This new Legal Perspectives feature of TEC will primarily take a Q-and-A form so that we may readily address questions from the TEC readers. Please submit your questions to legalperspectives@cec.sped.org, and we'll do our best to answer them promptly and directly in this column.

To get started, we have identified and answered questions relating to articles in this issue of TEC.

1. Is universal design a legal requirement under the IDEA? Did the recent IDEA amendments make any pertinent changes?

Until recently, the answer would have been “No, at least not explicitly.” However, the 2004 reauthorization of the IDEA, which went into effect July 1, 2004, added the requirement that state and local education agencies “must, to the extent possible, use universal design principals in developing and administering [all state-wide and district-wide] assessments,” including those implemented under the NCLB (IDEA, § 1412(a)(16)(E)). The definition of universal design for this purpose is “a concept or philosophy for designing and delivering products and services that are usable by people with the widest possible range of functional capabilities, which include products and services that are directly accessible (without requiring assistive technologies) and products and services that are interoperable with assistive technologies.” (Assistive Technology, § 3002(3)).

2. What is the definition of the general curriculum under the IDEA? Do the latest amendments or the proposed regulations contain pertinent changes?

Although the IDEA does not separately define this term, the regulations make clear that it equates to the “same curriculum as for nondisabled students,” (IDEA regulations, § 300.347(a)(1)(ii)) thus referring to the district’s regular education curriculum. The 2004 reauthorization did not change this meaning, and its proposed regulations (currently pending review and expected to be finalize approximately January 2006), reinforce this understanding by changing the term to the general education curriculum.

3. Have the latest amendments or the proposed regulations made any significant changes with regard to the definition of assistive technology?

The only significant change in the definitions of both assistive technology and related services is the express exclusion of “a medical device that is surgically implanted, or the replacement of that device” (IDEA § 1402(26)(B)). Cochlear implants would appear to be the primary target of this exclusion, but the issue of whether districts are responsible for the costs of mapping cochlear implants will depend on how hearing/review officers and courts interpret the definitional boundaries of device in this context.

4. Do the latest amendments require teachers of students with emotional disturbance to be highly qualified, and, if so, does this requirement include that they be therapeutic?

All special education teachers, including those of students with emotional disturbance, must be highly qualified if they teach one or more core academic subjects. These subjects include not only language arts, math, and science, but also foreign languages, social studies, and arts. The requirements for being highly qualified are key to state certification in not only the core academic subjects taught, but also special education. They are too complicated to be covered here, but they do not explicitly include a therapeutic criterion. (For a concise tabular presentation of the requirements for special education teachers, see Zirkel 2005). The Amendments follow the NCLB, including the distinction between teachers hired before and those after January 8, 2002, but add limited adjustments or alternatives for a few designated subcategories of special education teachers. The proposed regulations, if adopted, will provide one additional option, which is completion of an alternative certification program that meets certain, specified criteria.

5. What other changes in the latest IDEA amendments and the proposed regulations appear to be significant to the typical special education practitioner?

There are many depending on one’s particular perspective and position. The top five include the following:

- Changing the eligibility requirements for specific learning disability, including encouragement of using a response to intervention rather than severe discrepancy model. (For a comprehensive compilation, which includes pertinent published hearing/ review officer and court decisions, see the upcoming CEC monograph—Perry A. Zirkel, “The Legal Meaning of ‘Specific Learning Disability’ for Eligibility for Special Education Services”)
- Removing the authority of a hearing officer to override a parent’s refusal to consent to an initial evaluation for special education services, and, at the same time, removing the district’s liability for not providing the student with such services.
- Providing selective additional latitude for discipline of students with disabilities, such as the streamlining of the requirements for manifestation determinations.
- Allowing the use of up to 15% of a district’s IDEA funding for prereferral services and strategies in regular education, which the 2004 amendments call early intervening services.
- Establishing for filing for a due process hearing (1) a statute of limitations, which is 2 years unless state law specifies a different period; and (2) the prerequisite of a resolution session, which is aimed at identifying
and resolving the issues in dispute in a more informal setting.

Other changes that merit at least honorable mention include (1) no longer requiring IEPs to include benchmarks or short-term objectives (in contrast with goals) except for students who take alternative assessments with alternate standards; (2) expressly allowing parents to make IEP meetings less onerous for team members; (3) requiring that the IEP’s specification of special education be based, to the extent practicable, on peer-reviewed research; and (4) providing for IEPs and broad-scale paperwork reduction up to 15 states.

What other legal questions under the IDEA, Section 504, or the related case law do you have that might be of significant interest to other TEC readers? Let us know, and we’ll address them, along with questions addressed in recent court decisions, in future issues.

References
Individuals with Disabilities Education Act regulations, 34 C.F.R. §§ 300.1 et seq. (1999).
Individuals with Disabilities Education Improvement Act (IDEIA), 118 Stat. 2647 et seq., §§ 601 et seq. (2004).

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The Legal Meaning of SPECIFIC LEARNING DISABILITY for Eligibility in Special Education Services

Perry A. Zirkel

This monograph provides a special addition to the extensive literature concerning specific learning disability (SLD). It fills the gap with a comprehensive but compact synthesis of the primary sources of law—concerning the legal meaning of SLD under the Individuals with Disabilities Education Act (IDEA) and its state counterparts.