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April 1, 2005 Seminar to Cover Provisions of Act

On April 1, 2005, Knutson, Flynn & Deans, will hold a free seminar in which the Individuals With Disabilities Education Improvement Act's provisions will be discussed in greater detail. Additional information concerning the seminar will be mailed to you in the next few weeks. If you have any specific questions concerning the Act that you would like to have answered in advance of the seminar, please email them to us at djfolks@kfdmn.com.

To be included on our email list, contact: djfolks@kfdmn.com. Members will receive notification of upcoming presentations by Knutson, Flynn & Deans as well as newsletters on timely issues. Email addresses will not be provided to outside organizations.

THE INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT OF 2004

On December 3, 2004, President George W. Bush signed into law the Individuals with Disabilities Education Improvement Act of 2004 ("the Act"), which reauthorizes the Individuals with Disabilities Education Act ("IDEA") for seven more years. This memorandum highlights selected provisions of the Act that are particularly important to school districts. This is only a summary of the major provisions.

This article focuses on the following key areas: (1) individualized education programs ("IEPs") and paperwork reduction measures; (2) procedural safeguards requirements and due process; (3) discipline; (4) coordination with the No Child Left Behind Act of 2001 ("NCLBA"); and (5) implementing regulations. The provisions discussed below generally take effect July 1, 2005, except with respect to teacher qualification requirements, which are effective as of the date of enactment.

IEPS AND PAPERWORK REDUCTION

The Act makes significant changes to IEP requirements, including changes to provide more flexibility in developing and reviewing a child's IEP.

Evaluations and Provision of Services

Although the Act continues to require school districts to obtain parental consent before

conducting an initial evaluation, the Act permits, in some situations, initial evaluations without parental consent. Specifically, unless parental consent is required under state law, a school district may proceed with an initial evaluation, even if a parent refuses to consent to an initial evaluation or does not respond to a request for consent, if the district follows the procedural safeguards requirements set out in the Act (summarized below). The ability to override parental refusal to an initial evaluation remains subject to any state law regarding parental consent. Minnesota law currently does not allow school districts to override a parent's written refusal to consent to an evaluation. See Minn. Stat. § 125A.091, subd. 5(a). Thus, the Act does not empower a Minnesota school district to seek an initial evaluation over the parent's objection.

A district also may not provide special education and related services to a child without parental consent. This is consistent with Minnesota law. Id. If a parent does not consent to services under the Act (or does not respond to a request for consent), the school district will not be liable under the IDEA for failing to convene an IEP meeting, failing to develop an IEP, or not providing special education and related services.

Reevaluations

Unless the parent and school district agree otherwise, the Act

limits reevaluations to no more than one per year and at least one every three years. The Act continues to require an evaluation before terminating a child's eligibility for services, unless the ineligibility is based on either the student's graduation from secondary school with a "regular diploma" or the student's "aging-out" of special education under state law.

IEP Team Meetings

Under the Act, an IEP team member is not required to attend all or part of an IEP meeting if the parents and school district agree that that team member's participation "is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting." Even if the meeting does involve "a modification to or discussion of the member's area of the curriculum or related services," however, parents and educators can agree to excuse the IEP team member from attending all or part of the meeting if the member submits written input to the parent and the IEP team prior to the meeting. In either case, the parent must provide consent in writing.

Furthermore, parents and educators may agree to conduct IEP meetings and other meetings through alternative means, including videoconferences and

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conference calls. The Act directs school districts to encourage consolidation of reevaluation and IEP team meetings to the extent practicable.

Content of the IEP

The Act alters the required content of the IEP itself. For instance, the Act requires a child's IEP to describe how the district will measure the child's progress toward meeting the annual goals included in the IEP and to explain when the district will provide parents with periodic reports regarding the child's progress. These reports may be provided, for example, "quarterly . . . concurrent with the issuance of report cards." In addition, once a child reaches the age of 16, the IEP must include "appropriate measurable postsecondary goals" based on age appropriate transition assessments related to training, education, employment and, where appropriate, independent living skills.

In addition, although the current IDEA requires an IEP to include a statement of measurable annual goals, "including benchmarks or short-term objectives," the Act now requires only a statement of measurable annual goals. A statement of "benchmarks or short-term objectives" is now required only with respect to students with disabilities who take alternate assessments aligned with alternate achievement standards. In addition, if a child will participate in alternate assessments based on either general or alternative achievement standards, the IEP must explain why "the child cannot participate in the regular assessment" and why "the particular alternate assessment selected is appropriate for the child." In an apparent effort to align IDEA more closely with NCLBA, the Act permits IEP teams only to recommend appropriate accommodations or use of alternate assessments, but not to exempt children with disabilities from state or district-wide assessments altogether.

Review and Revision of the IEP

The Act generally retains the requirement for annual review of a child's IEP. It, however, permits parents and educators to agree to further modifications of the IEP without a full IEP team meeting.

The Act establishes a pilot program by which the U.S. Department of Education ("USDOE") can permit up to 15 states to use multi-year IEPs. Under the pilot program, participating states can permit use of a single IEP for up to three years.

Use of a multi-year IEP must be voluntary for parents in participating states. In addition, states that participate in the pilot program must have procedures in place for review and revision of multi-year IEPs, including at the child's "natural transition points." The Act generally defines "natural transition points" by reference to the child's change in school level, such as from preschool to elementary school or from middle school to high school. It is not yet known whether Minnesota will participate in this pilot program.

Effect of Student Transfers on the IEP

The Act provides that students who transfer during a school year from one school district to another within the same state must continue to receive services "comparable to those described in the previously held IEP" until the new school district "adopts the previously held IEP or develops, adopts, and implements a new IEP." If, during a school year, a student transfers to a new school district in a different state, the new school district must continue to provide services "comparable to those described in the previously held IEP" until the district conducts an evaluation of the child (if the district believes an evaluation is necessary) and, if appropriate, develops a new IEP.

Paperwork Reduction Pilot Program

The Act establishes a pilot program by which USDOE can grant up to 15 states waivers of certain IDEA statutory or regulatory requirements. The states' proposals must seek to "reduce excessive paperwork and non-instructional time burdens that do not assist in improving educational and functional results for children with disabilities." It is not yet known whether Minnesota will participate in this pilot program.

PROCEDURAL SAFEGUARDS AND DUE PROCESS

In an effort to reduce litigation involving schools and parents of children with disabilities, the Act modifies in several ways the detailed procedural safeguards contained in IDEA.

Procedural Safeguards Notices

The Act reduces the frequency with which school districts must provide a procedural safeguards notice to parents of a child with a disability. For example, under the Act, districts are no longer required to provide

the procedural safeguards notice upon each notification of an IEP meeting. Rather, districts must provide parents with the procedural safeguards notice upon initial referral or parental request for evaluation, upon the first filing of a due process complaint, and thereafter only once annually or upon parental request.

Complaint Notice Requirements

The Act requires any party initiating a due process complaint—whether a parent or the school district (or the attorney representing a party)—to provide confidential notice of the complaint to the other party and to the state education agency. Under the Act, a party may not receive a due process hearing until that party (or his/her attorney) files a notice that meets the Act's requirements. This new requirement appears to conflict with current Minnesota law. Minnesota Statutes Section 125A.091, subdivision 14 makes it clear that the MDOE cannot "deny a request for [a due process] hearing because the request is incomplete."

The Act also limits the issues that may be raised at the due process hearing to those set forth in the complaint notice, unless the parties agree otherwise or unless the hearing officer permits the complaint notice to be amended, which may be done at any time not later than five days before the due process hearing. This change is similar to a previous version of Minnesota law, which stated that any issue not pleaded with specificity was waived. See Minn. Stat. § 125A.09, subd. 6 (2002). Although that statute was repealed in 2003 by the Minnesota Legislature, the Act reintroduces the concept of limiting the issues that can be raised in a due process hearing.

Statute of Limitations for Due Process Complaints

The Act directs that a due process hearing request must be made within two years of the date that a parent or public agency "knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing, in such time as the State law allows." Since Minnesota does not have a codified statute of limitations governing the initiation of due process hearings, the two-year time period in the Act will apply in most instances. This statute of limitations does not apply if the parent was

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prevented from requesting a hearing due to the school district's misrepresentations or withholding of information.

Complaint Resolution Session

An important reform of the Act is the addition of a resolution session that provides parents and school districts an opportunity to resolve a complaint prior to initiation of a formal due process hearing. The Act requires a school district, within 15 days of receiving notice of a parent's complaint, to convene a meeting with the parent and the relevant member or members of the child's IEP team to discuss the facts underlying the parent's complaint and to give the school district an opportunity to resolve the complaint. The district may not bring an attorney to this resolution session unless the parent also is accompanied by an attorney. The Act provides that this pre-hearing resolution session is mandatory unless the parent and school district agree in writing to waive the requirement or agree to use IDEA's mediation process to try to resolve the complaint.

If the district and parent reach a resolution, the Act requires them to enter into a written settlement agreement signed by both the parent and a school district representative. This settlement is enforceable in court. If the district is unable to resolve the complaint "to the satisfaction of the parents" within 30 days after its receipt of the complaint, however, a formal due process hearing may occur, and the normal timelines for conducting and completing a due process hearing commence.

Hearing Officer Requirements

The Act includes new requirements for hearing officer credentials. The Act retains the requirement that the hearing officer not be an employee of the school district or state education agency involved in the education or care of the child at issue, but also provides that the hearing officer cannot have any other personal or professional interest that conflicts with his/her objectivity in the hearing. In addition, the Act requires the hearing officer to know and understand: (a) IDEA, federal and state regulations implementing IDEA and federal and state court interpretations of IDEA; (b) how to conduct hearings "in accordance with appropriate, standard legal practice"; and (c) how to

"render and write decisions in accordance with appropriate, standard legal practice."

The Act also restricts the hearing officer's discretion in some ways. For example, the Act directs that a hearing officer's decision generally must be made "on substantive grounds based on a determination of whether the child received a free appropriate public education" ("FAPE"). A procedural violation can be considered a denial of FAPE only if it "impeded the child's right" to FAPE, "significantly hampered the parents' opportunity to participate in the decision-making process" regarding provision of FAPE, or "caused a deprivation of educational benefits."

Attorneys' Fees

The Act significantly changes IDEA's attorneys' fees provisions. For example, the Act permits the award of reasonable attorneys' fees *to a prevailing school district or state education agency* when a complaint "or subsequent cause of action":

- Filed by the *attorney of a parent* is deemed to be "frivolous, unreasonable, or without foundation";
- Was pursued by the *attorney of a parent* "after the litigation clearly became frivolous, unreasonable, or without foundation"; or
- Was "presented [by the *attorney of a parent or the parent*] for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation."

The Act also provides that attorneys' fees are not available in connection with the new complaint resolution session required under the Act.

DISCIPLINE

The Act includes various changes regarding the treatment of children with disabilities who violate school rules. For example, although the Act continues to require "manifestation determinations," it provides that a disciplinary violation may be considered a manifestation of the child's disability only if the conduct at issue:

- Was caused by the child's disability;
- "[H]ad a direct and substantial relationship to the child's disability"; or

- "[W]as the direct result of the [school district's] failure to implement the IEP."

The Act now permits school personnel to remove students with disabilities to an interim alternative educational setting ("IAES") for up to 45 *school* days—regardless of whether the conduct at issue was a manifestation of disability—where the disciplinary violation involves illegal drugs, controlled substances or weapons. In addition, the Act authorizes removal to an IAES if the student engages in the "infliction of serious bodily injury." "Serious bodily injury" is defined as "*bodily injury* which involves . . . a substantial risk of death . . . extreme physical pain . . . protracted and obvious disfigurement . . . or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. . . ." "Bodily injury" is defined as "cut, abrasion, bruise, burn, or disfigurement . . . physical pain . . . illness . . . impairment of the function of a bodily member, organ or mental faculty . . . or any other injury to the body, no matter how temporary."

The Act also makes several important changes to the "knowledge" criteria by which students who previously had not been identified as children with disabilities could avail themselves of the IDEA's procedural protections. The new law provides that a school district will be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred—

- the parent of the child has expressed concern in writing to *supervisory or administrative personnel* of the appropriate educational agency, or a *teacher of the child*, that the child is in need of special education and related services;
- the parent of the child has requested an evaluation of the child; or
- the teacher of the child, or other personnel of the local educational agency, has expressed *specific concerns* about a pattern of behavior demonstrated by the child *directly* to the director of special education of such agency or to other supervisory personnel of the agency.

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Note that the broad “behavior or performance of the child demonstrates the need for special education. . . .” language which exists in current law has been removed. Expressions of concern by the parent must be in writing and directed to the child’s teacher or supervisory or administrative personnel. Expressions of concern by staff must be made directly to the special education director or other supervisory personnel, and must relate to concerns about the child’s demonstrated pattern of behavior.

COORDINATION WITH THE NO CHILD LEFT BEHIND ACT

To align IDEA with NCLBA, the Act imposes new requirements for teacher qualifications and for assessment of students with disabilities, including as described below. In addition, under NCLBA itself, students with disabilities are entitled to receive the same opportunities—including with respect to Title I choice and supplemental educational services—offered to all students at schools identified for improvement, corrective action or restructuring.

Teacher Qualifications

In general, NCLBA requires that all teachers employed after January 8, 2002 and working in a program supported by Title I must be highly qualified upon hire, and all teachers who teach in core subject areas must be highly qualified by the end of the 2005–06 school year. NCLBA, however, does not specifically address the status of special education teachers. In reauthorizing the IDEA, Congress cured this omission and clarified that special education teachers who teach children with disabilities in core subjects must comply with the NCLBA teacher qualification requirements. Under the Act, a special education teacher is generally considered to be “highly qualified” if the teacher:

- Has obtained full state certification as a special education teacher or passed a state special education teacher licensing examination;
- Holds a license to teach special education and has not had certification or licensure requirements waived on an emergency, provisional, or temporary basis;

- Has earned at least a bachelor’s degree; and
- Meets NCLBA requirements regarding subject matter competence, including, for example, through a “high, objective uniform state standard of evaluation” (“HOUSSE”).

The Act also permits *new* special education teachers who are “highly qualified in mathematics, language arts, or science” to demonstrate subject matter competence in the other core academic subjects taught using HOUSSE, including a single HOUSSE that covers multiple subjects. The NCLBA, by contrast, explicitly references use of HOUSSE only with respect to *veteran* teachers of core academic subjects. In addition, although special education teachers generally must meet NCLBA’s “highly qualified” teacher requirements by the end of the 2005–06 school year, new special education teachers of multiple subjects have two years after their date of employment to become “highly qualified.”

Importantly, the Act makes clear that failure of state or school district personnel to meet “highly qualified” requirements does not give rise to an individual right of action (i.e. a parent cannot claim a denial of a FAPE on the grounds that the child’s teacher was not “highly qualified”).

Student Assessments

The Act generally requires students with disabilities to participate in assessment testing as conducted by the state or school district pursuant to NCLBA, “with appropriate accommodations and alternate assessments where necessary and as indicated in their respective individualized education programs.” In addition, as noted above, when a child with disabilities takes alternate assessments based on alternate achievement standards, the child’s IEP must include a description of “benchmarks or short-term objectives” for that student.

IMPLEMENTING REGULATIONS

The Act permits USDOE to promulgate regulations to implement IDEA as reauthorized “only to the extent that such regulations are necessary to ensure . . . compliance.” USDOE will issue regulations within a year of the Act’s enactment. Comments and recommendations concerning the new IDEA regulations must be

received by the USDOE on or before **February 28, 2005**. Address all comments and recommendations to: Office of Special Education and Rehabilitative Service, U.S. Department of Education, 400 Maryland Avenue, SW Potomac Center Plaza, Room 5126, Washington, D.C. 20202-2641 or over the Internet to comments@ed.gov.

Please feel free to contact Peter Martin or another member of the Knutson Flynn & Deans law firm if you need any assistance as you work to implement the reauthorized IDEA.

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