

Inclusion: Answers to Frequently Asked Questions from the NEA

Note From Wrightslaw (<http://www.wrightslaw.com/info/lre.faqs.inclusion.htm>): This article is issued as a "guidance response" from the U. S. Department of Education Office of Special Education and Rehabilitation Services (OSERS) in 1994, in response to questions from the National Education Association (NEA).

Introduction

The Office of Special Education Programs (OSEP) and the Office of Special Education and Rehabilitative Services (OSERS) have been asked to provide guidance in a question and answer format on some frequently asked questions about the requirements of Federal law, particularly the Individuals with Disabilities Education Act (IDEA), that are relevant to educating students with disabilities. These questions were submitted by the National Education Association.

IDEA, formerly the Education of the Handicapped Act, includes Part B, the basic grants to States program. Originally enacted in 1975 as Public Law 94-142, Part B of IDEA provides Federal funds to assist States and school districts in making a free appropriate public education available to students with specified disabilities in mandated age ranges beginning at a student's third birthday and possibly lasting to a student's twenty-second birthday, depending on State law and practice. Students with specified physical, mental, emotional or sensory impairments who need special education and related services are eligible for services under Part B of IDEA. Part B of IDEA is administered by OSEP. Department regulations implementing Part B of IDEA are found at 34 CFR Part 300. Throughout this document, the acronym IDEA will be used to refer to the Part B program.

Two related Federal laws, which are enforced by the Department's Office for Civil Rights (OCR), also contain requirements relating to disabled students in public elementary or secondary education programs. Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibits discrimination on the basis of disability by recipients of Federal financial assistance, including IDEA funds. The Section 504 regulation at 34 CFR Part 104, 104.33-104.36, contains free appropriate public education requirements that are similar to the IDEA free appropriate public education requirements. The Americans with Disabilities Act of 1990 (ADA), Title II prohibits discrimination on the basis of disability by State and local governments, whether or not they receive Federal funds; OCR interprets the requirements of Title II of the ADA as consistent with those of Section 504. The similarities and differences in the requirements of the three laws are described in further detail in the response to question 13. Generally, the responses in this question and answer document reflect the requirements of IDEA, unless the question specifically calls for an interpretation of Section 504, Title II of the ADA, or another Federal law.

Additional information regarding this question and answer document can be obtained by calling either the OSERS contact person: Amy Bennett at (202) 205-8555 or the OSEP contact person: Rhonda Weiss at (202) 205-9053; or the OCR contact person: Karen Hakel at (202) 205-9036.

Questions & Answers

1 . A. What does the federal law require and not require with respect to inclusion?

IDEA does not use the term "inclusion." However, IDEA does require school districts to place students in the least restrictive environment (LRE). LRE means that, to the maximum extent appropriate, school districts must educate students with disabilities in the regular classroom with appropriate aids and supports, referred to as "supplementary aids and services," along with their nondisabled peers in the school they would attend if not disabled, unless a student's individualized education program (IEP) requires some other arrangement. This requires an individualized inquiry into the unique educational needs of each disabled student in determining the possible range of aids and supports that are needed. Some supplementary aids and services that educators have used successfully include modifications to the regular class curriculum, assistance of an itinerant teacher with special education training, special education training for the regular teacher, use of computer-assisted devices, provision of notetakers, and use of a resource room, to mention a few.

In implementing IDEA's LRE provisions, the regular classroom in the school the student would attend if not disabled is the first placement option considered for each disabled student before a more restrictive placement is considered. If a student with a disability can be educated satisfactorily with appropriate aids and supports in the regular classroom in the school the student would attend if not disabled, that placement is the LRE placement for that student. However, if the placement team determines that a student cannot be educated satisfactorily in that environment, even with the provision of appropriate aids and supports, the regular classroom in the school the student would attend if not disabled is not the LRE placement for that student. Any alternative placement selected for the student outside of the regular educational environment must maximize opportunities for the student to interact with nondisabled peers, to the extent appropriate to the needs of the student.

IDEA does not require that every student with a disability be placed in the regular classroom regardless of individual abilities and needs. This recognition that regular class placement may not be appropriate for every disabled student is reflected in the requirement that school districts make available a range of placement options, known as a continuum of alternative placements, to meet the unique educational needs of students with disabilities. This requirement for the continuum reinforces the importance of the individualized inquiry, not a "one size fits all" approach, in determining what placement is the LRE for each student with a disability. The options on this continuum must include the alternative placements listed in the definition of special education under 300.17 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions).

1. B. Is there a Federal definition of "inclusion?"

Because Federal statutes do not use the term "inclusion," the Department of Education has not defined that term.

2. A. Federal law requires the provision of necessary supports but when inadequate fiscal or personnel resources means that one or more necessary supports is not available, what does the Department recommend that educators and school districts do? What can be done to ensure that the needed supports are provided? Which agency has ultimate responsibility for providing required special education and related services and needed supports if the responsible school district cannot fund those services?

States receiving funds under IDEA must make a free appropriate public education available to eligible children with disabilities. The provision of a free appropriate public education requires that all special education and related services identified in a student's IEP must be provided at no cost to the parents. The term "special education" is defined at 34 CFR 300.17(a) as "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including --

(i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(ii) Instruction in physical education.

(2) The term includes speech pathology, or any other related service, if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, and is considered special education rather than a related service under State standards."

The term "related services" is defined at 34 CFR 300.16(a) as "transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training."

Under IDEA, school districts are responsible for developing and implementing an IEP for each of their children with disabilities. The State educational agency is responsible for ensuring that each school district develops and implements an IEP for each child with a disability and for otherwise ensuring that the requirements of IDEA are carried out. Ultimate responsibility for ensuring the provision of required special education and related services at no cost to parents is therefore with the State. IDEA does not specify particular sources of funding for required instruction and services. Each State may use whatever State, local, Federal, and private sources of support are available to provide special education and related services, consistent with State law, so long as the allocation, excess cost, and nonsupplanting requirements of IDEA are met.

Under IDEA, lack of adequate personnel or resources does not relieve school districts of their obligations to make a free appropriate public education available to students with disabilities in the least restrictive educational setting in which their IEPs can be implemented. The Department encourages States and school districts to develop innovative approaches to address issues surrounding resource availability. Factors that could be examined include cooperative learning, teaching styles, physical arrangements of the classroom, curriculum modifications, peer mediated supports, and equipment, to mention a few.

2. B. Which, if any of the following are permissible uses of IDEA funds: (a) professional development opportunities for educators (b) planning/release time for educators funding all or part of the salary of an additional classroom aide?

Determinations of whether the expenditures listed above would be permissible expenditures of IDEA funds must be made on a case-by-case basis. In general, the expenditures listed above could be permissible expenditures of IDEA funds if the school district responsible for the student's education determines that they would be necessary for students to receive a free appropriate public education, or, if all eligible children are receiving a free appropriate public education, to meet other requirements of IDEA. In all instances, the expenditures must be reasonable for the proper and efficient administration of IDEA, and must be expended with the cost principles applicable to the IDEA program. The expenditures must be included in the school district's application for IDEA funds submitted to and approved by the State educational agency.

3. Which factors legally must be considered in determining appropriate placement for a student with a disability? Which if any factors may not be considered?

The overriding rule in placement is that each student's placement must be individually- determined based on the individual student's abilities and needs, and it is the individualized program of instruction and related services reflected in each student's IEP that forms the basis for the placement decision. In determining if a placement is appropriate under IDEA, the following factors are relevant:

- . the educational benefit to the student from regular education in comparison to the benefits of special education;
- . the benefit to the disabled student from interacting with nondisabled students; and
- . the degree of disruption of the education of other students resulting in the inability to meet the unique needs of the student with a disability.

However, school districts may not make placements based on factors such as the following:

- . category of disability;
- . the configuration of the delivery system;
- . the availability of educational or related services;
- . availability of space; or
- . administrative convenience.

4. Does federal law permit consideration of the impact of a regular classroom placement on those students in the classroom who do not have a disability?

Yes. Department regulations provide that in selecting the LRE, consideration is given to any potential harmful effect on the student or on the quality of services that the student needs. If a student with a disability has behavioral problems that are so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the disabled student cannot be met in that environment. However, before making such a determination, school districts must ensure that consideration has been given to the full range of supplementary aids and services that could be provided to accommodate the unique needs of the disabled student. If the school district determines that even with the provision of supplementary aids and services, that student's IEP could not be implemented satisfactorily in the regular educational environment, that placement would not be the LRE placement for that student at that particular time, because her or his unique educational needs could not be met in that setting.

While Department regulations permit consideration of the effect of the placement of a disabled student in a regular

classroom on other students in that classroom, selected findings from Federally-funded research projects indicate that: (1) achievement test performance among students who were classmates of students with significant disabilities were equivalent or better than a comparison group (Salisbury, 1993); (2) students developed more positive attitudes towards peers with disabilities (CRI, 1992); and (3) self-concept, social skills, and problem solving skills improved for all students in inclusive settings (Peck, Donaldson, & Pezzoli, 1990, Salisbury & Palombaro, 1993).

5. Have federal legal provisions with respect to the Least Restrictive Environment (LRE) mandate in IDEA changed in recent years? Have they changed significantly in any other ways?

No changes have been made in the Federal LRE provisions since IDEA's LRE mandate was first made law in 1975.

6. Does federal law require that placement decisions be revisited? How often? How can a teacher/educator cause a child's placement decision to be reviewed in terms of its "appropriateness?"

Under IDEA, each student's placement, among other factors, must be determined at least annually and must be based on the student's IEP. Since each student's IEP must be based on the student's unique educational needs, it is the student's IEP that forms the basis for the placement decision. However, a student's IEP cannot be revised without holding another IEP meeting, which the school district is responsible for convening. If a teacher/educator wishes to initiate review of the student's IEP at a point during the school year that does not correspond with the annual IEP review, that individual can request the school district to hold another IEP meeting. Similarly, parents of a student with a disability have the right to request an IEP meeting at any time. At the meeting, if the student's IEP team determines that revisions in the IEP should be made, a proposal to change the student's placement may be necessary to reflect the revised IEP.

7. Under what circumstances if any would the placement of large numbers of students with disabilities in a regular classroom constitute a violation of federal law?

If students with disabilities are placed in the regular classroom, based on impermissible factors such as those mentioned in response to question 3 above, rather than on the basis of each student's abilities and needs as reflected in the student's IEP, such placements would violate Federal law. Similarly, placing disabled students in the regular classroom, without providing them with necessary aids and supports, as reflected in their IEPs, would violate Federal law. If a school district proposes to place a student in a regular classroom in the school the student would attend if not disabled, but the student's IEP could not be implemented, even with appropriate aids and supports, such a placement would violate Federal law.

8. A. Some educators have been told that federal law requires EITHER that necessary supports be provided for a child in a separate setting OR that the child be placed in a regular setting WITHOUT necessary support services. Is this interpretation of federal law correct? When a student switches from a special to a regular setting, does federal law require that necessary supports also be provided in the regular setting?

Federal law does not permit an either/or approach to placing a student with a disability in the LRE. If a school district determines that the IEP of a student who was placed in a separate facility could be implemented in the regular educational environment with appropriate aids and services, IDEA's LRE provisions require that those aids and services must be provided. The entitlement of each disabled student to a free appropriate public education requires a school district to provide the student with the instruction and services reflected in that student's IEP regardless of the setting in which that student is placed.

8. B. Under what if any circumstances may special education and related services be used to benefit non-special needs students as well as special needs students in a regular classroom?

IDEA funds may be expended only for the provision of special education and related services for students with disabilities who have been determined eligible for services under IDEA and for evaluative and diagnostic services for students who are eligible for, or suspected of being eligible for services under IDEA, but who have not yet been determined to have a disability. However, the Department has advised that special education personnel may provide services to students who have not been determined eligible, or are not suspected of being eligible, for services under IDEA if the benefit to the nondisabled students could be deemed "incidental." While determinations of what constitutes an "incidental" benefit must be made on a case-by-case basis, examples of situations where benefits conferred on

nondisabled students by special education personnel have been deemed "incidental" include situations such as those where nondisabled students share study sheets prepared by the special education teacher or have their questions answered by the special education teacher, or benefit from hearing the special education teacher's responses to questions asked by the disabled student. If special education personnel provide instructional services to children who are nondisabled, and who are not suspected of having disabilities or of being eligible for services under IDEA, and the benefits conferred are more than "incidental," the time spent providing those services may not be charged to IDEA funds, and appropriate time-and-effort allocation and record-keeping would be required.

9. A. What is an IEP meeting and what role does it play in decisions about the educational program for students with disabilities?

The IEP, the written document that contains the statement for a child with a disability of the program of specialized instruction and related services that must constitute the basis for the student's placement must be developed at an IEP meeting by a team or group of persons. The IEP must be in effect prior to the provision of special education or related services. The student's educational placement must be based on the IEP and therefore cannot be determined prior to completion of the IEP. IEP meetings provide an opportunity for parents, teachers and other knowledgeable individuals to discuss the student's special educational needs and make decisions about the program and services that the student will receive. For students receiving special education and related services for the first time, IDEA requires that the IEP meeting must be held within 30 calendar days of a determination that the student needs special education and related services. Each student's IEP must be implemented as soon as possible following the IEP meeting, that is, immediately following the meeting, except during the summer or a vacation period, or in circumstances that require a short delay, such as the need to work out transportation arrangements.

An IEP developed in accordance with IDEA's requirements is a required component of a free appropriate public education under IDEA, and each disabled student eligible to receive services under IDEA must receive special education and related services in conformity with an IEP. In particular, each student's IEP must contain, among other elements, a statement of goals and objectives, the specific special education and related services to be provided to the student and the extent that the student will be able to participate in regular educational programs, and a statement of needed transition services under certain circumstances. In addition, any necessary aids and supports, which could include modifications to the regular classroom or curriculum, to facilitate regular educational placement, must be included in the student's IEP, and must be provided to the student.

9. B. When must IEP meetings occur?

The school district is responsible for initiating and conducting meetings to develop or review each student's IEP periodically, and if appropriate, revise its provisions. A meeting must be held for this purpose at least once a year. While it is the responsibility of the school district to initiate and conduct IEP reviews, meetings must be scheduled at a time and place mutually agreed upon by the parents and school district to ensure that the parents have the opportunity to attend. The review requirement does not prescribe the precise time of year at which meetings must be held, and meetings may be held at any time during the school year, as long as the IEPs are in effect at the beginning of each school year. Depending on individual circumstances, meetings may be held at times such as the end of the school year, during the summer, or on the anniversary date of the last IEP meeting for the student. Regardless of the timing of the annual IEP review, an IEP meeting generally must take place before a proposal to change the student's placement can be implemented.

9. C. Who MUST legally be involved in an IEP meeting? (i.e., regular educators? if so, which ones? Special educators? Paraprofessionals?)?

Required participants at all IEP meetings include the child's teacher, an agency representative, who is qualified to provide or supervise the provision of special education, the parents, subject to certain limited exceptions, the child, if determined appropriate, and other individuals at the parent's or agency's discretion. For a student who is being considered for placement in special education for the first time, the teacher could be the student's regular teacher, or a teacher qualified to provide education in the type of program in which the child may be placed, or both. For a student who is receiving special education, the teacher could be the student's special education teacher. If the child is not in school or has more than one teacher, the agency may designate which teacher will participate in the meeting. Either the teacher or the agency representative should be qualified in the area of the student's suspected disability.

In determining who should be the "agency representative," the nature and extent of resources needed by the student could be relevant. Regardless of whether the individual selected is from the building or school district level, the agency representative must be "qualified" as described above, and should have the authority to commit agency resources to ensure that the student actually receives the program of instruction and services set out in her or his IEP.

If one of the purposes of the IEP meeting is discussion of a student's need for transition services, the student must be invited to participate. This would apply to students beginning at age sixteen, and to students beginning at age fourteen or younger, if determined appropriate by the school district. The Department believes that it is especially important for students to play an active role at IEP meetings in making decisions regarding their future. In addition, if an agency other than the school district is responsible for providing or paying for needed transition services, the school district also must invite a representative of that agency to attend.

If the IEP meeting occurs in connection with the child's initial placement in special education, the school district must ensure the participation of evaluation personnel, unless the child's teacher or public agency representative or some other person at the meeting is knowledgeable about the evaluation procedures used with the child and the results of those procedures. Generally, there is no requirement for related services personnel, paraprofessionals, or regular educators to attend IEP meetings, but such individuals may be invited to attend an IEP meeting at the discretion of the parents or agency.

Parent participation in the IEP process is extremely important. The school district is required to take steps to ensure that one or both parents are present at each meeting or are afforded the opportunity to participate. The parents must be notified of their child's IEP meeting early enough to ensure that they can attend, and the notice must inform them of the purpose, time and location of the meeting, and the other individuals who will be in attendance or who have been invited to attend. School districts are also required to take steps to ensure parent participation (such as through home visits or individual or conference telephone calls), if the school district is unable to convince the parents to attend. In this case, the school district must have a record of its attempts to arrange a mutually agreed upon time and place.

9. D. In the view of the Department of Education, who SHOULD be involved, as a matter of good practice? How can a child's teachers ensure that they are able to attend that child's IEP meeting?

As a matter of good practice, individuals who know the student best, such as those knowledgeable about the student's disability, and those knowledgeable about the educational options, should attend that student's IEP meeting. In some situations, the student's peers or other building personnel would be the persons most familiar with the student and her or his needs. Consistent with the importance of ensuring that persons who know a student best attend IEP meetings, several States have enacted legislation requiring the student's regular education teacher to attend the student's IEP meeting when the student's placement in the regular educational environment is being considered.

The IDEA requirement that a child's teacher attend that student's IEP meeting has been interpreted to require that only one teacher must be in attendance, even if the student has more than one teacher. However, if a disabled student is either placed, or being considered for placement in a regular classroom, the school district should exercise its option of inviting more than one teacher to attend the IEP meeting, and authorize the student's regular teacher, as well as the student's special education teacher, to attend the IEP meeting. It is appropriate for any teachers considered by the school district or parents to be beneficial to the student's success in school to attend the IEP meeting.

10. How does a teacher ensure that needed services are included in a student's IEP? What can a teacher do if she or he is told not to put into the IEP services which the teacher believes are necessary for the child?

IDEA contemplates that decisions made at IEP meetings are team decisions. Therefore, there is no one person on a student's IEP team who has the ultimate authority to dictate the services that an individual student receives. One reason for the participation of the agency representative, the individual with authority to commit agency resources, is to ensure that the agency will provide the services that the IEP team determines that the student needs. If a teacher who is a participant on the student's IEP team believes that particular services are appropriate for a student, the teacher should recommend those services during the IEP meeting, which includes the child's parents, for consideration. Once the IEP team makes a decision as to the instruction and services that a student needs, the school district responsible for

providing education to the student must implement the student's IEP developed at the IEP meeting. In the example provided in this question, if "an SEA or LEA [were] to direct teachers or other IEP team participants to not include in the IEP special education or related services which are needed by the child," the SEA or the LEA would be failing to comply with IDEA.

11. What rights does an educator have under the federal law to file a minority report or dissenting opinion with respect to an educational decision with which she or he disagrees?

There is no provision in Federal law for an educator to file a minority report or dissenting opinion in connection with an educational decision with which she or he disagrees. Any decision made at an IEP meeting should represent the decision of the IEP team, including the child's parents. Under IDEA, parents and public educational agencies have the right to initiate an impartial due process hearing on matters regarding the identification, evaluation, educational placement, or the provision of a free appropriate public education to a child, including educational decisions resulting from IEP meetings. Therefore, if the parents agree with the concerns expressed by the educator and disagree with their child's IEP, the parents may choose to initiate a due process hearing. Similarly, if the school district believes that the IEP team's decision did not properly reflect the needs of the student, the school district could also initiate such a hearing.

12. Some school districts are mandating that referrals for any classroom support or special need must first go to a "Prereferral Team" which can then delay the referral to special education for months. Is it a federal requirement that a "Prereferral Team" review special education referrals and, if not, how can educators ensure that students who are not yet identified receive a timely referral? What is considered "timely" under federal law?

IDEA requires States and school districts to have procedures for locating, identifying, and evaluating children suspected of having disabilities and needing special education and related services. This requirement, known as child find, is applicable to children from birth through twenty-one. There are no explicit timelines in Federal law for conducting special education evaluations once a referral is made, but a student suspected of having a disability must be evaluated without undue delay. Although IDEA does not set forth a specific standard for the timing of initial evaluations, each State must establish and implement standards to ensure that the right of each student with disabilities to receive a free appropriate public education is not denied or delayed because the responsible school district does not conduct an initial evaluation within a reasonable period of time. The determination of whether the State standard for conducting a timely evaluation following the student's referral for a special education evaluation has been violated must be made on a case-by-case basis.

Many States and school districts have initiated pre-referral systems prior to referral of students for formal special education evaluation, but there is no Federal requirement that they do so. If an educator has reason to believe that a student has a disability, the State or local requirement for review by the pre-referral team could result in an impermissible delay in the student's formal special education evaluation required by IDEA. Such a determination would have to be made on a case-by-case basis depending on the particular facts and circumstances.

In instances where States and school districts have implemented prereferral systems, parents should be informed that, even while attempts are being made by school district staff to alleviate an educational problem in the regular classroom, the parents have the right to ask a school district to evaluate their child if the parents suspect that their child has a disability under IDEA. A school district can advise the parents as to why it believes that it would be appropriate to have the student participate in an intervention program before a formal evaluation is conducted. However, if the school district suspects that the student has a disability, it cannot refuse to conduct the evaluation or delay the evaluation until the interventions have been tried. If the school district disagrees with the parents and does not suspect that the student has a disability, it may refuse to conduct an evaluation. In that instance, the parents may request a due process hearing on the matter of the school district's refusal to initiate an evaluation.

13. What are the requirements for students to be eligible for federal funds under the Individuals with Disabilities Education Act (IDEA)? Does the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973, or any other federal law qualify students with disabilities not covered under IDEA for special services of any kind? If so, is the method of determining which if any additional services

must be provided to students covered under other federal laws but not the IDEA different from the method used under the IDEA? Must the district fund necessary support services if the student is covered under Section 504 or the ADA but not the IDEA (and therefore is ineligible for federal funds under that law)?

States receiving IDEA funds must make a free appropriate public education (FAPE) available to all children with specified disabilities in mandated age ranges. There are thirteen recognized disability categories under IDEA, which refer to specified physical, mental, emotional, or sensory impairments and a child's need for special education and related services because of an impairment. Federal financial assistance to States under IDEA is generated based on an annual child count of children with disabilities receiving special education and related services. Regardless of the amount of a State's grant, each State receiving IDEA funds and its local school districts must make FAPE available to all resident children within the State within the State's mandatory FAPE age range. Under IDEA, FAPE means special education and related services provided in conformity with IEPs at no cost to parents. Currently, all States receiving IDEA funds make FAPE available to children with disabilities beginning at their third birthday, and at least through their eighteenth birthday. Whether FAPE will be provided to students over eighteen years of age depends on State law and practice. Section 504 and the ADA contain explicit provisions prohibiting discrimination on the basis of disability, but do not provide Federal financial assistance for educational programs. However, States and school districts must meet the requirements of these laws as a condition of receiving any Federal financial assistance, including IDEA funds. Title II of the ADA extends Section 504's prohibition against discrimination on the basis of disability to State and local governmental entities. This includes public school districts receiving Federal financial assistance as well as entities such as public libraries, whether or not they receive Federal funds.

Unlike IDEA's definition of "children with disabilities," which speaks in terms of a child's need for special education and related services because of a specific impairment, Section 504 and the ADA define a "person with a disability" in terms of a person's ability to function, i.e., whether a person has a physical or mental impairment that substantially affects the ability to perform a major life activity, e.g., learning. These differences in definitions mean that there may be students who qualify for regular or special education and related services under Section 504 but who do not have one of the 13 disabilities recognized by IDEA. For example, there may be students with Attention Deficit Disorder or drug addiction or alcoholism currently undergoing treatment for these addictions who are determined not to be eligible for services under IDEA but who may be covered by Section 504 and the ADA.

If a disabled student were covered by Section 504 and the ADA, but not eligible for services under IDEA, the school district would nevertheless be required to provide FAPE to that student in accordance with the Section 504 regulation. The Section 504 FAPE requirements relevant to educational setting, evaluation and placement, and procedural safeguards are substantially similar to the procedures required by IDEA. Both Section 504 and IDEA require the provision of required services at no cost to the parents. However, under the Section 504 regulation, FAPE consists of a program of regular or special education and related aids and services that is designed to meet the individual educational needs of persons with disabilities as adequately as the needs of nondisabled persons are met. An IEP is not required under the Section 504 regulation; however, implementation of an IEP developed in accordance with IDEA is one means of satisfying the FAPE requirements of the Section 504 regulation. Generally, it is school district practice to develop IEPs for persons with disabilities covered by Section 504.

In the example set out in this question, if the school district conducted an individual inquiry and determined that the student requires supplementary aids and services, e.g., modifications in the regular class curriculum in order to facilitate placement in a regular educational program, Section 504 and the ADA would require the school district to provide the needed supports to the student, even though the student was not determined eligible for services under the IDEA.

14. When state laws or regulations differ from federal laws or regulations, which "take precedence" and how is that decision made?

States receiving IDEA funds must ensure that their regulations are consistent with the requirements of the Federal laws and regulations, but there is no requirement that State regulations use terminology that is identical to the language of the Federal regulations. When there are differences, the determination of which regulations would take precedence would depend on the particular facts and circumstances. For example, if the State regulation creates a stricter standard of compliance than the Federal regulation under IDEA, or supplements the Federal regulation, but does not conflict with

the Federal regulation under IDEA, the State regulation would control. In contrast, if the standard in the State regulation is less stringent, the State must conform its law to the Federal standard in order to receive IDEA funds.

15. Who is responsible for providing medical services to students which are considered "related services" under the IDEA? What is the Department's position on medical services being rendered by non-medical personnel who are not licensed to provide a medical service under state law? Estimates indicate that well over one-half of public schools do not have a school nurse on staff. Does the Department suggest any guidelines on how schools which do not have nurses provide "related services" required under IDEA but which no school employee is licensed to provide?

Two types of related services as defined under IDEA are mentioned in this question:

1. Medical services for diagnostic and evaluation purposes, which IDEA's definition of "medical services" requires a licensed physician to provide; and
2. School health services, which IDEA's definition of "school health services" specifies that a qualified school nurse or other qualified person can provide.

State law governs whether individuals who provide particular services must be licensed. The Department encourages States to consider using paraprofessionals to provide related services, including health services, to students with disabilities, if doing so would be consistent with State law and State personnel standards that are consistent with the requirements of IDEA. Assuming applicable State law and standards and IDEA requirements are met, determinations of the circumstances under which paraprofessionals may provide required services to students with disabilities under IDEA are matters left up to the individual State.

16. A. What does federal law have to say about allowable policies pertaining to students with disabilities whose conduct in the classroom is a serious problem and/or poses a serious threat to themselves or others?

Generally, student discipline is a State and local matter. However, when students with disabilities are involved, the requirements of IDEA and Section 504 are applicable. Under IDEA and Section 504, school districts may not remove students with disabilities from school for more than ten school days for misconduct growing out of their disability, without first determining whether the student's misconduct was related to her or his disability. However, it is permissible for school districts to remove a student with a disability from school for up to ten school days without making this prior determination. A school district may also seek a court order to remove a dangerous student if the school district believes that maintaining that student in the current educational placement is substantially likely to result in injury to that student or to others. In addition, under IDEA and Section 504, school districts may use short-term measures, short of a change in placement, if to do so would not be inconsistent with the student's IEP, and in accordance with rules that are applied evenhandedly to all students.

Under IDEA and Section 504, a removal of a student from school for more than ten school days constitutes a change in placement, which cannot be implemented without first determining whether the student's misconduct is related to the student's disability. Section 504 also requires that a reevaluation of the student be conducted prior to any change in placement. Under IDEA and Section 504, the disability-relatedness determination must be made by a group of persons, not just by any one individual, which includes persons personally familiar with the student. If the student's misconduct is determined to be related to the student's disability, the procedural safeguard requirements of IDEA and Section 504 require that the parents must be given written notice of the proposal to change the student's placement and informed that they have the right to request a due process hearing. Under IDEA and Section 504, there is no requirement that parental consent be obtained before a school district can implement a proposal to change a student's placement, regardless of whether the proposal is made for disciplinary reasons. However, some States may require that parental consent be obtained under these circumstances.

Regardless of whether the State requires that parental consent be obtained before a proposal to change the student's placement, if the parents request an impartial due process hearing under IDEA, the "stay-put" or "pendency" provision requires that the student remain in the then current educational placement unless the parents and school district agree on an interim placement. School districts that are unable to persuade parents to agree on an interim placement also may seek a court order to remove a student from school, as described above.

Students with disabilities may be subject to long-term suspension or expulsion only for misconduct that has been determined to be unrelated to the student's disability. The nondiscrimination provisions of Section 504 permit school districts to discontinue educational services for disabled students subject to long term suspension or expulsion from school for non-disability-related misconduct in the same manner as educational services could be discontinued for nondisabled students. However, IDEA requires that educational services must continue for these students during periods of disciplinary removal that exceed ten school days.

16. B. When an inclusive placement is not working (in the opinion of the professional staff) and the placement is disrupting the learning of the rest of the class, what recourse does the school have against the "stay-put" provisions of the IDEA, if the parent will not consent to a change in placement? What must the district document? Do permissible policies differ for students with disabilities as opposed to students without disabilities, and, if so, how?

In the example that you provide, the school district should review the current placement to determine whether additional aids and supports can be provided or determine whether a change in placement is appropriate. If the parents disagree with the recommended change in placement and initiate a due process hearing, and if the school district is unable to persuade the parents to agree on an interim placement, IDEA's "pendency" or "stay-put" provision would require that the student remain in the current educational placement until the completion of all proceedings. While school districts can attempt to obtain a court order under these circumstances, the school district would have to demonstrate to the court that maintaining the student in the current placement is substantially likely to result in injury to the student or to others. Disruption of the learning of classmates may not be sufficient to satisfy this burden. For nondisabled students, policies differ, in that IDEA and Section 504 requirements, such as the procedural safeguards, do not apply.

17. What information does the Department have on professional development/training approaches which special and regular educators and paraprofessionals have found helpful in implementing inclusion and other educational practices which address the needs of special needs students?

The Department has supported a variety of professional development and training projects (e.g., preservice, inservice, school restructuring projects) that address the needs of students with disabilities in inclusive schools. In addition, the Department has financed Statewide Systems Change projects which support changing the setting for delivery of educational services from separate settings to general education settings in the student's neighborhood school. Numerous materials and products have been developed by these projects which have focused on strategies that support collaborative planning and problem solving, site-based control, curriculum and technological adaptations and modifications, parent and family involvement, and the creative use of human and fiscal resources. These projects have underscored the importance of timely access to resources (e.g., people, materials, information, technology) when they are needed. Educators can obtain further information regarding these programs by contacting:

National Information Center for
Children and Youth with
Disabilities
P.O. Box 1492
Washington, D.C. 20013-1492
Telephone: 1-800-695-0285

Practices
Allegheny Singer Research
Institute
320 E. North Avenue
Pittsburgh, PA. 15212
Telephone: (412) 359-1600

the Integration of Students with
Severe Disabilities
San Francisco State University
14 Tapia Drive
San Francisco, California 94132
Telephone: (415) 338-7847

Consortium on Inclusive Schooling

California Research Institute on

18. The Administration through its GOALS 2000 legislation is encouraging all school districts voluntarily to adopt high achievement standards for all students. When--if at all--is it appropriate to modify an achievement standard for a student with a disability or any other student, or modify the expectation of the level of attainment of a given standard? If it is appropriate in some contexts, what guidelines and/or resources does the Department suggest to the educators?

One of the stated purposes of the Goals 2000: Educate America Act is to provide for the establishment of high-quality, internationally competitive content and student performance standards and strategies that all students will be expected

to achieve. The term "all students" is defined to include students with disabilities, as well as students from a broad range of other diverse backgrounds and circumstances.

Under IDEA and Section 504, school districts must provide an appropriate education consistent with the individual needs of students with disabilities, and must make individualized determinations about a student's educational needs. Goals 2000 calls for a study of the inclusion of students with disabilities in school reform activities assisted under that Act, including "an evaluation of the National Education Goals and objectives, curriculum reforms, standards, and other programs and activities intended to achieve those goals." The Department will be providing additional guidance on Goals 2000 as it affects the education of students with disabilities.

19. Are there any guidelines or resources available to educators on how to modify a student achievement assessment where a student's disability prevents the student from being able to perform the assessment in the same way as other students in the class?

Section 504 requires that testing of students with disabilities be fair and reflect their true abilities. Consequently, any necessary testing modifications must be made for students with disabilities, as appropriate. As with other matters relating to the education of students with disabilities, these determinations must be made on an individual basis in light of each student's particular abilities and needs. While some States have enacted rules or guidelines that govern testing modifications for students with disabilities, other States leave these determinations to participants on each student's IEP team. If testing modifications are included in a student's IEP or other individualized educational plan under Section 504, they must be provided to the student.

The National Center on Educational Outcomes has reference materials on various testing modifications that may be considered in individual cases. As a result of a special study funded by the Office of Special Education Programs, the National Center on Educational Outcomes has conducted research on existing guidelines for modifications through a national survey of state assessment practices and a literature survey. Their findings identify four major types of modifications used in state and national assessments that educators may want to consider in modifying tests for disabled students: alternative presentation modes, alternative response modes, alternative settings, and alternative time allotments and scheduling.

Alternative presentations include modifications such as Braille versions of test, large print editions, and orally presented instructions. Alternative response modes include the use of computers for written answers, sign language, and the use of recorders. Setting variations that are often allowed include small group or individual assessments, or in rare instances, home-based assessments. Flexibility in time allotments and scheduling also are used for some students with disabilities.

Further information can be obtained from:

National Center on Educational Outcomes

350 Elliot Hall

75 East River Road

Minneapolis, Minnesota 55455

Tel: 612-626-1530

20. Studies have shown that achievement test score results for approximately 40-50% of all students with disabilities are simply not reported by schools and/or districts for some national surveys of student achievement. When if ever is it permissible for a school or a district to NOT report the results of achievement tests or assessments of students with disabilities (or other students) to local, state or federal authorities?

Generally, it is not permissible to exclude students with disabilities from tests or from reports of results. Whether the failure to report scores for students with disabilities constitutes discrimination on the basis of disability, and thus a violation of Section 504 and the ADA depends on the particular facts and circumstances of each case, such as what is being measured. The Department anticipates addressing this issue, as the need arises, in various contexts, including in national assessments, other tests/assessments, and in the enforcement of nondiscrimination laws.

21. What are the relationships between the Americans with Disabilities Act (ADA), section 504 of the Rehabilitation Act, and the Individuals with Disabilities Education Act? What if any practical implications other than those addressed in question 13 do the differences in these laws have for educators?

The Office for Civil Rights (OCR) enforces five Federal laws that prohibit discrimination on the basis of race or national origin, sex, disability and age. Four of these laws apply specifically to recipients of Federal financial assistance (the fifth applies to all activities of State and local governments, including those that do not receive Federal financial assistance). While Section 504 applies to entities that receive or benefit from Federal financial assistance, the ADA's reach is broader. It extends Section 504's prohibition against discrimination on the basis of disability to all activities of State and local governments, including those that do not receive Federal financial assistance and therefore are not covered by Section 504. Since standards for compliance with the ADA are generally the same as those of Section 504, this has little practical consequence for public school districts, all of which are recipients of Federal financial assistance. Generally, the same complaint procedures apply for Section 504 and Title II complaints.

Individuals with questions about Section 504 and Title II of the ADA should contact the relevant Office for Civil Rights (OCR) regional office, the addresses and telephone numbers of which are provided in the appendix to this document, or the OCR contact person listed in this document for further assistance. Individuals with questions about the implementation of IDEA in your State should contact the State director of special education in your State Department of Education, or the OSERS or OSEP contact persons listed in this document, for further assistance. The names, addresses, and telephone numbers of the State directors of special education are provided in the appendix to this document.

22. How can educators report practices to the U.S. Department of Education which are believed to be out of compliance with the Individuals with Disabilities Education Act? Does the Department place equal emphasis in its monitoring activities on inappropriate inclusion as it does on inappropriate non-inclusion?

Yes. In enforcing the free appropriate public education requirements of IDEA and Section 504, the Department must ensure that States and school districts comply with their responsibilities to educate students with disabilities in the LRE in accordance with the requirements of those laws. If the Department determines through monitoring or other compliance activities that these requirements are being misapplied, it will take whatever measures are deemed necessary to achieve compliance.

When OSEP monitors States' compliance with the requirements of IDEA, OSEP will examine whether LRE requirements are being properly implemented at the local level. If OSEP identifies instances of inappropriate placement of students with disabilities in regular educational settings, OSEP will examine whether adequate appropriate aids and supports have been provided to the affected students in those settings.

There are mechanisms under IDEA, Section 504, and the ADA for individuals and organizations subject to the protections of those laws to file complaints alleging that school districts have not educated students with disabilities in the LRE. Because IDEA is a State-administered program, complaints by individuals or organizations alleging violations of IDEA are not investigated directly by OSEP or OSERS but are referred to the relevant State Department of Education for resolution. A copy of the State complaint procedures in the IDEA regulations and a brief explanation of those procedures is provided in the appendix to this document. Individuals or organizations alleging discrimination on the basis of disability by a public school district in violation of Section 504 or Title II of the ADA may file a complaint with the relevant OCR regional office in accordance with the procedures described in the Appendix to this document.

23. What general precautions should educators take in order to minimize their exposure to contagious diseases?

Educators are in a position to have a positive impact on measures to contain the spread of contagious diseases among students and staff in schools by preventive behaviors which include the following: (1) use of universal precautions, such as hand-washing after situations that bring them in contact with body secretions; (2) immediate referral to the school health resource for any physical and/or behavioral changes that are of concern; (3) positive reinforcement for health behavior for children as part of their curriculum experience; and (4) encouraging inservice updating on infectious disease and prevention for all school personnel.

24. Does the Department have any recommendations or suggestions on what can be done to reduce the paperwork burden on educators which results from federal, state and local laws, regulations and policies? Does federal law identify any specific forms which must be completed or designate any particular party which must complete them?

The Department is sensitive to the paperwork burdens that its compliance responsibilities may involve. The collection of general information from schools is carefully scrutinized by the Department, as well as the Office of Management and Budget. The Department is constantly reviewing its regulations to reduce paperwork burdens on school districts. Most of the paperwork responsibilities that result from Federal reporting requirements are the responsibility of State Departments of Education rather than educators at the local school district level. In many instances, there are paperwork requirements that are burdensome for educators that are not specifically the result of a Federal requirement. Therefore, consultation at the State and local levels may be helpful in determining whether any of these paperwork requirements can be reduced or eliminated.

Federal regulations implementing civil rights statutes require recipients of Federal financial assistance to submit to the Department timely and accurate compliance reports at such times specified by the Department, which reports must contain information necessary for the Department to ascertain the recipient's compliance. Accordingly, OCR conducts a civil rights survey of elementary and secondary schools every two years, but only for a sample rather than for all schools. The survey forms must be completed by officials in those school districts selected for inclusion in the survey. The content of each survey is developed in consultation with state and school officials.

The text of this publication is available through NICHCY, courtesy of the National Education Association. NICHCY thanks NEA for supplying this material on disk to the Clearinghouse.

See full article at: <http://www.wrightslaw.com/info/lre.faqs.inclusion.htm>