and the Amended Complaint Notice are in Section 1415(c)(2).

If the school did not provide Prior Written Notice (PWN) to the parent previously, the school must send the notice within **10 days**.

After receiving the Due Process Complaint Notice, the other party must prepare and file a “response that specifically addresses the issues raised in the complaint” within **10 days**. (Section 1415(c)(2)(B)(ii))

If the notice is insufficient, the receiving party must complain to the Hearing Officer within **15 days**. (Section 1415(c)(2)(C))

The Hearing Officer must determine if the complaint is sufficient within **5 days**. (Section 1415(c)(2)(D)) If the hearing officer determines that the notice is not sufficient, the hearing officer may permit an amended complaint to be filed (Section 1415(c)(2)(E)(i)(2)) or may refuse to permit the Hearing to proceed. (Section 1415(b)(7)(B)) A party may amend the Due Process Complaint Notice only if the other party consents and is given the opportunity to resolve the dispute pursuant to a Resolution Session as described in Section 1415(f)(1)(B).

This requirement is similar to the “12(b)(6)” Motion to Dismiss proceeding in the Federal Rules of Civil Procedure (FRCP). When an amended notice is filed, the “time clock” resets.

### *Resolution Session*

After the school district receives the parent’s Due Process Complaint Notice, the district must convene a Resolution Session within **15 days**. (Section 1415(f)(1)(B))

The Resolution Session provides the parties with an opportunity to resolve their complaint before the due process hearing. The school district must send “the relevant member or members of the IEP team” who have knowledge

## APPENDIX F

# RESEARCH BASED INSTRUCTION AND READING

Most children with disabilities have severely deficient reading skills. Research has found a high relationship between poor reading skills, learning disabilities, and juvenile delinquency.

Sadly, schools often use reading programs that are not effective in teaching children with disabilities, English language learners, migratory children, Native American children, neglected children, delinquent children, and homeless children to read.

A primary focus of this law is the requirement that school districts and individual schools use effective, research-based reading remediation programs so all children are reading at grade level by the end of third grade.

No Child Left Behind authorizes funds:

To provide assistance to State educational agencies and local educational agencies in establishing reading programs for students in kindergarten through grade 3 that are based on scientifically based reading research, to ensure that **every student can read at grade level or above not later than the end of grade 3.** (emphasis added) (20 U. S. C. § 6361)

The No Child Left Behind Act includes legal definitions of reading, reading instruction, and reading research.

### *Reading*

**Reading** is defined as:

“a complex system of deriving meaning from print that requires all of the following:

- skills and knowledge to understand how phonemes or speech sounds are connected to print,
- the ability to decode unfamiliar words,
- the ability to read fluently,
- sufficient background information and vocabulary to foster reading comprehension,
- the development of appropriate active strategies to construct meaning from print, and
- the development and maintenance of a motivation to read. (20 U. S. C. § 6368(5))

### *Essential Components of Reading Instruction*

The NCLB statute defines the **essential components of reading instruction** as:

explicit and systematic instruction in

- (A) phonemic awareness;
- (B) phonics;

# GLOSSARY OF ACRONYMS, ABBREVIATIONS AND TERMS

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The Individuals with Disabilities Education Act of 2004 incorporated definitions and terms from the No Child Left Behind statute and regulations so the authors decided to include the definitions from No Child Left Behind. If you need to use a definition, be sure get the full definition from the No Child Left Behind Act.

Depending on where a term is located in the No Child Left Behind statute, a word may have more than one definition.

## ACRONYMS AND ABBREVIATIONS

ADA	Americans with Disabilities Act
AYP	Adequate Yearly Progress
CSR	Class-size Reduction
EDGAR	Education Department General Administrative Regulations
ESEA	Elementary and Secondary Education Act of 1965
ESL	English as a Second Language
FY	Fiscal Year
HEA	Higher Education Act
IDEA	Individuals with Disabilities Education Act
IHE	Institution of Higher Education
LEA	Local Educational Agency (school district)
NCLB	No Child Left Behind, the Act that amended ESEA
OMB	Office of Management and Budget
RFP	Request for Proposal
SAHE	State Agency for Higher Education
SEA	State educational agency
Secretary Department	Secretary of Education, U.S. Department of Education The U.S. Department of Education