

Tri-State Regional Special Education Law Conference

What's Changed: What You Need to Know About IDEA and Other New Laws and Regulations

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I. **Final IDEA Regulations (effective December 31,2008) (Federal Register, Volume 73, No.231, December 1, 2008).**

A. Revocation of Consent for Continued Special Education Services

1. Right to Revoke Consent

The IDEA has required the Local Education Agency (LEA) to obtain the written consent of the parents of a student with a disability for the initial provision of special education and related services.

The final regulations now permit the parents of a student with a disability to withdraw their consent for continued IEP services for their child at any time subsequent to their initial provision. (34 CFR 300.9 (c)(3) and 300(b)(4)).

Note: If under State law IDEA rights accorded to parents transfers to the student when he/she reaches the age of majority, the right to revoke consent for special education services is also transferred to the adult student. Schools must still provide the parents with any notices required by the IDEA.

In the case of parents who have equal legal authority to make educational decisions and one parent provides consent for IEP services and the other parent submits a written revocation, the LEA must provide written notice to both parents that IEP services will be terminated.

The IDEA further provides that either parent, after services are ceased due to the revocation of consent, has the right to request an initial evaluation to determine if the child is IEP eligible. Letter to Cox (United States Department of Education, Office of Special Education Programs (August 2009)).

This regulation reverses the United States Department of Education's Office of Special Education Programs (OSEP) longstanding interpretation on the issue. OSEP previously issued a policy interpretation which stated, "if a public agency believes that a child continues to be eligible for special education, it cannot simply defer to the parents' request and remove the student from special education services." Letter to Williams 18 IDELR 534 (United States Department of Education, Office of Special Education Programs (1991)).

The Comments to the Regulations highlight the reasons for the Department's change of policy. The Comments state:

Allowing parents to revoke consent for the continued provision of special education and related services at any time is consistent with the IDEA's emphasis of the role of parents in protecting their child's rights and the Department's goal of enhancing parent involvement and choice in their child's education. (Federal Register, Volume 73, No. 231, Page 73009).

The Comments to the Regulations also clarify that the parents have the right to revoke special education services in their entirety. The IDEA does not give the parents a right to revoke consent just for a particular service. The parents could use the due process hearing procedures to ask a hearing officer to find that a particular service is not appropriate for their child.

Further, the Department opines that if the parent disagrees with a particular service and the parents and public agency agree that the child would be provided a FAPE without that service, "the public agency should remove the service from the child's IEP..." (Federal Register, Volume 73, No. 231, Page 73011).

2. Revocation not subject to due process hearings

The parents' right to terminate their child's IEP services is not subject to challenge in a due process hearing or mediation. (34 CFR 300.300(b)(4)(ii)).

The Comments to the Regulations allow States to establish additional procedures such as requiring schools to offer to meet with the parents to discuss their concerns. Any additional procedures that a State may establish must be voluntary and must not delay or deny the discontinuation of special education services. (Federal Register, Volume 73, No. 231, Page 73008)

3. Written Revocation

The parent must provide the school with a written revocation discontinuing special education services for their child. (34 CFR 300.300(b)(4))

The Comments to the Regulations clarify that although a public agency may inquire why a parent is revoking consent for special education services, the parent is not required to provide an explanation. (Federal Register, Volume 73, No. 231, Page 73008)

4. Prior Written Notice

The school must respond to the parents' revocation with a prior written notice (meeting the requirements of 34 CFR 300.503) to the parent before ceasing the provision of special education and related services. (34 CFR 300.300(b)(4)(i)).

Note: Even if the right to revoke consent for services is transferred to the adult student, as provided under State law, the written notice must be sent to both the adult student and parents.

The Comments to the Regulations state that the prior written notice must inform the parent, in language understandable to the general public, regarding the change in educational placement and services that will result from the parents' revocation of consent. Although there is no specific timeline from revocation of consent to the discontinuation of services, it is expected that discontinuation occurs in a timely manner. In addition, the notice must include information on sources for parents in understanding the requirements of Part B of IDEA. (Federal Register, Volume 73, No. 231, Page 73008).

Best Practice Recommendation:

The prior written notice should also address the impact of the parents' revocation of consent for services on the child's rights under the disciplinary provisions of the IDEA discussed later in this outline.

5. No FAPE violation

If a parent revokes consent for special education services, the public agency will not be considered to be in violation of the requirement to make a FAPE available to the child because of the failure to provide the child with further special education and related services. (34 CFR 300.300(b)(4)(iii)).

The Comments to the Regulations indicate that the revocation of parental consent for services releases the public agency from liability for providing FAPE from the time the parent revokes consent for services until the time, if any, that the child is evaluated and deemed eligible, once again, for special education services. (Federal Register, Volume 73, No. 231, Page 73010)

6. Right to request new evaluation

The Comments to the Regulations note that if a parent revokes consent for special education services, the parent may request at any time that the student be re-enrolled in special education. In such case, the request shall be treated as a request for an initial evaluation. The Comments highlight that the parent may want to consider making an evaluation request when their child has a discipline issue or in meeting graduation requirements. There is no limitation on the number of times a parent may revoke consent for special education and then subsequently request reinstatement in special education. (Federal Register, Volume 73, No. 231, Page 73014)

If a parent makes a request for a special education evaluation, the student should be treated as any other student in the child find process. Depending on the data available the new evaluation may consist of a review of existing evaluation data. Based on a review of existing data that includes information provided by the parents, current classroom, local and/or State assessments and observations

by teachers and related service providers, the IEP Team and other qualified professionals will determine what, if any, evaluation data are needed to determine whether the student qualifies for special education and, if so, the educational needs of the student. (Federal Register, Volume 73, No. 231, Page 73015)

7. IDEA Disciplinary Protections

The Comments to the Regulations provide that if the parent revokes consent for special education, the student is treated as a non-disabled student for disciplinary purposes under the IDEA. The parent is deemed to have refused services if they revoke consent for special education and therefore the public agency is not deemed to have knowledge that the student is a student with a disability. The student may be disciplined as a general education student. (Federal Register, Volume 73, No. 231, Page 73012)

Best Practice Recommendation:

As previously stated in this outline, it is recommended that the prior written notice required to be sent to the parents include the impact of the revocation of consent on IDEA disciplinary protections.

Unresolved Issue:

It should be noted that the regulations themselves do not address the application of the IDEA's disciplinary protections to students whose parents have revoked consent for special education services. The Comments to the Regulations do not have the same legal weight as the statute or regulations themselves.

Previous to these regulations, at least one Court issued a preliminary injunction barring a school board from suspending a student whose special education services were terminated in response to the parents' request to do so. Jeffrey S. v. School Board of Riverdale School District 21 IDELR 1164, 885 F.Supp. 1192 (United States District Court, Western District, Wisconsin (1995))

In addition, the Comments to the Regulations specifically state that the final regulations implement provisions of the IDEA only. They do not attempt to address any overlap between the legal protections of the IDEA and Section 504/ADA. (Federal Register, Volume 73, No. 231, Page 73013) Therefore, there is a compelling argument that Section 504 disciplinary protections apply to students whose parents have revoked consent for IDEA services.

8. Education Records

If a parent revokes consent for special education services, the public agency is not required to amend the student's educational records to remove any references to the student's receipt of special education and related services because of the revocation of consent. (34 CFR 300.9 (c))

The Comments to the Regulations explain that the parents' revocation of consent is not retroactive. Consequently, the public agency is not required to amend the student's educational records removing references that the student had been in special education. (Federal Register, Volume 73, No. 231, Page 73007)

9. Procedural Safeguards Statement

Schools are required to provide parents, at least annually, a statement of procedural safeguards fully explaining the procedural rights that the IDEA provides to parents of students with disabilities.

The statement should include the parental right to revoke consent for services and the right to subsequently request an evaluation for future services.

10. Section 504

The Comments to the IDEA Regulations clarify that these are IDEA regulations and do not address the protections and requirements under Section 504 and the Americans With Disabilities Act. (Federal Register, Volume 73, No. 231, Page 73013)

Unresolved Issue:

If a parent revokes consent for IDEA services, is the student still considered a student with a disability under Section 504 requiring the school to provide services/accommodations under a Section 504 plan?

In 1996, the Office for Civil Rights (OCR) issued a letter which stated that if a parent rejects IDEA services, the parent would essentially be rejecting what would be offered under Section 504. See Letter to McKethan 25 IDELR 295 (OCR 1996).

However, since the IDEA regulations regarding revocation of consent do not impact Section 504 protections, there is a strong argument that the parent may still request Section 504 services. Section 504 also has a child find requirement similar to the IDEA which puts the affirmative responsibility on the school to identify the student under Section 504 if there is a reason to believe the student may qualify as an individual with a disability. (34 CFR 104.32)

In addition, The Office for Civil Rights issued a guidance document in March of 2009, Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children With Disabilities (Office for Civil Rights (2009) which allows, unlike the IDEA, a school to challenge a parent's decision to terminate Section 504 services. The relevant question and response is :

Question: A student is receiving services that the school district maintains are necessary under Section 504 in order to provide the student with an appropriate education. The student's parent no longer wants the student to receive those services. If the parent wishes to withdraw the student from a Section 504 plan, what can the school district do to ensure continuation of services?

OCR's Response: The school district may initiate a Section 504 due process hearing to resolve the dispute if the district believes the student needs the services in order to receive an appropriate education. (See Question 32 in the guidance document.)

Best Practice Recommendation: It is recommended that the prior written notice required to be sent to the parent after the parent revokes consent for IDEA services addresses the application of Section 504 protections. The school should consider offering to develop a Section 504 plan for the student should the parent desire.

11. No Child Left Behind---Assessment Accommodations

Once a parent has revoked consent for special education services, the student is deemed a general education student under the No Child Left Behind Act. Therefore, if consent is revoked before the administration of the State's assessment, there is no longer a requirement to provide the assessment accommodations that were

previously included in the student's IEP. (Federal Register, Volume 73, No. 231, Page 73011)

Unresolved Issue:

Since Section 504 protections are not impacted by revocation of consent for IDEA services, would the school still be required to offer the assessment accommodations under Section 504?

12. No Child Left Behind—Adequate Yearly Performance

If a parent revokes consent for IDEA services, the student is no longer a member of the subgroup of students with disabilities for NCLB purposes. However, NCLB allows States to include for a period of up to two AYP determination cycles, the scores of students who were previously identified with a disability under the IDEA. (see NCLB Regulation 34 CFR 200.20(f)) Therefore, States may allow scores of students exited from special education due to parents' revocation of consent to be included in the students with disabilities subgroup for calculating AYP for up to two years. The students will not be counted for reporting purposes. (Federal Register, Volume 73, No. 231, Page 73011)

13. State Performance Plans(APP)/Annual Performance Reports (APR)

If a student is removed from special education as a result of the parents' revocation of consent for services, the student is no longer required to be included in calculations under SPP indicators. States may choose to treat such students in graduation rate calculations for SPP/APR purposes in the same manner they treat other students who exit special education prior to graduation. (Federal Register, Volume 73, No. 231, Page 73016)

14. Supplemental Security Income (SSI)

If a parent revoked consent for the provision of special education and related services, the student's eligibility for other programs such as supplemental security income may be affected. (Federal Register, Volume 73, No. 231, Page 73013)

Best Practice Recommendation:

The school may want to include in its prior written notice sent to the parent that the revocation of consent may impact their eligibility in other programs. The parent should be encouraged to seek additional

information concerning eligibility requirements from the agency responsible for implementing the program.

15. Abuse and Neglect Reporting

Nothing in these regulations alter responsibilities under State law for mandatory reporting for suspected abuse or neglect. (Federal Register, Volume 73, No. 231, Page 73016)

- B. Representation at Due Process Hearings by Non-Attorneys
The United States Department of Education final regulation gives the parties the right to be represented by a non-attorney in a due process hearing as determined under State law. (34 CFR 300.512(a)(1)).

The IDEA statute and regulation provide that either party at a due process hearing may be “accompanied and advised” by a non-attorney at the hearing. The IDEA did not address the issue of representation. Therefore, the IDEA regulation regarding representation leaves the matter to each State to decide.

The Comments to the Regulations indicate that if State law is silent on the question of whether a non-attorney advocate can represent parties in a due process hearing, there is no prohibition under the IDEA. (Federal Register, Volume 73, No. 231, Page 73018)

The Comments to the Regulations also clarify that whether a State Educational Agency (SEA) may have a regulation or procedural rule addressing the representation issue or whether the State attorney practice Statute provision is required is a matter determined by State law. (Federal Register, Volume 73, No. 231, Page 73018)

The Comments to the Regulations further provide that the issue of non-attorney representation in other stages of the special education process (such as mediation, etc.) is also a matter of state law. However, parents have the right to invite other individuals who have knowledge or special expertise regarding the student to the IEP Team meeting. In such case, their role is not to “represent” or speak for the parent. (Federal Register, Volume 73, No. 231, Page 73018)

- C. State Monitoring and Enforcement

The final regulations provide that the State must ensure that when it identifies noncompliance with the requirements of the IDEA by its LEAs, the noncompliance must be corrected as soon as possible, and in no case, later than one year after the State's identification. Correction of noncompliance means that a State requires a public agency to revise any noncompliant policies, procedures and practices, and verifies through a follow up review of documentation or interviews, or both, that the noncompliance issues are corrected. If necessary, the State must use appropriate enforcement mechanisms which include the provision of technical assistance, conditions on funding the LEA, a corrective action or improvement plan, and withholding funds, in whole or in part. (34 CFR 300.600 (a) and (e))

D. Annual Performance Reports for each Local Education Agency

If necessary, the State must use appropriate enforcement mechanisms. The State must annually make a determination about the performance of each LEA under the targets in the State's Performance Plan. The annual report to the public shall be made no later than 120 days after the State's submission of its Annual Performance Report. The State Performance Plan, the Annual Performance Report and the annual LEP Performance Reports shall be made public by, at a minimum, posting the reports on the SEA's website and distribution of the plan and reports to the media and through public agencies. (34 CFR 300.602(b)(1)(i))

E. Employment and Advancement of Individuals With Disabilities

Each recipient of assistance under Part B of the IDEA must make positive efforts to employ, and advance in employment, qualified individuals with disabilities in programs assisted under Part B. (34 CFR 300.177 (b)).

The Comments to the Regulations indicate that the United States Department of Education will decline to define the term "positive efforts" since such efforts will vary based on the unique and individual needs of a State and those needs may change over time. (Federal Register, Volume 73, No. 231, Page 73016)

F. Subgrants to Local Education Agencies

Each State must distribute both Section 611 funds (Part B grants for students 3-21) and Section 619 funds (Part B grants for students 3-5) to eligible LEAs, including charter schools that operate as an LEA, even if the LEA is not serving any students with disabilities. This requirement starts with Part B funds that become available on July 1, 2009. (34 CFR 300.705(a) and 815)

The Comments to the Regulations clarify that the purpose of this requirement is to ensure that LEAs have Part B funds available if they are needed to conduct child find activities or to serve students with disabilities who enroll or are identified during the year. In addition, Part B funds may be used for any permissible activity such as child find, professional development and for coordinated early intervening services. (Federal Register, Volume 73, No. 231, Page 73024)

G. Reallocation of LEA funds

If the State determines that an LEA is adequately providing FAPE to all children with disabilities residing in the LEA with State and local funds, the State may reallocate any portion of the funds not needed to other LEAs in the State. The State may also retain those funds at the State level to the extent that it has not reserved the maximum amount of funds permitted. (34 CFR 300.705(c)).

II. Americans With Disabilities Act Amendments Act of 2008 (effective January 1, 2009).

- A. The ADA Amendment Act of 2008 amends the definition of a person with a disability under the ADA and Section 504 of the Rehabilitation Act. The definition of a person with a disability means an individual: with a physical or mental impairment that substantially limits one or more major life activities; with a record of an impairment; or being regarded as having an impairment.

The Act states that the term “disability” shall be construed in favor of broad coverage of individuals to the maximum extent permitted by the Act.

Specifically, the Act:

1. Redefines major life activities to include, but not limited to caring for oneself, performing manual tasks, seeing,

hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.

2. Provides that an impairment that substantially limits one major life activity need not limit other major life activities in order to be a disability.
 3. Provides that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
 4. Clarifies that the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of specified mitigating measures such as: medication, equipment, low vision devices (which do not include ordinary eyeglasses or contact lenses) prosthetics, hearing aids and cochlear implants, mobility devices, oxygen therapy equipment and supplies, assistive technology, reasonable accommodations or auxiliary aids or services (including qualified interpreters, qualified readers, taped texts, and the acquisition/modification of equipment or devices) or learned behavioral or adaptive neurological modification.
 5. Defines the term “auxiliary aids and services” to include: qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments; qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments; acquisition or modification of equipment or devices and other similar services and actions.
- B. The Office for Civil Rights (OCR) is evaluating the impact of the ADA Amendments on OCR’s enforcement responsibilities under Section 504 and Title II of ADA Amendments, including whether any changes in regulations, guidance or other publications are appropriate. In Re: Americans With Disabilities Act Amendments of 2008 51 IDELR 80 (Office for Civil Rights (October 2008))
- C. The OCR has issued a revised guidance document Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children With Disabilities (Office for Civil Rights (March 2009)).
The document may be downloaded at:

The guidance relevant to the impact of the ADA Amendments Act of 2008 includes:

1. What is a physical or mental impairment that substantially limits a major life activity?

The determination of whether a student has a physical or mental impairment that substantially limits a major life activity must be made on the basis of an individual inquiry. The Section 504 regulatory provision at 34 C.F.R. 104.3(j)(2)(i) defines a physical or mental impairment as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The regulatory provision does not set forth an exhaustive list of specific diseases and conditions that may constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list.

Major life activities, as defined in the Section 504 regulations at 34 C.F.R. 104.3(j)(2)(ii), include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. Other functions can be major life activities for purposes of Section 504. In the ADA Amendments Act of 2008, Congress provided additional examples of general activities that are major life activities, including eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating. Congress also provided a non-exhaustive list of examples of “major bodily functions” that are major life activities, such as the functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. The Section 504 regulatory provision, though not as comprehensive as the Amendments Act, is still valid – the Section 504 regulatory provision’s list of examples of major life activities is not exclusive, and an activity or function not specifically listed in the Section 504

regulatory provision can nonetheless be a major life activity.
Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities, Question 12, (Office of Civil Rights Guidance (2009)).

2. **May school districts consider "mitigating measures" used by a student in determining whether the student has a disability under Section 504?**

No. As of January 1, 2009, school districts, in determining whether a student has a physical or mental impairment that substantially limits that student in a major life activity, must *not* consider the ameliorating effects of any mitigating measures that student is using. This is a change from prior law. Before January 1, 2009, school districts had to consider a student's use of mitigating measures in determining whether that student had a physical or mental impairment that substantially limited that student in a major life activity. In the ADA Amendments Act of 2008, however, Congress specified that the ameliorative effects of mitigating measures must not be considered in determining if a person is an individual with a disability.

Congress did not define the term "mitigating measures" but rather provided a non-exhaustive list of "mitigating measures." The mitigating measures are as follows: medication; medical supplies, equipment or appliances; low-vision devices (which do not include ordinary eyeglasses or contact lenses); prosthetics (including limbs and devices); hearing aids and cochlear implants or other implantable hearing devices; mobility devices; oxygen therapy equipment and supplies; use of assistive technology; reasonable accommodations or auxiliary aids or services; and learned behavioral or adaptive neurological modifications.

Congress created one exception to the mitigating measures analysis. The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining if an impairment substantially limits a major life activity. "Ordinary eyeglasses or contact lenses" are lenses that are intended to fully correct visual acuity or eliminate refractive error, whereas "low-vision devices" (listed above) are devices that magnify, enhance, or otherwise augment a

visual image. Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities, Question 21, (Office of Civil Rights Guidance (2009)).

3. How should a recipient school district view a temporary impairment?

A temporary impairment does not constitute a disability for purposes of Section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities for an extended period of time. The issue of whether a temporary impairment is substantial enough to be a disability must be resolved on a case-by-case basis, taking into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual.

In the ADA Amendments Act of 2008, Congress clarified that an individual is not “regarded as” an individual with a disability if the impairment is transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less. Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities, Question 34, (Office of Civil Rights Guidance (2009)).

4. Is an impairment that is episodic or in remission a disability under Section 504?

Yes, under certain circumstances. In the ADA Amendments Act of 2008, Congress clarified that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. A student with such an impairment is entitled to a free appropriate public education under Section 504. Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities, Question 35, (Office of Civil Rights Guidance (2009)).

III. No Child Left Behind Act Final Regulations (effective November 28, 2008)

- A. The United States Department of Education issued final regulations on October 29, 2008. The final regulations are found in the Federal Register, Volume 73, No. 210 (October 29, 2008).
- B. **Assessment**
The final regulations allow “multiple up to date measures of student academic achievement” which may include single or multiple question formats (multiple choice, extended response, etc.) that range in difficulty within a single assessment as well as multiple assessments within a subject area (reading and writing assessments to measure reading/language arts). (34 CFR 200.2(b)(7)).
- C. **Subgroup size**
The final regulations require States to explain how the subgroup size (for subgroups including students with disabilities, students who are limited English proficient, students who are economically disadvantaged and students who are members of major racial and ethnic groups) or “n” provide statistically reliable information while ensuring the maximum inclusion of all students and subgroups in AYP determinations.
The “n” size must ensure inclusion of subgroups especially at school level for AYP determinations. States are required to collect and report data on the number and percentage of students and subgroups excluded from AYP school level determinations. (34 CFR 200.7)
- D. **Graduation Rates**
1. The final regulations require States use a uniform and accurate method for calculating graduation rates using the “four year adjusted cohort graduation rate”. This rate is based on the number of students who graduate in 4 years with a regular diploma divided by the number of students who form the adjustable cohort group. To remove a student from a cohort, a school or district must confirm in writing that the student has transferred out, emigrated to another country or is deceased. (34 CFR 200.19(b))
 2. To confirm that a student transferred out and is no longer a member of the cohort for graduation rate purposes, the school or LEA must have official written documentation that the student is enrolled in another school or in an educational program that culminates in the award of a regular high school diploma.

A student who is retained in a grade, enrolls in a GED program or leaves for any other reason may not be counted for the purpose of calculating graduation rates.(34 CFR 200.19(b)(1)(ii)(B)(1)).

In the Comments to the Regulations, the Department clarifies that official written documentation that a student has transferred out may include a request for records from the receiving high school, an approved application for home schooling or distance education, evidence that is recorded in a State's data system or a letter from an official in the receiving school.

In addition, the Comments highlight that there is no exception to the written documentation requirement for transferring students to be removed from the cohort even if the school has made multiple unsuccessful attempts in obtaining the documentation.(Federal Register, Volume 73, No. 210, Page 64452)

The United States Department of Education has issued a guidance document on the calculation of graduation rates under the NCLB. See NCLB High School Graduation Rate, Non-Regulatory Guidance (United States Department of Education (December 2008) (To read the high school graduation rate non-regulatory guidance, go to: www.ed.gov/policy/elsec/guid/hsgrguidance.pdf)

3. States will be allowed, with the approval of the U.S. Department of Education, to establish an extended year adjusted cohort graduation rate which must be reported separately. (34 CFR 200.19(b)(1)(v)).
4. Each State, district, and school must report graduation rates in the aggregate and by subgroups beginning with the results of the 2010-2011 assessments. For AYP determinations, these rates must be used at the school, district and state levels based on the 2011-2012 assessments. (34 CFR 200.19(b)(4))

E. Growth models

Nine states are currently piloting a growth model based on measures of individual student performance and growth for determining AYP. The final regulations establish criteria for allowing any State to seek

approval from the U.S. Department of Education to utilize a growth model. (34 CFR 200.20(h))

- F. **AYP Determinations**
The final regulations state that a district or school is in need of improvement if it does not meet annual measurable objectives in the same subject for two consecutive school years regardless of which subgroup did not meet the objective. Schools and districts cannot limit identification as being in need of improvement only if same subgroup did not meet annual objectives in same subject area. (34 CFR 200.32(a)).
- G. **Public School Choice**
Public school choice is available to parents of students in Title I schools in need of improvement. The final regulations require districts to provide parents with an explanation and details of available school choice options no later than 14 days before the beginning of the school year. (34 CFR 200.37(b)(4))
- H. **Supplemental Educational Services**
The final regulations require annual notice of the availability of SES to those eligible students attending Title I schools that are deemed in need of improvement for the second year. The district is also required to include on their web site a list of SES providers and the location where such services are provided.
States are required to develop, implement and publicly report the standards and techniques it uses to monitor how districts implement SES requirements. (34 CFR 200.37(b)(5) and 47)
- I. **Highly Qualified Special Education Teachers**
The final NCLB regulations cross references the highly qualified requirements for special education teachers currently in the IDEA. (34 CFR 200.56)

IV. Family Educational Rights and Privacy Act (FERPA) Final Regulations (effective January 8, 2009)

- A. The United States Department of Education issued final regulations on December 9, 2008 amending the previous FERPA regulations. The final regulations are found in the Federal Register, Volume 73, No. 237, December 9, 2008.

- B. Health and Safety Emergencies
The final regulations provide that an educational agency may disclose personally identifiable information from the student's educational records without the consent of the parent or adult student if it is determined that there is an "articulable and significant threat" to the health or safety of a student or others. The information may be disclosed to appropriate parties whose knowledge of the information is necessary. The educational agency must record the threat that formed the basis for the disclosure and the parties to whom the information was disclosed. (34 CFR 99.36)
- C. School Officials With Legitimate Educational Interests
The final regulations clarify that educational records may be disclosed without consent to school officials with legitimate educational interests including contractors, consultants and other parties to whom the school has outsourced school services or functions. The school remains responsible for outside service providers' adherence to the confidentiality requirements under FERPA. (34 CFR 99.31(a)(1))
- D. Peer Grading
The final regulations create a new exception to the definition of an educational record that excludes grades on peer graded papers before they are collected and recorded by a teacher. This change reflects the United States Supreme Court decision in Owasso Independent School District v. Falvo (2002). (34 CFR 99.3)
- E. Directory Information
Schools may designate certain information as directory information that can be disclosed with out consent provided the school has provided the parent with notice of the information and give them the opportunity to opt out of directory information disclosures. The final regulations specifically prohibit the disclosure of a student's social security number as directory information. (34 CFR 99.3)
- The Comments to the Regulations clarify that schools are not required to make student directories available to the general public just because it is shared within the school community. (Federal Register, Volume 73, No. 237, Page 74808).
- F. Adult Students
The final regulations clarify that disclosure of education records to a parent of a high school student who turns 18 or attends a

postsecondary institute does not require the written consent of the adult student. Such disclosure is permitted when the student is deemed a dependent for Federal income tax purposes or in connection with a health or safety emergency. (34 CFR 99.5(a)(2).

G. Settlement Agreements

The Comments to the Regulations address the issue of whether settlement agreements regarding former students may be disclosed without the consent of the parent/adult student. The Department opines that a settlement agreement may contain highly confidential information (such as special education diagnoses, educational supports, mental and physical health and treatment information) and therefore schools may not disclose this information to the media or other parties without consent simply because the student is no longer in attendance at the school. (Federal Register, Volume 73, No. 237, Page 74811)

Note: This outline is intended to provide workshop participants with a summary of selected Federal statutory/regulatory provisions and selected judicial interpretations of the law. The presenter is not, in using this outline, rendering legal advice to the participants. The services of a licensed attorney should be sought in responding to individual student situations.

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