

Archived Information

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MEMORANDUM

OSEP - 97-5

TO : Chief State School Officers

FROM : Thomas Hehir, Director
Office of Special Education Programs (OSEP)

SUBJECT : Changes in Part B of the Individuals with Disabilities Education Act, as Required by the Individuals with Disabilities Education Act Amendments of 1997

The purposes of this memorandum are to:

- (1) inform State educational agencies (SEAs) of the procedures they are to follow in order to receive a grant award, under Part B of the Individuals with Disabilities Education Act (IDEA), for Federal fiscal year 1997 (i.e., the grant period beginning July 1, 1997); and
- (2) summarize the relevant changes in Part B, as set forth in the Individuals with Disabilities Education Act Amendments of 1997 (IDEA Amendments of 1997), Pub. L. No. 105-17, June 4, 1997, that affect State implementation for the 1997-98 school year. Further guidance on other aspects of the IDEA Amendments of 1997 that are not necessary to States' implementation of Part B for the period July 1, 1997 through June 30, 1998 will be provided at a later date.

I.

Procedures States are to Follow in Order to Receive a Part B Grant Award for Federal Fiscal Year 1997

In the past, each SEA was responsible for applying for Part B funds by submitting a Part B State plan. The IDEA Amendments of 1997, however, do not require SEAs to submit a State plan. Instead, each State must "demonstrate to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the conditions [set forth in section 612(a) of the Act]." For the grant period from July 1, 1997 through June 30, 1998, the Department is asking States to submit an assurance of compliance with the requirements of the revised IDEA, rather than revised statutes, regulations, policies and procedures. (A copy of this assurance statement is included as Enclosure 2 to the letter to which this memorandum is also an enclosure.) Your State should carefully consider who has the authority to provide this assurance in light of the changes to the IDEA and your own State's law.

As in the past, the SEA will continue to have primary authority and responsibility for ensuring that educational programs for children with disabilities in the State meet the educational standards of the State, including the requirements of Part B (see section 612(a)(11)(A)). There are, however, some new provisions in the Act that, depending upon State law, may not be under the authority of the SEA. (See, for example, section 612(a)(11)(C), (12)(A) and (B), and (19) (described below).

I urge you to review carefully the enclosed copies of the IDEA Amendments of 1997, the memorandum, and the assurance, and relevant provisions of State law to determine who the appropriate official is under State law who has the authority to provide the enclosed assurance.

In addition to submitting the signed assurance statement, States must also submit the completed ED Form 80-0013. We have enclosed, as Enclosure C to the letter to which this memorandum is also an enclosure, a copy of ED Form 80-0013 that the State may use if it has not already submitted a signed copy of the Form for Federal Fiscal Year 1997.

II.

Summary of Substantive Changes to the IDEA by the IDEA Amendments of 1997 that are relevant to State Implementation of Part B for July 1, 1997 through June 30, 1998

SECTION 602--DEFINITIONS

The definitions in section 602 have been alphabetized and renumbered accordingly. With the exception of the changes noted below, however, the definitions have remained substantively unchanged.

SECTION 602(3)--CHILD WITH A DISABILITY

This definition has been retained with two changes:

- (1) The definition now states at 602(3)(A)(i) that the term "emotional disturbance" replaces "serious emotional disturbance" in the remainder of the Act; and
- (2) section 602(3)(B) permits States, at the discretion of the State and the local educational agency, to identify, as children with disabilities, children aged three through nine who are experiencing developmental delays and need special education and related services.

SECTION 602(4)--EDUCATIONAL SERVICE AGENCY

This term and definition replace the term "intermediate educational unit."

SECTION 602(15)--LOCAL EDUCATIONAL AGENCY

This definition has been revised to make it consistent with the definition in the Improving America's Schools Act.

SECTION 602(19)--PARENT

A provision has been added to state that the term "parent" includes a legal guardian and a surrogate parent.

SECTION 602(22)--RELATED SERVICES

This definition has been retained with one change--it has been revised to specifically include orientation and mobility services.

SECTION 602(28)--SEA

This definition has been revised to make it consistent with the definition in the Improving America's Schools Act.

SECTION 602(30)--TRANSITION SERVICES

This definition has been retained with one change -- it has been revised to provide that the term means, "a coordinated set of activities for a student with a disability that includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation, as required by section 602(a)(30)(C) of the Act." (Emphasis added.)

SECTION 611--FORMULA, STATE USE OF FUNDS

The changes to Section 611 set forth in the IDEA Amendments of 1997 do not take effect this year. For funds appropriated before Federal Fiscal Year 1998, Section 611 as in effect before enactment of the IDEA Amendments of 1997 continues to apply. The changes in section 611 will be the subject of future guidance.

SECTION 612--STATE ELIGIBILITY

Section 612 combines and reorganizes the State eligibility and State plan requirements previously set forth in sections 612 and 613 of prior law, and makes the following substantive changes to those requirements.

SECTION 612(a)--ELIGIBILITY

Section 612(a) provides that a State is eligible for assistance under Part B for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the conditions set forth in section 612(a). As set forth in greater detail in the discussion of section 612(c) below, States are no longer required to periodically resubmit documentation in order to establish their continuing eligibility to receive funds under Part B.

SECTION 612(a)(1)--FREE APPROPRIATE PUBLIC EDUCATION

The eligibility requirements regarding the provision of a free appropriate public education have been retained, with two changes:

- (1) The Act now makes explicit, at section 612(a)(1)(A), that the requirement that States make a free appropriate public education available to all eligible children with disabilities includes children with disabilities who have been suspended or expelled from school; and
- (2) The Act has been amended at section 612(a)(2)(B) to provide that unless required by State law, States are not required to provide special education and related services under Part B to youth with disabilities, aged 18 through 21, who, in the educational placement prior to their incarceration in an adult correctional facility:
 - (a) were not actually identified as being a child with a disability under section 602(3) of the Act; or
 - (b) did not have an Individualized Education Program under Part B.

SECTION 612(a)(2)--FULL EDUCATIONAL OPPORTUNITY GOAL

The eligibility requirement that each State establish a goal of providing full educational opportunity to all children with disabilities and a detailed timetable for accomplishing that goal has been retained, but the requirement in prior law that each State also establish "... a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal" has been deleted.

SECTION 612(a)(3)--CHILD FIND

This eligibility requirement has been retained, with three changes:

- (1) it adds a specific statement that the State's child find responsibility includes children with disabilities attending private schools;
- (2) it eliminates the requirement that the State develop and implement a practical method to determine which children with disabilities are not currently receiving needed special education and related services; and
- (3) it adds a "construction clause" to make clear that the Act does not require States to ensure that children with disabilities be classified by their disability, so long as each child who has a disability listed in section 602 and who, by reason of that disability, needs special education and related services, is regarded as a child with a disability under Part B.

SECTION 612(a)(4)--INDIVIDUALIZED EDUCATION PROGRAM (IEP)

The IDEA, as amended, retains the prior law requirement that public agencies develop, review and revise an IEP for each child with a disability. Significant changes in Part B requirements for the development and content of IEPs,

which take effect July 1, 1998, will be the subject of future guidance. For the period July 1, 1997 through June 30, 1998, States and school districts satisfy this obligation by complying with the IEP provisions of the IDEA and its regulations, as in effect before the enactment of the IDEA Amendments of 1997.

SECTION 612(a)(5)--LEAST RESTRICTIVE ENVIRONMENT

The IDEA, as amended, retains the prior law provisions concerning placement in the least restrictive environment.

The IDEA Amendments of 1997 adds a new provision requiring that:

- (1) if a State distributes State aid on the basis of the type of setting in which children are placed, that funding formula does not result in placements that violate the least restrictive environment requirement; and
- (2) if a State does not have policies and procedures to insure compliance with this funding formula requirement, it provides an assurance that it will revise the funding formula as soon as feasible to ensure that the funding mechanism does not result in placements that violate the least restrictive environment requirement.

SECTION 612(a)(6)--PROCEDURAL SAFEGUARDS

The section retains the prior law eligibility requirement that children with disabilities and their parents be afforded the procedural safeguards required by section 615, and the prior law provision regarding nondiscriminatory selection and administration of testing and evaluation materials, administration in the child's native language, and no single procedure as the sole criterion for determining an appropriate educational program for a child. Changes to the specific procedural safeguard requirements are addressed in the subsequent section of this memorandum concerning section 615.

SECTION 612(a)(7)--EVALUATION

This section incorporates as an eligibility requirement in the statute the existing regulatory provision, at 34 CFR §300.133, requiring that the State establish procedures to ensure that requirements regarding evaluations are met. Part B's specific requirements concerning evaluations are addressed in the subsequent section of this memorandum concerning section 614.

SECTION 612(a)(8)--CONFIDENTIALITY

This section retains the prior law requirement that the State have policies and procedures to ensure the confidentiality of any personally identifiable information collected, used, or maintained under Part B. Part B's specific requirements concerning confidentiality are unchanged, and, as in prior law, are addressed in Section 617.

SECTION 612(a)(9)--TRANSITION FROM PART C TO PRESCHOOL PROGRAMS

This section retains the prior law requirement that the State have policies and procedures to ensure a smooth transition from the Early Intervention Program (Part H, to become "Part C"). This section adds language to make clear that these transitions must also be "effective," and adds a requirement that LEAs participate in transition planning conferences arranged by the lead agency under section 637(a)(8).

SECTION 612(a)(10)--CHILDREN IN PRIVATE SCHOOLS

Section 612(a)(10)(A) retains the requirement, previously at section 613(a)(4)(A), that, to the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under Part B by providing for such children special education and related services, unless the Secretary has arranged for services to children with disabilities who are enrolled by their parents in private elementary and secondary schools. This provision has been clarified with the addition of language explaining that:

- (1) Amounts expended for the provision of those services by an LEA are equal to a proportionate amount of Federal funds made available under Part B; and
- (2) Such services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law.

In addition, a provision has been added that states that the requirements of section 612(a)(3) relating to child find apply with respect to children with disabilities in the State who are enrolled in private, including parochial, elementary and secondary schools.

Section 612(a)(10)(B) retains the requirements, at section 613(a)(4)(B) in prior law, that apply when the State or appropriate LEA places children with disabilities in, or refers them to, private schools and facilities as the means of carrying out the requirements of Part B or any other applicable law requiring the provision of special education and related services to all children with disabilities within the State.

Section 612(a)(10)(C) consists of the following new provisions regarding public agencies' responsibilities to children whose parents enroll them in private schools or facilities:

- (1) Subject to section 612(a)(10)(A), Part B does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility [612(a)(10)(C)(i)].
- (2) If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment [612(a)(10)(C)(ii)].
- (3) The cost of reimbursement described in 612(a)(10)(C)(ii) may be reduced or denied—
 - (I) if—
 - (aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
 - (bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in 612(a)(10)(C)(ii)(I)(aa);
 - (II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 615(b)(7), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or
 - (III) upon a judicial finding of unreasonableness with respect to actions taken by the parents [612(a)(10)(C)(iii)].

- (4) Notwithstanding the notice requirement in section 612(a)(10)(C)(iii)(I), the cost of reimbursement may not be reduced or denied for failure to provide such notice if --
 - (1) the parent is illiterate and cannot write in English;
 - (2) compliance with clause (iii)(I) would likely result in physical or serious emotional harm to the child;
 - (3) the school prevented the parent from providing such notice; or
 - (4) the parents had not received notice, pursuant to section 615, of the notice requirement in section 612(a)(10)(C)(iii)(I) [612(a)(10)(C)(iv)].

SECTION 612(a)(11)--SEA RESPONSIBLE FOR GENERAL SUPERVISION

This section retains the general supervision requirements set forth in section 612(6) in prior law, but provides that the Governor (or another individual pursuant to State law), consistent with State law, may assign to any public agency in the State the responsibility of ensuring that Part B requirements are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons.

SECTION 612(a)(12)--OBLIGATIONS RELATED TO AND METHODS OF ENSURING SERVICES

Section 612(a)(12)(A) sets forth requirements regarding the responsibility of the State's Chief Executive Officer or designee to ensure that an interagency agreement or other mechanism for interagency coordination is in effect between the SEA and each public agency other than an educational agency that is otherwise obligated under Federal or State law, or assigned responsibility under State policy or pursuant to section 612(a)(12)(A), to provide or pay for any services that are also considered special education or related services, in order to ensure that all such services that are needed as a part of a free appropriate public education are provided. Such agreements or mechanisms must include:

- (1) an identification of, or method of defining, the financial responsibility of each agency for providing services described in section 612(a)(12)(B)(i) to ensure a free appropriate public education to children with disabilities, provided that the financial responsibility of each public agency described in section 612(a)(12)(B), including the State Medicaid agency and other public insurers of children with disabilities, shall precede the financial responsibility of the local educational agency (or the State agency responsible for developing the child's IEP);
- (2) the conditions, terms, and procedures under which an LEA is reimbursed by other agencies;
- (3) procedures for resolving interagency disputes under the agreement or other mechanism to secure reimbursement from other agencies or otherwise implement the provisions of the agreement or mechanism; and
- (4) Policies and procedures for agencies to determine and identify the interagency coordination responsibilities of each agency to promote the coordination and timely and appropriate delivery of services described in section 612(a)(12)(B)(i).

The requirements in section 612(a)(12)(A) may be met through:

- (1) State statute or regulation;
- (2) signed agreements between respective agency officials that clearly identify the responsibilities of each agency relating to the provision of services; or

- (3) other appropriate written methods as determined by the Chief Executive Officer of the State or designee of the officer [612(a)(12)(C)].

Section 612(a)(12)(B) provides, with regard to the responsibility of public agencies that are not educational agencies, that:

- (1) If any public agency other than an educational agency is otherwise obligated under Federal or State law, or assigned responsibility under State policy or pursuant to section 612(a)(12)(A), to provide or pay for any services that are also considered special education or related services that are necessary for ensuring a free appropriate public education to children with disabilities within the State, that public agency shall fulfill that obligation or responsibility, either directly or through contract or other arrangement; and
- (2) If a public agency other than an educational agency fails to provide or pay for such special education and related services, the LEA (or State agency responsible for developing the child's IEP) provides or pays for such services to the child, and may then claim reimbursement for the services from the public agency that failed to provide or pay for such services and that public agency reimburses the LEA or State agency pursuant to the terms of the interagency agreement or other mechanism.

SECTION 612(a)(13)--PROCEDURAL REQUIREMENTS RELATING TO LEA ELIGIBILITY

This section requires that the SEA not make a final determination that an LEA is not eligible for assistance under Part B, without first affording that agency reasonable notice and an opportunity for a hearing.

SECTION 612(a)(14)--COMPREHENSIVE SYSTEM OF PERSONNEL

DEVELOPMENT This section requires that the State have in effect, consistent with the purposes of the Act and with section 635(a)(8), a comprehensive system of personnel development that is designed to ensure an adequate supply of qualified special education, regular education, and related services personnel that meets the requirements for a State improvement plan relating to personnel development in subsections (b)(2)(B) and (c)(3)(D) of section 653. This section does not take effect until July 1, 1998. Until that date, Section 613(a)(3) and 34 CFR §§300.380-300.383, as in effect before enactment of the IDEA Amendments of 1997, continue to apply. The requirements of section 612(a)(14), as set forth in the IDEA Amendments of 1997, will be the subject of future guidance.

SECTION 612(a)(15)--PERSONNEL STANDARDS

This section retains the provisions of section 613(a)(14) of prior law, with two changes that afford States greater flexibility in ensuring that personnel necessary to carry out Part B are appropriately and adequately prepared and trained:

- (1) Paraprofessionals and assistants who are appropriately trained and supervised, may, in accordance with State law, regulations, or written policy, be used in meeting the requirements of Part B of the Act to assist in the provision of special education and related services to children with disabilities under Part B; and
- (2) In implementing section 612(a)(15), a State may adopt a policy that includes a requirement that LEAs in the State make an ongoing good-faith effort to recruit and hire appropriately and adequately trained personnel to provide special education and related services to children with disabilities, including, in a geographic area of the State where there is a shortage of such personnel, the most qualified individuals available who are making satisfactory progress toward completing applicable course work necessary to meet the standards described in section 615(a)(15)(B)(i), consistent with State law, and the steps described in subparagraph (B)(ii) within three years.

SECTION 612(a)(16)--PERFORMANCE GOALS AND INDICATORS

The requirements of section 612(a)(16), as set forth in the IDEA Amendments of 1997, do not take effect until July 1, 1998, and will be the subject of future guidance.

SECTION 612(a)(17)--PARTICIPATION IN ASSESSMENTS

This section establishes the following requirements regarding the participation of children with disabilities in general State and district-wide assessment programs:

- (1) Children with disabilities must be included in general State and district-wide assessment programs, with appropriate accommodations, where necessary.
- (2) As appropriate, the State or local educational agency must:
 - (a) develop guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in State and district-wide assessment programs; and
 - (b) develop and, beginning not later than July 1, 2000, conduct those alternate assessments.
- (3) The SEA must make available to the public, and report to the public with the same frequency and in the same detail as it reports on the assessment of nondisabled children:
 - (a) The number of children with disabilities participating in regular assessments;
 - (b) The number of those children participating in alternate assessments; and
 - (c) The performance of those children on regular assessments (beginning not later than July 1, 1998) and on alternate assessments (not later than July 1, 2000), if doing so would be statistically sound and would not result in the disclosure of performance results identifiable to individual children; data relating to the performance of these children must be disaggregated:
 - (i) for assessments conducted after July 1, 1998; and
 - (ii) for assessments conducted before July 1, 1998, if the State is required to disaggregate such data prior to July 1, 1998.

SECTION 612(a)(18)--SUPPLEMENTATION OF STATE, LOCAL, AND OTHER FEDERAL FUNDS

This section maintains the prior law requirements concerning use of Part B funds [34 CFR §300.148], commingling [prior law 613(a)(9)(A)], and supplementation [prior law 613(a)(9)(B)].

SECTION 612(a)(19)--MAINTENANCE OF STATE FINANCIAL SUPPORT

This section requires that the State not reduce the amount of State financial support for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year, and provides that the Secretary shall reduce the allocation to the State in the following year if the State fails to comply with this requirement. The provision allows the Secretary to waive this requirement on the State for one year at a time if the Secretary determines that granting a waiver would be equitable due to exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State or if the State meets the standard in 612(a)(18)(C) for a waiver of the requirement to supplement, and not supplant, funds received under this part. The provision also establishes the level of financial support that is required of a State in years after it has reduced financial support, including after a waiver. The provision also directs the Secretary to establish by regulation procedures (including objective criteria and consideration of the results of compliance reviews of the State

conducted by the Secretary) for determining whether to grant a waiver of the maintenance of financial support requirement based on the State meeting the standard in 612(a)(18)(C).

SECTION 612(a)(20)--PUBLIC PARTICIPATION

This section requires that, prior to the adoption of any policies and procedures needed to comply with section 612 (including any amendments to such policies and procedures), there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities.

SECTION 612(a)(21)--STATE ADVISORY PANEL

This section retains the requirements of section 613(a)(12) in prior law regarding the establishment of a State advisory panel, with the following changes:

- (1) A requirement is added that the advisory panel must include representatives of private schools and public charter schools, and representatives from the State juvenile and adult corrections agencies;
- (2) A requirement is added that a majority of the members of the panel must be individuals with disabilities or parents of children with disabilities;
- (3) The section retains the requirement that the advisory panel must comment publicly on any rules or regulations proposed by the State regarding the education of children with disabilities, but does not retain the requirement in prior law that the advisory panel must comment publicly on the procedures for distribution of funds under Part B;
- (4) A requirement is added that the advisory panel must advise the SEA in developing corrective action plans to address findings in Federal Part B monitoring reports; and
- (5) A requirement is added that the advisory panel must advise the SEA in developing and implementing policies relating to the coordination of services for children with disabilities.

SECTION 612(a)(22)--SUSPENSION AND EXPULSION RATES

This section establishes requirements for the examination of data regarding rates of long-term suspensions and expulsions of children with disabilities:

- (1) The SEA must examine data to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities--
 - (a) among LEAs in the State; or
 - (b) compared to such rates for nondisabled children within such agencies.
- (2) If such discrepancies are occurring, the SEA must review and, if appropriate, revise (or require the affected State or local educational agency to revise) its policies, procedures, and practices relating to the development and implementation of IEPs, the use of behavioral interventions, and procedural safeguards, to ensure that such policies, procedures, and practices comply with the Act.

SECTION 612(b)--SEA AS PROVIDER OF FREE APPROPRIATE PUBLIC EDUCATION OR DIRECT SERVICES

This section requires that if the SEA provides free appropriate public education to children with disabilities, or provides direct services to such children, the agency:

- (1) will comply with any additional requirements of section 613(a), as if the agency were an LEA; and
- (2) may use amounts that are otherwise available to such agency under this part to serve those children without regard to section 613(a)(2)(A)(i) (relating to excess costs).

SECTION 612(c)--EXCEPTION FOR PRIOR STATE PLANS

Section 612(c) of the Act, as amended, sets forth conditions under which States may establish their eligibility to receive

Part B funds without submitting a State plan every three years, as was required under prior law:

- (1) If a State has on file with the Secretary policies and procedures that demonstrate that such State meets any requirement of section 612(a), including any policies and procedures filed under Part B as in effect before the effective date of the Individuals with Disabilities Education Act Amendments of 1997, the Secretary shall consider such State to have met such requirement for purposes of receiving a Part B grant.
- (2) Subject to section 612(c)(3), an application submitted by a State in accordance with section 612 shall remain in effect until the State submits to the Secretary such modifications as the State deems necessary. Section 612 shall apply to a modification to an application to the same extent and in the same manner as it applies to the original plan.
- (3) If, after the effective date of the Individuals with Disabilities Education Act Amendments of 1997, the provisions of IDEA are amended (or the regulations developed to carry out IDEA are amended), or there is a new interpretation of IDEA by a Federal court or a State's highest court, or there is an official finding of noncompliance with Federal law or regulations, the Secretary may require a State to modify its application only to the extent necessary to ensure the State's compliance with Part B.

SECTION 612(d)--APPROVAL BY THE SECRETARY

This section specifies that, if the Secretary determines that a State is eligible to receive a grant under Part B, the Secretary shall notify the State of that determination. It also retains the requirement, at section 613(c)(2) in prior law, that the Secretary may not make a final determination that a State is not eligible to receive a grant under Part B until after providing the State--

- (1) with reasonable notice; and
- (2) with an opportunity for a hearing.

SECTION 612(e)--ASSISTANCE UNDER OTHER FEDERAL PROGRAMS

This section retains the requirement, at section 613(e) in prior law, that nothing in Title 20 of United States Code (which includes the IDEA) permits a State to reduce medical and other assistance available, or to alter eligibility, under titles V and XIX of the Social Security Act with respect to the provision of a free appropriate public education for children with disabilities in the State.

SECTION 612(f)--BY-PASS FOR CHILDREN IN PRIVATE SCHOOLS

This section retains the requirements, at section 613(d) in prior law, regarding funding by-pass procedures to be implemented if, on the date of enactment of the Education of the Handicapped Act Amendments of 1983, an SEA was prohibited by law from providing for the participation in special programs of children with disabilities enrolled in private elementary and secondary schools.

SECTION 613--LOCAL EDUCATIONAL AGENCY ELIGIBILITY**SECTION 613(a)--IN GENERAL**

This section sets forth Part B eligibility requirements for LEAs. It provides that an LEA is eligible to receive Part B funds for a fiscal year if the agency demonstrates to the satisfaction of the State agency that it meets each of the following conditions:

- (1) The LEA, in providing for the education of children with disabilities within its jurisdiction, has in effect policies, procedures, and programs that are consistent with the State policies and procedures established under section 612.
- (2) Part B funds received by the LEA:
 - (a) will be expended in accordance with the applicable provisions of Part B and will be used only to pay the excess costs of providing special education and related services to children with disabilities [613(a)(2)(A)(i)];
 - (b) will be used to supplement State, local, and other Federal funds and not to supplant such funds [613(a)(2)(A)(ii)]; and
 - (c) will not be used, except as provided in section 613(a)(1)(B) and (C), to reduce the level of expenditures for the education of children with disabilities made by the LEA from local funds below the level of those expenditures for the preceding fiscal year [613(a)(2)(A)(iii)].
- (3) Notwithstanding the restriction in section 613(a)(2)(A)(iii), an LEA may reduce the level of expenditures where such reduction is attributable to--
 - (a) the voluntary departure, by retirement or otherwise, or departure for just cause, of special education personnel;
 - (b) a decrease in the enrollment of children with disabilities;
 - (c) the termination of the obligation of the agency, consistent with Part B, to provide a program of special education to a particular child with a disability that is an exceptionally costly program, as determined by the SEA, because the child--
 - (i) has left the jurisdiction of the agency;
 - (ii) has reached the age at which the obligation of the agency to provide a free appropriate public education to the child has terminated; or
 - (iii) no longer needs such program of special education; or
 - (d) the termination of costly expenditures for long-term purchases, such as the acquisition of equipment or the construction of school facilities.
- (4) Notwithstanding section 613(a)(2)(A)(ii) and (iii), for any fiscal year for which amounts appropriated to carry out section 611 exceeds \$4,100,000,000, an LEA may treat as local funds, for the purpose of such clauses, up to 20 percent of the amount of funds it receives under Part B that exceeds the amount it received under Part B for the previous fiscal year [613(a)(2)(C)(i)].

- (5) Notwithstanding section 613(a)(2)(C)(i), if an SEA determines that an LEA is not meeting the requirements of Part B, the SEA may prohibit the LEA from treating funds received under Part B as local funds under that section for any fiscal year, only if it is authorized to do so by the State constitution or a State statute.
- (6) Notwithstanding section 613(a)(2)(A) or any other provision of Part B, an LEA may use funds received under Part B for any fiscal year to carry out a schoolwide program under section 1114 of the Elementary and Secondary Education Act of 1965, except that the amount so used in any such program shall not exceed--(i) the number of children with disabilities participating in the schoolwide program; multiplied by (ii)(I) the amount received by the LEA under Part B for that fiscal year; divided by (II) the number of children with disabilities in the jurisdiction of that agency.
- (7) The LEA--
 - (a) shall ensure that all personnel necessary to carry out this part are appropriately and adequately prepared, consistent with the requirements of section 653(c)(3)(D); and
 - (b) to the extent such agency determines appropriate, shall contribute to and use the comprehensive system of personnel development of the State established under section 612(a)(14).
- (8) Notwithstanding section 613(a)(2)(A) or section 612(a)(18)(B) (relating to commingled funds), funds provided to the LEA under Part B may be used for the following activities:
 - (a) For the costs of special education and related services and supplementary aids and services provided in a regular class or other education-related setting to a child with a disability in accordance with the individualized education program of the child, even if one or more nondisabled children benefit from such services.
 - (b) To develop and implement a fully integrated and coordinated services system in accordance with section 613(f).
 - (c) In carrying out Part B with respect to charter schools that are public schools of the LEA, the LEA--
 - (i) serves children with disabilities attending those schools in the same manner as it serves children with disabilities in its other schools; and
 - (ii) provides funds under Part B to those schools in the same manner as it provides those funds to its other schools.
- (9) The LEA shall provide the SEA with information necessary to enable the SEA to carry out its duties under this part, including, with respect to section 612(a)(16) and (17), information relating to the performance of children with disabilities participating in programs carried out under Part B.
- (10) The LEA shall make available to parents of children with disabilities and to the general public all documents relating to the eligibility of such agency under Part B.

SECTION 613(b)--EXCEPTION FOR PRIOR LOCAL PLANS

This section sets forth the procedures that States must use to determine the eligibility of LEAs to receive funds under Part B, as follows:

- (1) If an LEA or State agency has on file with the SEA policies and procedures that demonstrate that such LEA, or such State agency, as the case may be, meets any requirement of section 613(a), including any policies and procedures filed under Part B as in effect before the effective date of the Individuals with Disabilities Education Act Amendments of 1997, the SEA shall consider such LEA or State agency to have met such requirement for purposes of receiving assistance under Part B.
- (2) Subject to section 613(b)(3), an application submitted by an LEA in accordance with section 613 shall remain in effect until it submits to the SEA such modifications as the LEA deems necessary.
- (3) If, after the effective date of the Individuals with Disabilities Education Act Amendments of 1997, the provisions of the Act are amended (or the regulations developed to carry out the Act are amended), or there is a new interpretation of the Act by Federal or State courts, or there is an official finding of noncompliance with Federal or State law or regulations, the SEA may require an LEA to modify its application only to the extent necessary to ensure the LEA's compliance with this part or State law [613(b)(3)].

SECTION 613(c)--NOTIFICATION OF LEA OR STATE AGENCY IN CASE OF INELIGIBILITY

This section requires that if the SEA determines that an LEA or State agency is not eligible under this section, the SEA must notify the LEA or State agency, as the case may be, of that determination and provide the LEA or State agency with reasonable notice and an opportunity for a hearing.

SECTION 613(d)--LEA COMPLIANCE

This section sets forth requirements that an SEA must meet if it finds that an LEA or State agency that it has determined eligible is failing to comply with any of the requirements of section 613(a):

- (1) If the SEA, after reasonable notice and an opportunity for a hearing, finds that an LEA or State agency that has been determined to be eligible under this section is failing to comply with any requirement described in section 613(a), the SEA must reduce or not provide any further payments to the LEA or State agency until the SEA is satisfied that the LEA or State agency, is complying with that requirement [613(d)(1)].
- (2) Any State agency or LEA in receipt of a notice described in section 613(d)(1) must, by means of public notice, take such measures as may be necessary to bring the pendency of an action pursuant to this section 613(d) to the attention of the public within the jurisdiction of such agency.
- (3) In carrying out its responsibilities under section 613(d)(1), the SEA must consider any decision made in a hearing held under section 615 that is adverse to the LEA or State agency involved in that decision.

SECTION 613(e)--JOINT ESTABLISHMENT OF ELIGIBILITY

This section sets forth requirements that an SEA must follow if it chooses to require an LEA to establish its Part B eligibility jointly with another LEA, because the LEA would be ineligible because it would not be able to establish and maintain programs of sufficient size and scope to effectively meet the needs of children with disabilities:

- (1) An SEA: (a) may require an LEA to establish its eligibility jointly with another LEA if the SEA determines that the LEA would be ineligible under this section because the LEA would not be able to establish and maintain programs of sufficient size and scope to effectively meet the needs of children with disabilities; but may not require a charter school that is an LEA to jointly establish its eligibility unless the State's charter school statute explicitly permits it to do so [613(e)(1)].

- (2) If an SEA requires the joint establishment of eligibility under section 613(e)(1), the total amount of funds made available to the affected LEAs shall be equal to the sum of the payments that each such LEA would have received under section 611(g) if such agencies were eligible for such payments.
- (3) LEAs that establish joint eligibility under section 613(e) must--
 - (a) adopt policies and procedures that are consistent with the State's policies and procedures under section 612(a); and
 - (b) be jointly responsible for implementing programs that receive assistance under Part B.
- (4) If an educational service agency (ESA) is required by State law to carry out programs under Part B, the joint responsibilities given to LEAs under section 613(e) shall--
 - (a) not apply to the administration and disbursement of any payments received by that ESA; and
 - (b) be carried out only by that ESA. Notwithstanding any other provision of section 613(e), an ESA shall provide for the education of children with disabilities in the least restrictive environment, as required by section 612(a)(5).

SECTION 613(f)--COORDINATED SERVICES SYSTEM

This section sets forth requirements with which an LEA must comply if it chooses to use Part B funds to develop and implement a coordinated services system designed to improve results for children and families, including children with disabilities and their families:

- (1) An LEA may not use more than 5 percent of the amount such agency receives under this part for any fiscal year, in combination with other amounts (which shall include amounts other than education funds), to develop and implement a coordinated services system designed to improve results for children and families, including children with disabilities and their families.
- (2) In implementing a coordinated services system under section 613(f), an LEA may carry out activities that include--
 - (a) improving the effectiveness and efficiency of service delivery, including developing strategies that promote accountability for results;
 - (b) service coordination and case management that facilitates the linkage of IEPs under Part B and IFSPs under Part C with individualized service plans under multiple Federal and State programs, such as Title I of the Rehabilitation Act of 1973 (vocational rehabilitation), Title XIX of the Social Security Act (Medicaid), and Title XVI of the Social Security Act (supplemental security income);
 - (c) developing and implementing interagency financing strategies for the provision of education, health, mental health, and social services, including transition services and related services under the IDEA; and
 - (d) interagency personnel development for individuals working on coordinated services.
- (3) If an LEA is carrying out a coordinated services project under Title XI of the Elementary and Secondary Education Act of 1965 and a coordinated services project under Part B in the same schools, such agency shall use amounts under section 613(f) in accordance with the requirements of that title.

SECTION 613(g)--SCHOOL-BASED IMPROVEMENT PLAN

This section sets forth requirements with which an LEA must comply if it elects to use Part B funds to permit a public school within the LEA's jurisdiction to design, implement, and evaluate a school-based improvement plan:

- (1) Each LEA may, in accordance with section 613(g)(2), use Part B funds to permit a public school within the LEA's jurisdiction to design, implement, and evaluate a school-based improvement plan that is consistent with the purposes described in section 651(b) and designed to improve educational and transitional results for all children with disabilities and, as appropriate, for other children consistent with section 613(a)(4)(A) and (B) in that public school [613(g)(1)].
- (2) An SEA may grant authority to an LEA to permit a public school described in section 613(g)(1) (through a school-based standing panel established under section 613(g)(4)(B)) to design, implement, and evaluate a school-based improvement plan described in section 613(g)(1) for a period not to exceed 3 years [613(g)(2)(A)].
- (3) If an SEA grants the authority described in section 613(g)(2)(A), an LEA granted such authority must have the sole responsibility of oversight of all activities relating to the design, implementation, and evaluation of any school-based improvement plan that a public school is permitted to design under section 613(g).
- (4) A school-based improvement plan described in section 613(g)(1) must--
 - (a) be designed to be consistent with the purposes described in section 651(b) and to improve educational and transitional results for all children with disabilities and, as appropriate, for other children consistent with section 613(a)(4)(A) and (B), who attend the school for which the plan is designed and implemented;
 - (b) be designed, evaluated, and, as appropriate, implemented by a school-based standing panel established in accordance with section 613(g)(4)(B);
 - (c) include goals and measurable indicators to assess the progress of the public school in meeting such goals; and
 - (d) ensure that all children with disabilities receive the services described in the IEPs of such children.
- (5) An LEA that is granted authority under section 613(g)(2) to permit a public school to design, implement, and evaluate a school-based improvement plan shall--
 - (a) select each school under the agency's jurisdiction that is eligible to design, implement, and evaluate such a plan [613(g)(5)(A)];
 - (b) require each school selected under section 613(g)(5)(A), in accordance with criteria established by the LEA under section 613(g)(5)(C), to establish a school-based standing panel to carry out the duties described in section 613(g)(3)(B);
 - (c) establish--
 - (i) criteria that the LEA will use in the selection of an eligible school under 613(g)(5)(A);
 - (ii) criteria that a public school selected will use in the establishment of a school-based standing panel to carry out the duties described in paragraph section 613(g)(3)(B) and that shall ensure

that the membership of such panel reflects the diversity of the community in which the public school is located and includes, at a minimum--

- (I) parents of children with disabilities who attend such public school, including parents of children with disabilities from unserved and underserved populations, as appropriate;
 - (II) special education and general education teachers of such public school;
 - (III) special education and general education administrators, or the designee of such administrators, of such public school; and
 - (IV) related services providers who are responsible for providing services to the children with disabilities who attend such public school; and
- (iii) criteria that the LEA will use with respect to the distribution of funds under Part B to carry out section 613(g) [613(g)(5)(C)];
 - (d) disseminate the criteria established under section 613(g)(5)(C) to local school district personnel and local parent organizations within the jurisdiction of such LEA;
 - (e) require a public school that desires to design, implement, and evaluate a school-based improvement plan to submit an application at such time, in such manner, and accompanied by such information as such LEA shall reasonably require; and
 - (f) establish procedures for approval by such LEA of a school-based improvement plan designed under section 613(g).
- (6) A school-based improvement plan described in 613(g)(1) may be submitted to an LEA for approval only if a consensus with any matter relating to the design, implementation, or evaluation of the goals of such plan is reached by the school-based standing panel that designed such plan.
 - (7) In carrying out the requirements of section 613(g), an LEA must ensure that the parents of children with disabilities are involved in the design, evaluation, and, where appropriate, implementation of school-based improvement plans in accordance with section 613(g).
 - (8) An LEA may approve a school-based improvement plan of a public school within the jurisdiction of such agency for a period of 3 years, if--
 - (a) the approval is consistent with the policies, procedures, and practices established by the LEA and in accordance with section 613(g); and
 - (b) a majority of parents of children who are members of the school-based standing panel, and a majority of other members of the school-based standing panel, that designed such plan agree in writing to such plan [section 613(g)(6)(B)].
 - (9) If a public school within the jurisdiction of an LEA meets the applicable requirements and criteria described in paragraphs 613(g)(3) and (4) at the expiration of the 3-year approval period described in section 613(g)(6)(B), such agency may approve a school-based improvement plan of such school for an additional 3-year period.

SECTION 613(h)--DIRECT SERVICES BY THE STATE EDUCATIONAL AGENCY

This section sets forth requirements for an SEA to use funds, that would otherwise have been available to an LEA or State agency, to provide special education and related services directly to children with disabilities for whom such LEA or State agency is responsible, under the circumstances described below:

- (1) An SEA must use the payments that would otherwise have been available to an LEA or to a State agency to provide special education and related services directly to children with disabilities residing in the area served by that local agency, or for whom that State agency is responsible, if the SEA determines that the LEA or State agency, as the case may be--
 - (a) has not provided the information needed to establish the eligibility of such agency under section 613;
 - (b) is unable to establish and maintain programs of free appropriate public education that meet the requirements of section 613(a);
 - (c) is unable or unwilling to be consolidated with one or more LEAs in order to establish and maintain such programs; or
 - (d) has one or more children with disabilities who can best be served by a regional or State program or service-delivery system designed to meet the needs of such children.
- (2) The SEA may provide special education and related services under paragraph (1) in such manner and at such locations (including regional or State centers) as the State agency considers appropriate. Such education and services must be provided in accordance with Part B requirements.

SECTION 613(i)--STATE AGENCY ELIGIBILITY

Any State agency that desires to receive a subgrant for any fiscal year under section 611(g) must demonstrate to the satisfaction of the SEA that--

- (1) all children with disabilities who are participating in programs and projects funded under Part B receive a free appropriate public education, and that those children and their parents are provided all the rights and procedural safeguards described in Part B; and
- (2) the agency meets such other conditions of section 613 as the Secretary determines to be appropriate.

SECTION 613(j)--DISCIPLINARY INFORMATION

This section provides that:

- (1) The State may require that an LEA include in the records of a child with a disability a statement of any current or previous disciplinary action that has been taken against the child and transmit such statement to the same extent that such disciplinary information is included in, and transmitted with, the student records of nondisabled children.
- (2) The statement may include a description of any behavior engaged in by the child that required disciplinary action, a description of the disciplinary action taken, and any other information that is relevant to the safety of the child and other individuals involved with the child.
- (3) If the State adopts such a policy, and the child transfers from one school to another, the transmission of any of the child's records must include both the child's current IEP and any such statement of current or previous disciplinary action that has been taken against the child.

SECTION 614--EVALUATIONS, ELIGIBILITY DETERMINATIONS, IEPs, AND EDUCATIONAL PLACEMENTS

SECTION 614(a)(1)--INITIAL EVALUATIONS

This section incorporates into statute the requirements regarding initial (or "preplacement") evaluations set forth in the Part B regulations, with the following additions:

- (1) an initial evaluation must consist of procedures to determine whether a child is a child with a disability, and to determine the educational needs of such child (emphasis added);
- (2) parental consent for evaluation shall not be construed as consent for placement for receipt of special education and related services; and
- (3) if the parents of a child refuse consent for the evaluation, the agency may continue to pursue an evaluation by utilizing the mediation and due process procedures under section 615, except to the extent inconsistent with State law relating to parental consent.

SECTION 614(a)(2)--REEVALUATIONS

This section:

- (a) incorporates into statute the current regulatory requirement that an LEA shall ensure that a reevaluation of each child with a disability is conducted if conditions warrant, or if the child's parent or teacher requests a reevaluation, but at least once every 3 years; and
- (b) requires that a reevaluation be in accordance with section 614(b) and (c) (see discussion below).

SECTION 614(b)(1)--EVALUATION PROCEDURES--NOTICE

This section requires an LEA to provide notice to the parents of a child with a disability, in accordance with sections 615(b)(3), (b)(4), and (c) of section 615, that describes any evaluation procedures that the LEA proposes to conduct.

SECTION 614(b)(2)--EVALUATION PROCEDURES--CONDUCT OF EVALUATION

This section incorporates requirements regarding procedures for initial evaluations and reevaluations, as set forth in the current Part B regulations, and further requires that, in conducting an initial evaluation or reevaluation, the LEA:

- (1) Uses a variety of assessment tools and strategies to gather relevant functional and developmental information, including information provided by the parent, that may assist in determining whether the child is a child with a disability and the content of the child's IEP, including information related to enabling the child to be involved in and progress in the general curriculum or, for preschool children, to participate in appropriate activities; and
- (2) Uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

SECTION 614(b)(3)--EVALUATIONS AND REEVALUATIONS -- EVALUATION PROCEDURES -- ADDITIONAL REQUIREMENTS

This section retains requirements regarding procedures for initial evaluations and reevaluations, as set forth in the current Part B regulations, and further requires that each LEA ensure that assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

SECTION 614(b)(4)--EVALUATIONS AND REEVALUATIONS--EVALUATION PROCEDURES--DETERMINATION OF ELIGIBILITY

This section requires that, upon completion of administration of tests and other evaluation materials:

- (1) the determination of whether the child is a child with a disability as defined in section 602(3) is made by a team of qualified professionals and the parent of the child in accordance with section 614(b)(5); and
- (2) a copy of the evaluation report and the documentation of determination of eligibility is given to the parent.

SECTION 614(b)(5)--SPECIAL RULE FOR ELIGIBILITY DETERMINATION

This section requires that, in making a determination of eligibility under section 614(b)(4)(A), a child may not be determined to be a child with a disability if the determinant factor for such determination is lack of instruction in reading or math or limited English proficiency.

SECTION 614(c)--ADDITIONAL REQUIREMENTS FOR EVALUATION AND REEVALUATIONS

This section adds requirements that:

- (1) As part of an initial evaluation (if appropriate) and as part of any reevaluation under this section, the IEP Team and other qualified professionals, as appropriate--
 - (a) shall review existing evaluation data on the child, including evaluations and information provided by the parents of the child, current classroom-based assessments and observations, and teacher and related services providers observation; and
 - (b) on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine--
 - (i) whether the child has a particular category of disability, as described in section 602(3), or, in case of a reevaluation of a child, whether the child continues to have such a disability;
 - (ii) the present levels of performance and educational needs of the child;
 - (iii) whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and
 - (iv) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general curriculum [614(c)(1)(B)].
- (2) The LEA shall administer such tests and other evaluation materials as may be needed to produce the data identified by the IEP Team under section 614(c)(1)(B).
- (3) Each LEA shall obtain informed parental consent, in accordance with section 614(a)(1)(C), prior to conducting any reevaluation of a child with a disability, except that such informed parent consent need not be obtained if the LEA can demonstrate that it had taken reasonable measures to obtain such consent and the child's parent has failed to respond.
- (4) If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, the LEA--

- (a) shall notify the child's parents of--
 - (i) that determination and the reasons for it; and
 - (ii) the right of such parents to request an assessment to determine whether the child continues to be a child with a disability; and
 - (b) is not required to conduct such an assessment unless requested to by the child's parents.
- (5) An LEA shall evaluate a child with a disability in accordance with section 614 before determining that the child is no longer a child with a disability.

SECTION 614(d)--INDIVIDUALIZED EDUCATION PROGRAMS

With the exception of section 614(d)(6), discussed below, the provisions of section 614 in the 1997 amendments are not effective until July 1, 1998. The IEP requirements in prior law in sections 602(a)(20), 612(4), and 614(a)(5) and in the Part B regulations at 34 CFR §§300.340- 300.350, as in effect before enactment of the IDEA Amendments of 1997 continue to apply until July 1, 1998. The changes in section 614(d)(1)-(5) will be the subject of future guidance.

SECTION 614(d)(6)--CHILDREN WITH DISABILITIES IN ADULT PRISONS

This section:

- (1) specifies Part B requirements that do not apply to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons; and
- (2) provides that the IEP Team may modify the IEP or placement of a child with a disability convicted as an adult under State law and incarcerated in an adult prison, notwithstanding the requirements of sections 612(a)(5)(A) [least restrictive environment] and 614(d)(1)(A) [IEP contents], if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated. Specifically, this section provides that the following requirements do not apply to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons:
 - (1) The requirements contained in sections 612(a)(17) and 614(d)(1)(A)(v) (relating to participation of children with disabilities in general assessments);
 - (2) The requirements of section 614(d)(1)(A)(vii)(I) and (II) (relating to transition planning and transition services), do not apply with respect to such children whose Part B eligibility will end, because of their age, before they will be released from prison.

SECTION 614(e)--CONSTRUCTION

This section provides that nothing in section 614 may be construed to require the IEP Team to include information under one component of a child's IEP that is already contained under another component of such IEP.

SECTION 614(f)--EDUCATIONAL PLACEMENTS

This section adds a requirement that each LEA or SEA must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

SECTION 615--PROCEDURAL SAFEGUARDS

SECTION 615(a)--ESTABLISHMENT OF PROCEDURES

This section retains the requirement in prior law that any SEA, State agency, or LEA that receives assistance under this part shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

SECTION 615(b)--TYPES OF PROCEDURES

This section retains the requirements of prior law regarding the right of parents to: examine records relating to their child [615(b)(1)], obtain an independent educational evaluation of the child [615(b)(1)], receive prior written notice of actions proposed or refused by the public agency [615(b)(3)], in their native language, unless clearly not feasible to do so [615(b)(4)], and initiate a due process hearing regarding such actions [615(b)(6)]. It includes the following changes from prior law:

- (1) It adds, at section 615(b)(1), the requirement that parents have an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of their child, and the provision of a free appropriate public education to the child.
- (2) The Act is revised, at section 615(b)(2), to specify that:
 - (a) a surrogate parent must be appointed whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents (emphasis added; this is consistent with current regulatory requirements); and
 - (b) a person assigned to act as a surrogate for the parents may not be an employee of the SEA, the LEA, or any other agency that is involved in the education or care of the child (emphasis added).
- (3) Section 615(b)(5) establishes a requirement that the rights afforded to parents under section 615 include an opportunity for mediation in accordance with section 615(e). (See discussion below regarding the requirements of section 615(e).)
- (4) Section 615(b)(7) establishes a requirement that an SEA, State agency, or LEA that receives assistance under Part B of the Act, establish and maintain procedures requiring the parent of a child with a disability, or the attorney representing the child, to provide notice (which shall remain confidential)--
 - (a) to the SEA or LEA, as the case may be, in the complaint filed under section 615(b)(6); and
 - (b) that includes--
 - (i) the name of the child, the address of the residence of the child, and the name of the school the child is attending;
 - (ii) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and
 - (iii) a proposed resolution of the problem to the extent known and available to the parents at the time.
- (5) Section 615(b)(8) requires the SEA to develop a model form to assist parents in filing a complaint (i.e., requesting an impartial due process hearing).

SECTION 615(c)--CONTENT OF PRIOR WRITTEN NOTICE

This section retains, with the following modifications, the requirements of prior law regarding the content of prior written notice to the parents:

- (1) A statement that the parents of a child with a disability have protection under the procedural safeguards of Part B and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and
- (2) Sources for parents to contact to obtain assistance in understanding the provisions of Part B of the Act.

SECTION 615(d)--PROCEDURAL SAFEGUARDS NOTICE

This section requires that:

- (1) A copy of the procedural safeguards available to the parents of a child with a disability is given to the parents, at a minimum--
 - (a) upon initial referral for evaluation;
 - (b) upon each notification of an IEP meeting and upon reevaluation of the child; and
 - (c) upon registration of a complaint (i.e., a request for an impartial due process hearing under section 615(b)(6)).
- (2) The procedural safeguards notice includes a full explanation of the procedural safeguards, written in the native language of the parents, unless it clearly is not feasible to do so, and written in an easily understandable manner, available under section 615 and under regulations promulgated by the Secretary relating to--
 - (a) independent educational evaluation;
 - (b) prior written notice;
 - (c) parental consent;
 - (d) access to educational records;
 - (e) opportunity to present complaints;
 - (f) the child's placement during pendency of due process proceedings;
 - (g) procedures for students who are subject to placement in an interim alternative educational setting;
 - (h) requirements for unilateral placement by parents of children in private schools at public expense;
 - (i) mediation;
 - (j) due process hearings, including requirements for disclosure of evaluation results and recommendations;
 - (k) State-level appeals (if applicable in that State);

- (l) civil actions; and
- (m) attorneys' fees.

SECTION 615(e)--MEDIATION

This section adds the requirement that the SEA and any LEA that receives assistance under Part B establish procedures to ensure that:

- (1) Parties to disputes involving any matter described in section 615(b)(6) may resolve such disputes through a mediation process which, at a minimum, is available whenever a hearing is requested under section 615(f) or (k).
- (2) The mediation process--
 - (a) is voluntary on the part of the parties;
 - (b) is not used to deny or delay a parent's right to a due process hearing under section 615(f), or to deny any other rights afforded under Part B of the Act; and
 - (c) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.
- (3) The State maintains a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.
- (4) The State bears the cost of the mediation process.
- (5) Each session in the mediation process is scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.
- (6) An agreement reached by the parties to the dispute in the mediation process is set forth in a written mediation agreement.
- (7) Discussions that occur during the mediation process are confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of such process.

SECTION 615(f)--IMPARTIAL DUE PROCESS HEARINGS

This section makes the following changes to prior law regarding impartial due process hearings:

- (1) It adds, at section 615(f)(2), a requirement that, at least 5 business days prior to a hearing, each party must disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing. It further provides that a hearing officer may bar any party that fails to comply with this disclosure requirement from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.
- (2) It specifies, at section 615(f)(3), that a hearing may not be conducted by an employee of the SEA or the LEA involved in the education or care of the child.

SECTION 615(g)--APPEAL

This section retains the requirements in prior law that:

- (1) any party aggrieved by the findings and decision rendered in a due process hearing conducted by an LEA may appeal the such findings and decision to the SEA;
- (2) the SEA must conduct an impartial review of such decision; and
- (3) the officer conducting the review must make an independent decision upon completion of the review.

SECTION 615(h)--SAFEGUARDS

This section maintains the requirements in prior law that any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), be accorded the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities, and the right to present evidence and confront, cross-examine, and compel the attendance of witnesses. It also retains the right of any party to receive a written or electronic verbatim record of the hearing and written findings of fact and decisions, but further provides, at section 615(h)(3) and (4), that the parents may, at their option, choose the format in which they receive the hearing record and the findings of fact and decisions (i.e., written or electronic).

SECTION 615(i)--ADMINISTRATIVE PROCEDURES

This section retains the provisions of prior law regarding finality of hearing and review decisions (subject to the right to appeal), the right to bring a civil action and procedures regarding such actions, and the award of attorneys' fees. It adds, at section 615(i)(3)(D)(ii), a provision that attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion

of the State, for a mediation described in section 615(e) that is conducted prior to the filing of a complaint under section 615(b)(6) or (k). It also adds, at section 615(i)(3)(F)(iv), to the list of circumstances (from prior law) under which a court reduces attorneys fees, a new provision that directs reduction in an award of attorneys fees if the attorney representing the parent did not provide to the school district the appropriate information in the due process complaint in accordance with section 615(b)(7).

SECTION 615(j)--MAINTENANCE OF CURRENT EDUCATIONAL PLACEMENT

This section retains the requirements of prior law that, during the pendency of any proceedings conducted pursuant to section 615, unless the State or local educational agency and the parents otherwise agree, the child must remain in his or her then-current educational placement, or, if applying for initial admission to a public school, with the consent of the parents, be placed in the public school program until all such proceedings have been completed. This section specifies that these requirement apply, except as provided in section 615(k)(7) (regarding placement during appeals when a parent requests a hearing regarding a disciplinary action described in 615(k)(1)(A)(ii) or (2) to challenge the interim alternative educational setting or the manifestation determination).

SECTION 615(k)--PLACEMENT IN ALTERNATIVE EDUCATIONAL SETTING

This section sets forth the requirements regarding discipline and placement of students with disabilities in alternative educational settings, and provides that:

- (1) School personnel under section 615 may order a change in the placement of a child with a disability--
 - (a) to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives would be applied to children without disabilities); and
 - (b) to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days if--

- (i) the child carries a weapon to school or to a school function under the jurisdiction of a State or an LEA; or
 - (ii) the child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of a State or local educational agency [section 615(k)(1)(A)].
- (2) Either before or not later than 10 days after taking a disciplinary action described in 615(k)(1)(A):
 - (a) if the LEA did not conduct a functional behavioral assessment and implement a behavioral intervention plan for such child before the behavior that resulted in the suspension described in 615(k)(1)(A), the agency must convene an IEP meeting to develop an assessment plan to address that behavior; or
 - (b) if the child already has a behavioral intervention plan, the IEP Team must review the plan and modify it, as necessary, to address the behavior [section 615(k)(1)(B)].
- (3) A hearing officer may order a change in the placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer--
 - (a) determines that the public agency has demonstrated by substantial evidence that maintaining the current placement of such child is substantially likely to result in injury to the child or to others;
 - (b) considers the appropriateness of the child's current placement;
 - (c) considers whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and
 - (d) determines that the interim alternative educational setting meets the requirements of section 615(k)(3)(B) (described in paragraph (5) below) [section 615(k)(2)].
- (4) The alternative educational setting described in section 615(k)(1)(A)(ii) must be determined by the IEP Team [section 615(k)(3)(A)].
- (5) Any interim alternative educational setting in which a child is placed under section 615(k)(1) or (2) must--
 - (a) be selected so as to enable the child to continue to participate in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP; and
 - (b) include services and modifications designed to address the behavior described in section 615(k)(1) or (2) so that it does not recur [section 615(k)(3)(B)].
- (6) If a disciplinary action is contemplated as described in section 615(k)(1) or (2) for a behavior of a child with a disability described in either of those subsections, or if a disciplinary action involving a change of placement for more than 10 days is contemplated for a child with a disability who has engaged in other behavior that any rule or code of conduct of the LEA that applies to all children--

- (a) not later than the date on which the decision to take that action is made, the parents must be notified of that decision and of all procedural safeguards accorded under section 615; and
 - (b) immediately, if possible, but in no case later than 10 school days after the date on which the decision to take that action is made, a review must be conducted of the relationship between the child's disability and the behavior subject to the disciplinary action [section 615(k)(4)(A)].
- (7) A review described in section 615(k)(4)(A) must be conducted by the IEP Team and other qualified personnel [section 615(k)(4)(B)].
- (8) In carrying out a review described in section 615(k)(4)(A), the IEP Team may determine that the behavior of the child was not a manifestation of such child's disability only if the IEP Team--
- (a) first considers, in terms of the behavior subject to disciplinary action, all relevant information, including--
 - (i) evaluation and diagnostic results, including such results or other relevant information supplied by the parents of the child;
 - (ii) observations of the child; and
 - (iii) the child's IEP and placement; and
 - (b) then determines that--
 - (i) in relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;
 - (ii) the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and
 - (iii) the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action [section 615(k)(4)(C)].
- (9) If the result of the review described in section 615(k)(4) is a determination, consistent with section 615(k)(4)(C), that the behavior of the child with a disability was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities, except as provided in section 612(a)(1) (i.e., the State must make a free appropriate public education available to all eligible children with disabilities, including children with disabilities who have been suspended or expelled from school) [section 615(k)(5)(A)].
- (10) If the public agency initiates disciplinary procedures applicable to all children, the agency must ensure that the special education and disciplinary records of the child with a disability are transmitted for consideration by the person or persons making the final determination regarding the disciplinary action [section 615(k)(5)(B)].
- (11) If the child's parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement, the parent may request a hearing [section 615(k)(6)(A)(i)].

- (12) The State or local educational agency must arrange for an expedited hearing in any case described in section 615(k) when requested by a parent [section 615(k)(6)(A)(ii)].
- (13) In reviewing a decision with respect to the manifestation determination, the hearing officer must determine whether the public agency has demonstrated that the child's behavior was not a manifestation of such child's disability consistent with the requirements of section 615(k)(4)(C) [section 615(k)(6)(B)(i)].
- (14) In reviewing a decision under section 615(k)(1)(A)(ii) to place the child in an interim alternative educational setting, the hearing officer must apply the standards set out in section 615(k)(1)(A)(ii)(2) (described in paragraph (3) above) [section 615(k)(6)(B)(ii)].
- (15) When a parent requests a hearing regarding a disciplinary action described in section 615(k)(1)(A)(ii) or (2) to challenge the interim alternative educational setting or the manifestation determination, the child must remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in section 615(k)(1)(A)(ii) or (2), whichever occurs first, unless the parent and the State or local educational agency agree otherwise [section 615(k)(7)(A)].
- (16) If a child is placed in an interim alternative educational setting pursuant to section 615(k)(1)(A)(ii) or (2) and school personnel propose to change the child's placement after expiration of the interim alternative placement, during the pendency of any proceeding to challenge the proposed change in placement, the child must remain in the current placement (the child's placement prior to the interim alternative educational setting), except as provided in section 615(k)(7)(C) [section 615(k)(7)(B)].
- (17) If school personnel maintain that it is dangerous for the child to be in the current placement (placement prior to removal to the interim alternative education setting) during the pendency of the due process proceedings, the LEA may request an expedited hearing [section 615(k)(7)(C)(i)].
- (18) In determining whether the child may be placed in the alternative educational setting or in another appropriate placement ordered by the hearing officer, the hearing officer must apply the standards set out in section 615(k)(2) (described in paragraph (3) above) [section 615(k)(7)(C)(ii)].
- (19) A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated any rule or code of conduct of the LEA, including any behavior described in section 615(k)(1), may assert any of the protections provided for in Part B if the LEA had knowledge (as determined in accordance with section 615(k)(8)(A)) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred [section 615(k)(8)(A)].
- (20) An LEA is deemed to have knowledge that a child is a child with a disability if--
 - (a) the parent of the child has expressed concern in writing (unless the parent is illiterate or has a disability that prevents compliance with the requirements contained in this clause) to personnel of the appropriate educational agency that the child is in need of special education and related services;
 - (b) the behavior or performance of the child demonstrates the need for such services;
 - (c) the parent of the child has requested an evaluation of the child pursuant to section 614; or

- (d) the teacher of the child, or other personnel of the LEA, has expressed concern about the behavior or performance of the child to the director of special education of such agency or to other personnel of the agency [section 615(k)(8)(B)].
- (21) If an LEA does not have knowledge that a child is a child with a disability (in accordance with section 615(k)(8)(B)) prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measures as measures applied to children without disabilities who engaged in comparable behaviors consistent with section 615(k)(8)(C)(ii) [section 615(k)(8)(C)(i)].
- (22) If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under section 615(k)(1) or (2), the evaluation must be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency must provide special education and related services in accordance with the provisions of Part B of the Act, except that, pending the results of the evaluation, the child must remain in the educational placement determined by school authorities [section 615(k)(8)(C)(ii)].
- (23) Nothing in Part B shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability [615(k)(9)(A)].
- (24) An agency reporting a crime committed by a child with a disability to appropriate authorities committed by a child with a disability must ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime [section 615(k)(9)(B)].
- (25) The following terms are defined as follows for purposes of section 615(k):
- (a) The term "controlled substance" means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c) (copy attached)) [section 615(k)(10)(A)].
- (b) The term "illegal drug" means a controlled substance; but does not include such a substance that is legally possessed or used under the supervision of a licensed healthcare professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law [section 615(k)(10)(B)].
- (c) The term "substantial evidence" means beyond a preponderance of the evidence [section 615(k)(10)(C)].
- (d) The term "weapon" has the meaning given the term "dangerous weapon" under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code (copy attached) [section 615(k)(10)(D)].

SECTION 615(m)--TRANSFER OF PARENTAL RIGHTS AT AGE OF MAJORITY

This section permits States to transfer procedural rights under Part B from the parents to children with disabilities who reach the age of majority under State law, but who have not been determined to be incompetent under State law. If the State chooses to provide for such transfer, it must ensure that:

- (1) The public agency provides any notice required by section 615 to both the individual and the parents;

- (2) The public agency transfers all other rights accorded to parents under Part B to the child;
- (3) The public agency notifies the individual and the parents of the transfer of rights; and
- (4) All rights accorded to parents under Part B transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

In addition, if State law allows that a child with a disability, who has reached the age of majority under State law and has not determined to be incompetent, may be determined not to have the ability to provide informed consent with respect to the educational program of the child, the State establishes procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under Part B of the Act.

SECTION 616--WITHHOLDING AND JUDICIAL REVIEW

Section 616 retains the provisions in prior law regarding the Secretary's withholding of funds under Part B, with the following changes:

- (1) Section 616(a)(1)(B) has been revised to provide that the Secretary may, under specified conditions:
 - (a) withhold, in whole or in part, any further payments to the State under Part B; or
 - (b) refer the matter for appropriate enforcement action, which may include referral to the Department of Justice (underlining added to show additions to prior law).
- (2) Section 616(c) has been added to set forth specific procedures for withholding Part B funds from a State where responsibility for ensuring that the requirements of Part B are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons is assigned to a public agency other than the SEA pursuant to section 612(a)(11)(C). That section provides that:

For purposes of section 616, where responsibility for ensuring that the requirements of Part B are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons is assigned to a public agency other than the SEA pursuant to section 612(a)(11)(C), the Secretary, in instances where the Secretary finds that the failure to comply substantially with the provisions of Part B are related to a failure by the public agency, shall take appropriate corrective action to ensure compliance with Part B, except--

- (1) any reduction or withholding of payments to the State is proportionate to the total funds allotted under section 611 to the State as the number of eligible children with disabilities in adult prisons under the supervision of the other public agency is proportionate to the number of eligible individuals with disabilities in the State under the supervision of the SEA; and
- (2) any withholding of funds under section 616(c)(1) shall be limited to the specific agency responsible for the failure to comply with Part B.

SECTION 617--ADMINISTRATION

Section 617(c) retains without change the requirements at section 617(c) in prior law regarding the confidentiality of personally identifiable information. The other provisions of section 617 address responsibilities of the Secretary, and do not set forth requirements for States, SEAs, or LEAs.

SECTION 618--PROGRAM INFORMATION

The changes to section 618 set forth in the IDEA Amendments of 1997 do not take effect until July 1, 1998. Section 618 as in effect before enactment of the IDEA Amendments of 1997 continues to apply until July 1, 1998. The changes in section 618 will be the subject of future guidance.

SECTION 619--PRESCHOOL GRANTS

The changes to section 619 set forth in the IDEA Amendments of 1997 do not take effect this year. For funds appropriated before Federal fiscal year 1998, Section 619 as in effect before enactment of the IDEA Amendments of 1997 continues to apply. The changes in section 619 will be the subject of future guidance.

Attachments:

Individuals with Disabilities Education Act Amendments of 1997
Assurances regarding Implementation of the Requirements during Federal Fiscal Year 1997
Relevant Provisions of Titles 18 and 21 of the United States Code
(Attachments not included in web site version)

cc: State Directors of Special Education
Regional Resource Centers
Federal Resource Center
National Early Childhood Technical Assistance System
Technical Assistance for Parent Programs