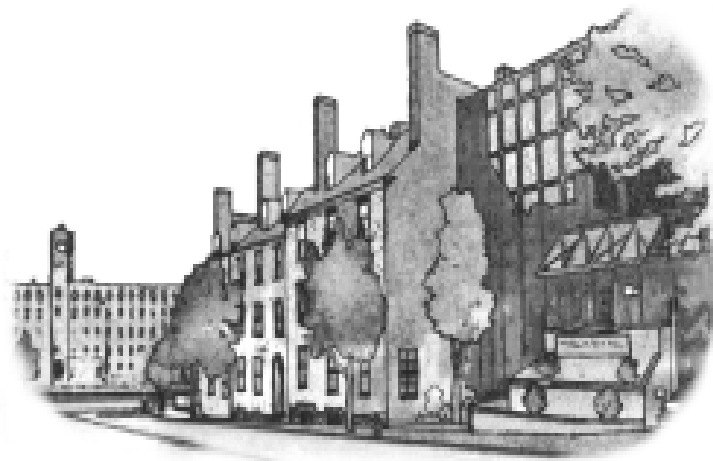


Key Changes to the New Hampshire Rules for the Education of Students with Disabilities

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By: Dean B. Eggert, Esquire
Alison M. Minutelli, Esquire
WADLEIGH, STARR & PETERS, P.L.L.C.
95 Market Street
Manchester, New Hampshire 03101
Telephone: 603/669-4140
Facsimile: 603/669-6018
E-Mail: deggert@wadleighlaw.com
aminutelli@wadleighlaw.com
Website: www.wadleighlaw.com

About the Authors

Dean B. Eggert, Esquire (JD., UCLA; B.A., Wheaton College) is a partner in the firm of Wadleigh, Starr & Peters, P.L.L.C. Mr. Eggert is a jury trial attorney. Over the last 20 years he has had extensive experience representing school districts in its special education matters at the administrative and appellate levels. He has also provided in-service seminars to school districts on issues of risk management in the field of special education law.

Alison M. Minutelli, Esquire (JD., Franklin Pierce Law Center; B.A. Brandeis University) is an associate in the firm of Wadleigh, Starr & Peters, P.L.L.C. Ms. Minutelli practices in the areas of school law and civil litigation.

A Word of Caution

This material is designed to provide educators with an overview of the changes to the New Hampshire Rules for the Education of Children with Disabilities. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case. In addition, it is important to remember that these regulations took effect on **June 30, 2008**.

I. Overview

The purpose of this material is to provide educators with an overview of the changes to the New Hampshire Rules for the Education of Children with Disabilities, Ed 1100 et seq. The rules discussed in this material took effect on **June 30, 2008**. This material is not intended to substitute for legal counsel nor is it intended to provide an exhaustive statement of the State rules or the IDEA. For the most part, this material does not include discussion of 2008 rules that are identical or substantially similar to the rules that took effect on July 1, 2002.¹

II. Changes to the Regulations

A. Purpose and Scope, Ed 1101.01

The purpose and scope of the rules is “to insure that all children with disabilities have available to them a free, appropriate, public education pursuant to the Individuals with Disabilities Education Improvement Act of 2004 . . . The further purpose of Ed 1100 is to adopt rules that are consistent with 20 U.S.C. 1400.” Ed 1101.01.

The “rules apply only to programs that receive public funds.” Ed 1101.02.

B. Definitions, Ed 1102

Ed 1102 et seq. contains 106 definitions. The majority of those definitions (56) are newly defined terms.

i. Newly Defined Terms

1. Academic Achievement, Ed 1102.01(a), “means the student’s level of academic performance when measured against the general education curriculum.”

2. Accommodation, Ed 1102.01(b), “means any change in instruction or evaluation determined necessary by the IEP team that does not impact the rigor and/or validity of the subject matter being taught or assessed.”

3. Administrative case management, Ed 1102.01(d), “means the following activities that are not direct instruction but are necessary to facilitate a student’s special education:

¹ When the rules that took effect on July 1, 2002 are discussed in this document, they are referred to as “Ed ____ (2002).” All references to Ed ____ refer to the rules that were adopted by the State Board on June 11, 2008.

- a. Scheduling IEP meetings;
- b. Coordinating evaluations, and IEP drafting;
- c. Visiting potential student placement environments;
- d. Communicating with a parent; and
- e. Updating progress reports for meeting IEP goals.”

- 4. Administrative due process hearing, Ed 1102.01(e), “means a hearing conducted in compliance with Ed 1123 and in compliance with the provisions of 34 CFR 300.507-300.518.”

Ed 1123 and 34 CFR 300.507-300.518 set forth procedural safeguards and procedures for due process hearings.

- 5. Alternate achievement standards, Ed 1102.01(g), “means the expectation of performance established by the [NH DOE] consistent with the Elementary and Secondary Education Act of 1965, as amended (ESEA).”

- 6. Alternate assessments, Ed 1102.01(h), “means those assessments developed pursuant to the provisions of 34 CFR 300.704(b)(4)(x) and sections 1111(b) and 6111 of ESEA.”

Pursuant to 34 CFR 300.704(b)(4)(x), the State may reserve a portion of its IDEA monies, and utilize those funds “[t]o support the development and provision of appropriate accommodations for children with disabilities, or the development and provision of alternate assessments that are valid and reliable for assessing the performance of children with disabilities, in accordance with sections 1111(b) and 6111 of the ESEA.”

- 7. Alternative dispute resolution, Ed 1102.01(i), “means the following processes that can be used to resolve an issue or issues in dispute:

- a. A facilitated IEP meeting;
- b. LEA mediation;
- c. State mediation; and
- d. A neutral conference.”

8. Aversive behavioral interventions, Ed 1102.01(m), “means those procedures that subject a child with a disability to physical or psychological harm or unsupervised confinement or that deprive the child of basic necessities such as nutrition, clothing, communication, or contact with parents, so as to endanger the child’s physical, mental or emotional health.”

9. Behavior intervention plan, Ed 1102.01(n), “means the positive behavior interventions and supports incorporated in the student’s IEP.” (emphasis added).

10. Child find, Ed 1102.01(q), “means the system detailed in Ed 1105.”

11. Child eligible for special education but not currently receiving services, Ed 1102.01(s), “means a child who has been evaluated and determined to be a child with a disability who is not currently receiving special education services due to one or more of the following factors:

- a. The child is 2.5 years of age and has been determined to be eligible for special education;
- b. The child’s current condition prevents the delivery of special education services;
- c. The child’s parent, legal guardian, surrogate parent, or adult student has refused services;
- d. The child has dropped out of school;
- e. The child is no longer attending school.”

12. Collaborative program, Ed 1102.01(t), “means the cooperative agreements that school districts or [SAUs], or both, may enter into under RSA 186-C:8.”

13. Core Academic Subjects, Ed 1102.01(w), adopts the definition set forth in 34 CFR 300.10, and includes English, reading or language arts, math, science, foreign languages, civics and government, economics, arts, history, and geography.

The federal regulations have adopted the definition of core academic subjects found in Section 9101 of the Elementary and Secondary Education Act of 1965, as amended. 34 CFR 300.10.

14. Curriculum for preschoolers, Ed 1102.01(z), “means all of the organized educational activities and/or experiences that are offered within the early childhood program to address all aspects of development and to promote meaningful learning experiences regarding preschoolers, their families and their community.”

15. Diploma, Ed 1102.02(e), “means a regular high school diploma that reflects the achievement of the academic standards adopted by the local school board for earning a regular high school diploma detailed in Ed 306.”

16. Disability, Ed 1102.02(f), “means a disability, as defined in 34 CFR 300.8.”

The disabilities listed in 34 CFR 300.8 include: mental retardation, hearing impairment (including deafness), speech or language impairment, visual impairment (including blindness), serious emotional disturbance, orthopedic impairment, autism, traumatic brain injury, other health impairment, specific learning disability, deaf-blindness, and multiple disabilities. 34 CFR 300.8(a)(1).

The rules also define the term “child with a disability,” which is discussed in more detail in the next section.

17. Disinterested party, Ed 1102.02(g), “means a party who has no personal or professional interest in the outcome of a conflict in which they mediate.”

18. Early intervening services, Ed 1102.02(i), “means the coordinated services for students in kindergarten through grade 12 who are not currently identified as needing special education or related services but who need additional academic and behavior support, with

emphasis on services for students in kindergarten through grade 3, as defined in 34 CFR 300.226.”

Pursuant to 34 CFR 300.226(b), the LEA may carry out activities for early intervention services that include:

- Professional development (which may be provided by entities other than LEAs) for teachers and other school staff to enable such personnel to deliver scientifically based academic and behavioral interventions, including scientifically based literacy instruction, and, where appropriate, instruction on the use of adaptive and instructional software; and
- Providing educational and behavioral evaluations, services, and supports, including scientifically based literacy instruction.

There are limitations on the amount of Part B funds that LEAs may use to develop and implement early intervening services.

19. Electronic mail, Ed 1102.02(k), “means the secure electronic exchange of information necessary to comply with the requirements of the Act, New Hampshire statutes, and Ed 1100.”
20. Elementary and Secondary Education Act (ESEA), Ed 1102.02(m), “means the Elementary and Secondary Education Act of 1965.” The ESEA has been reauthorized and is now known as the No Child Left Behind Act (NCLB).
21. Extracurricular and nonacademic activities, Ed 1102.02(o), “means those activities and services set forth in 34 CFR 300.107.”

Pursuant to 34 CFR 300.107, nonacademic and extracurricular services and activities include: “counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to

individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available.”

22. Facilitated IEP meeting, Ed 1102.02(p), “means an IEP meeting at which an impartial facilitator, trained by the department, assists parties to conduct special education meetings.”
23. Family centered early supports and services, Ed 1102.02(q), “means the array of comprehensive supports and services for families who reside in NH with children, birth through age 2, who have developmental delays, are at risk for substantial developmental delays, and/or have established conditions.”

24. Functional Behavioral Assessment, Ed 1102.02(t), means “an assessment of a student’s behavior.”

Practice Pointer: A functional behavioral assessment should contain enough information to enable the IEP team to develop an appropriate behavioral intervention plan. To that end, the functional behavioral assessment should be based on multiple sources of data, and should include the frequency, duration, intensity, and/or latency across a variety of areas, such as: activities, settings, people, and times of day. The FBA should also:

- *Identify the problem behavior;*
- *Define the behavior*
- *Identify the factors that contribute to the behavior*
- *Identify the probable reasons for the behavior*

25. Functional goal, Ed 1102.02(u), “means a measurable outcome that is developed by the IEP Team to address a need detailed in the analysis of the student’s functional performance.”

26. Functional performance, Ed 1102.02(v), means “how the child demonstrates skills and behaviors in cognition, communication, motor, adaptive, social/emotional and sensory areas.”

27. Functionally blind, Ed 1102.02(w), adopts the definition from RSA 186-C:2, VI.

“Functionally blind means a pupil who has:

- a. Visual acuity of 20/200 or less in the better eye with the use of the best correction for any refractive error, or a limited field of vision in which the widest diameter of the visual field subtends an angle no greater than 20 degrees.
- b. A medically indicated expectation of visual deterioration.
- c. A functional limitation resulting from a medically diagnosed visual impairment which restricts the child’s ability to read and write standard print at levels expected of other children of comparable ability and grade level.”

RSA 186-C:2, VI.

28. Highly qualified teacher, Ed 1102.03(b), adopts the definitions set forth in 34 CFR 300.18 and 34 CFR 300.156(c).

All special education teachers must be highly qualified. 34 CFR 300.156(c). The “HQT” requirements include: special education certification and a bachelor’s degree. 34 CFR 300.18(b)(1)(i), (iii). In addition, the teacher’s special education certification cannot have been “waived on an

emergency, temporary or provisional basis.” Id. at 300.18(b)(1)(ii).

29. Home education, Ed 1102.03(c), “means ‘home education’ as defined in RSA 193-A:4, and includes the term home schooling.”

Home education must consist “of instruction in science, mathematics, language, government, history, health, reading, writing, spelling, the history of the constitutions of New Hampshire and the United States, and an exposure to and appreciation of art and music.” RSA 193-A:4, I.

30. Home instruction, Ed 1102.03(e), is defined as “a home-based LEA placement as detailed in Ed 1111.05 that provides home instruction for school-aged children.”

31. Homeless child with a disability, Ed 1102.03(f), adopts the definition set forth in 34 CFR 300.19. 34 CFR 300.19 adopts the definition of homeless children set forth in the McKinney-Vento Homeless Assistance Act.

“The term ‘homeless children and youths’ means individuals who lack a fixed, regular, and adequate nighttime residence.” 42 USC 11434a(2)(A). The term includes “children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement.” Id. at 11434a(1)(B)(i). The term also includes “children and youths who have a primary nighttime residence that is a public or private place not designated for or ordinarily used as a regular sleeping accommodation for human beings,” as well as “children and youths who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings.” Id. at 11434a(1)(B)(ii)-(iii).

32. Interim alternative educational setting, Ed 1102.03(l), “means the setting, as determined by the IEP Team pursuant to 34 CFR 300.530(g) through 34 CFR 300.532, in which a child with a disability receives services when removed from placement for disciplinary reasons.”
33. Interpreter services, Ed 1102.03(m), means “interpreting services provided by an interpreter for the deaf and hard of hearing who is licensed in accordance with Int 300 and RSA 326-I:2, IV that are necessary for a parent, surrogate parent, guardian, or adult student to participate in the special education process.”
34. Interpreting services for a child with a disability, Ed 1102.03(n), adopts the definition set forth in 34 CFR 300.34(c)(4).

34 CFR 300.34(c)(4) defines “interpreting services” for children who are deaf or hard of hearing as “Oral transliteration services, cued language transliteration services, sign language transliteration and interpreting services, and transcription services, such as communication access real-time translation (CART), C-Print, and TypeWell.” 34 CFR 300.34(c)(4)(i). With respect to children who are deaf-blind, the term also includes “special interpreting services.” *Id.* at 300.34(c)(4)(ii).

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| <p>35. <u>Manifestation determination</u>, Ed 1102.03(s), “means the process by which the IEP team determines whether the behavior that violated a student code of conduct is a manifestation of a student’s disability pursuant to 34 CFR 300.530(e).”</p> |
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36. Mediation, Ed 1102.03(t), “means an alternative dispute resolution process in which an impartial mediator assists the parties in resolving issues in dispute pursuant to RSA 186-C:24.”
37. Migratory child with disabilities, Ed 1102.03(u), “means a migratory child, as defined in 20 USC 6399(2), who has been identified as a child with a disability.”

20 USC 6399(2) defines a migratory child as “a child who is, or whose parent or spouse is, a migratory agricultural worker, including a migratory dairy worker, or a migratory fisher, and who, in the preceding 36 months, in order to obtain, or accompany such parent or spouse, in order to obtain, temporary or seasonal employment in agricultural or fishing work, has moved from one school district to another, . . . or resides in a school district of more than 15,000 square miles, and migrates a distances of 20 miles or more to a temporary residence to engage in a fishing activity.”

38. Modification, Ed 1102.03(v), “means any change in instruction or evaluation determined necessary by the IEP team that impacts the rigor and validity or rigor or validity, of the subject matter being taught or assessed.”

39. National Instructional Materials Access Center (NIMAC), Ed 1102.04(a), “means the center established pursuant to 34 CFR 300.172.”

40. National Instructional Materials Accessibility Standard (NIMAS), Ed 1102.04(b), “means the standards defined in 34 CFR 300.172.”

41. Native language, Ed 1102.04(c), “means native language as defined by 20 U.S.C. 7011(11).”

Thus, native language, “when used with reference to an individual of limited English proficiency, means the language normally used by such individual; or in the case of a child or youth, the language normally used by the parents of the child or youth.” 20 USC 7011(11).

42. New Hampshire Special Education Information System (NHSEIS), Ed 1102.04(d), “means a computer-based special education data base and retrieval system that confidentially maintains personally identifiable data used for program development, monitoring, compliance, and reporting to the state board of education, the New Hampshire

legislative bodies, and the U.S. Department of Education.”

43. Neutral conference, Ed 1102.04(e), adopts the definition of neutral conference set forth in RSA 186-C:23-b.

Pursuant to RSA 186-C:23-b, neutral conferences “consist of an informal, abbreviated presentation of case facts and issues by the parties to a neutral who is responsible for reviewing the strengths and weaknesses of the case and issuing a recommendation.”

44. Nonacademic services, Ed 1102.04(f), “means those services and activities set forth in 34 CFR 300.117.”

34 CFR 300.117, nonacademic settings, states:

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 300.107, each public agency must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. The public agency must ensure that each child with a disability has the supplementary aids and services determined by the child’s IEP Team to be appropriate and necessary for the child to participate in nonacademic settings.

This provision does not set forth any nonacademic services or activities. Thus, it is likely that Ed 1102.04(f) should instead have referred to 34 CFR 300.107, which, as discussed above (see Ed 1102.02(o), Extracurricular and Nonacademic Activities), contains several examples of nonacademic services, including counseling, health services, and transportation.

45. Paraprofessional personnel, Ed 1102.04(g), “means personnel who do not meet the requirements of 34

CFR 300.156 [personnel qualifications],² and who work only under the direct supervision of qualified personnel.”³

46. Private provider of special education, Ed 1102.04(k), “means a private or non-district special education program that provides the educational component of a child’s IEP and is subject to program approval under Ed 1114. Private provider of special education does not mean a public charter school or a public academy.”
47. Private school, Ed 1102.04(l), “means any school that meets the provisions of a non public school as defined in Ed 401.01(c) and is not a charter school.”
48. Public academy, Ed 1102.04(m), “means a public academy as defined in RSA 194:23, II.” In accord with RSA 194:23, II, a public academy is “an independent school which contracts with one or more school districts to provide education services to such districts in compliance with RSA 194:23.”

All contacts between a public academy and school district are subject to approval by the state board of education. RSA 194:23, II.

² 34 CFR 300.156 sets forth requirements for personnel qualifications. “The SEA must establish and maintain qualifications to ensure that personnel necessary to carry out the purposes of [Part B] are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities [sic].” 34 CFR 300.156(a). Qualifications for paraprofessionals:

1. Must be consistent with State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services; and
2. Must ensure that related services personnel who deliver services:
 - a. Meet the State certification/licensing requirements; and
 - b. Have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis; and
 - c. Allow paraprofessionals and assistants who are appropriately trained and supervised, in accord with State law, regulation or written policy, in meeting the requirements of Part B to assist in the provision of special education and related services.

34 CFR 300.156(b)(1)-(2).

³ The term “qualified personnel” is defined in Ed 1102.40 (2002); however, that definition has been deleted from the 2008 regulations.

49. Response to scientific, research-based interventions (RTI), Ed 1102.04(r), “means the process by which individual student instruction and student academic performance is evaluated using research based models of instruction prior to identifying a child with a learning disability as detailed in Ed 1107.02.”

50. State education agency (SEA), Ed 1102.05(d), “means the New Hampshire department of education.”

51. Services plan, Ed 1102.05(e), “means a written statement developed and implemented in accordance with 34 CFR 300.137 through 34 CFR 300.139 that describes the special education and related services that the LEA will provide to a parentally-placed child with a disability who is enrolled in a private school and has been designated to receive services, including the location of the services and any transportation necessary consistent with 34 CFR 300.132.”

52. Special factors, Ed 1102.05(f), “means the factors that the IEP team shall consider when the team develops each child’s IEP, as provided in 34 CFR 300.324(a)(2) and Ed 1100.”

The special factors listed in 34 CFR 300.324(a)(2) are:

1. In the case of a child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;
2. In the case of a child with limited English proficiency, consider the language needs of the child as those needs relate to the child’s IEP;
3. In the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the

4. Consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and
5. Consider whether the child needs assistive technology devices and services.

34 CFR 300.324(a)(2)(i)-(v).

53. State advisory committee, Ed 1102.05(h), "means the advisory committee appointed pursuant to RSA 186-C:3-b and 34 CFR 300.167." The purpose of the advisory committee is to provide policy guidance regarding special education and related services for children with disabilities, and to promote communication and cooperation among individuals involved with students with disabilities. 34 CFR 300.167; RSA 186-C:3-b.
54. Student code of conduct, Ed 1102.05(j), "means a written policy of expectations adopted by the LEA, SAU, or private provider of special education."
55. Universal design, Ed 1102.05(n), adopts the definition set forth in 34 CFR 300.44. Section 300.44 adopts the definition set forth in the Assistive Technology Act of 1998, as amended, 29 USC 3002. Universal design 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.

29 USC 3002(19).

56. Written affirmation, Ed 1102.05(o), adopts the description set forth in 34 CFR 300.135.

Pursuant to 34 CFR 300.135,

[w]hen timely and meaningful consultation [with private schools], as required by § 300.134, has occurred, the LEA must obtain a written affirmation signed by the representatives of participating private schools. If the representatives do not provide the affirmation within a reasonable period of time, the LEA must forward the documentation of the consultation process to the SEA.

57. Written prior notice, Ed 1102.05(p), “means ‘prior notice by the public agency,’ as described in 34 CFR 300.503.”

Pursuant to 34 CFR 300.503(b), the notice must contain:

1. A description of the action proposed or refused by the agency;
2. An explanation of why the agency proposes or refuses to take the action;
3. A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

4. A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if the notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
5. Sources for parents to contact to obtain assistance in understanding the provisions of this part;
6. A description of other options that the IEP Team considered and the reasons why those options were rejected; and
7. A description of other factors that are relevant to the agency's proposal or refusal.

ii. Revised Definitions

The following terms are defined in the 2002 regulations; however, the 2002 definitions differ from the definitions adopted on June 11, 2008.

1. Approved program, Ed 1102.01(j), "means a program of special education as defined in RSA 186-C:2, II."

As of January 1, 2009, the term "approved program" will mean "a program of special education that has been approved by the state board of education and that is maintained by a school district, regional special education center, private organization, or state facility for the benefit of children with disabilities, and may include home instruction provided by the school district." HB 766 (2008) (eff. 1/1/09).

2. Assistive technology device, Ed 1102.01(k), adopts the definition set forth in 34 C.F.R. 300.5, which excludes medical devices that are surgically implanted, and the replacement of such devices, such as cochlear implants.

In June 2008, the Legislature passed a bill (HB 678) that establishes a committee to:

- Study the procedure and costs for inclusion of related services pertaining to medical services, including transportation, which are necessary for purposes of diagnosis and evaluation or the surgical implant or replacement of a medical device, and to
- Evaluate existing procedures and costs for maintenance, programming, or mapping of such a device.

The committee must file report a report with the Legislature by November 1, 2008.

3. Child with a disability, Ed 1102.01(r), means
 - a. 'Child with a disability' as defined by 34 CFR 300.8 who is 3 years of age or older but less than 21 years of age and who has not yet received a regular high school diploma as provided in 34 CFR 300.102; and
 - b. A child with a developmental delay as defined in RSA 186-C:2, I-a.⁴

⁴ New Hampshire defines a "developmentally delayed child" as "a child between 3 and 9 years of age, who, because of impairments in development, needs special education or special education and educationally related services, provided that the child must first be determined to have an educationally disabling condition as defined in RSA 186-C:2(I)." RSA 186-C:2, I-a.

"Educationally disabling conditions" include mental retardation, hearing impairment, speech or language impaired or both, visual impairments including blindness, serious emotional disturbance, orthopedic impairment, otherwise severely health impaired, deaf-blind, multi-disabled, traumatic brain injury, autistic, or specific learning disability." RSA 186-C:2, I.

Effective January 1, 2009, a "developmentally delayed child" is "a child at least 3 years of age or older, but less than 10 years of age, who, because of impairments in development, needs special education or special education and related services, and may be identified as being

The definition adopts the definition of child with a disability set forth in the Federal Regulations, 34 CFR 300.8. Section 300.8 differs slightly from the former section (34 CFR 300.7). The differences are:

Pursuant to 34 CFR 300.8(b), the use of the term “developmental delay” is subject to the conditions set forth in 34 C.F.R. 300.111(b). These conditions make clear that if the State adopts a definition of “developmental delay,” that it must determine whether the term applies to children aged three through nine or to a subset of that age range. However, the State may not require an LEA to adopt and use the term “developmental delay” for any children within its jurisdiction. If an LEA uses the term “developmental delay,” then it must conform to both the State’s definition of that term and to the age range adopted by the State. If the State does not adopt the term “developmental delay,” then the LEA may not independently use that term as a basis for establishing eligibility for special education and related services.

“Other Health Impairment” is now defined as: “having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that –

- i. Is due to chronic or acute health problems such as asthma, [ADD] or [ADHD], diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
- ii. Adversely affects a child’s educational performance.”

300.8(c)(9). The inclusion of “Tourette syndrome” is new to the Federal definition.

developmentally delayed provided that such a child meets the criteria established by the state board of education.” HB 766 (2008), eff. Jan. 1, 2009.

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| 4. | <u>Curriculum</u> , Ed 1102.01(y), the definition states that curriculum includes all courses and other education opportunities offered by “the responsible” LEA. |
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5. Free appropriate public education, Ed 1102.02(s), adopts the definition of FAPE set forth in 34 CFR 300.17, and includes an additional requirement: “that meets the least restrictive environment requirements detailed in 34 CFR 300.114.”
 7. The definition of Home for children, Ed 1102.03(d), has been expanded to include experiential wilderness facilities and independent living homes.
 8. Local education agency (LEA), Ed 1102.03(o), references the definition of school district found in Ed 1102.03(r) as well as the definition found in 34 CFR 300.28.
 9. Local school district, Ed 1102.03(q), is defined as “the political subdivisions of the state as defined in RSA 194:1, RSA 195:1 and RSA 195-A:1, I.” The references to RSA 195:1 and RSA 195-A:1, I are new.
 10. “Parent”, Ed 1102.04(h), has been revised to reference “biological” rather than “natural” parents.
 11. Receiving district, Ed 1102.04(p) now references the definition in RSA 193:27,V.
 12. Related services, Ed 1102.04(q), adopts the definition of related services set forth in 20 USC § 1401(26)(A).

The IDEA defines related services as:

transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the

child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 USC § 1401(26)(A). Medical devices that are “surgically implanted, or the replacement of such device[s]” are excluded from the definition of related services. Id. at § 1401(26)(B).

C. Participants in the Special Education Process, Ed 1103

Ed 1103.01, IEP Team, is substantially similar to Ed 1109.03 (2002), in that the composition of the “IEP team, for the purposes of Ed 1103, shall be as provided in 34 CFR 300.321.” Thus, the public agency is required to ensure that the IEP Team for each child with a disability includes:

1. The parents of the child;
2. Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
3. Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;
4. A representative of the public agency who:
 - i. Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
 - ii. Is knowledgeable about the general education curriculum; and
 - iii. Is knowledgeable about the availability of resources of the public agency.
5. An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section;

6. At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
7. Whenever appropriate, the child with a disability.

34 CFR 300.321(a)(1)-(a)(7).

Ed 1103.01(c), states that “[w]hen a vocational education component is being considered,” the IEP team “shall include an individual knowledgeable about the vocational education program being considered.”

The LEA or parent must “notify the other party 72 hours before a scheduled meeting or upon learning of the expected absence of a team member, whichever is earlier.” Ed 1103.01(d).

Ed 1103.02, Parent participation, is substantially similar to Ed 1109.03 (2002). The meeting notice requirements “shall be waived with the written consent of the parent.” Ed 1103.02(b).

Ed 1103.02(c) expands on the “parent participation” requirement, and states that “[p]arent participation shall be in accordance with 34 CFR 300.322 and 34 CFR 300.501(b) – 34 CFR 300.501(c).”

Thus, the public agency “must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate.” 34 CFR 300.322(a).

34 CFR 300.501(b)(1) states that parents must be afforded an opportunity to participate in meetings with respect to: i) identification, evaluation, and educational placement; and ii) the provision of FAPE. Pursuant to 34 CFR 300.501(c)(1), the “public agency must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent’s child.” Placement decisions “may be made by a group without the involvement of a parent, if the public agency is unable to obtain the parent’s participation in the decision,” and the public agency has “a record of its attempt to ensure their involvement.” 34 CFR 300.501(c)(4).

The agency’s record of attempts may include:

1. Detailed records of telephone calls made or attempted and the results of those calls;

2. Copies of correspondence sent to the parents and any responses received; and
3. Detailed records of visits made to the parent's home or place of employment and the results of those visits.

34 CFR 300.322(d)(1)-(3).

Ed 1103.02(d) requires that public agencies "take whatever action is necessary to ensure that the parent(s) understands the proceedings at the IEP meeting consistent with 34 CFR 300.322(e)." In accord with Section 300.322(e), the public agency's duties include "arranging for an interpreter for parents with deafness or whose native language is other than English." 34 CFR 300.322(e).

D. Special Education Process Sequence, Ed 1104

The rule adds two provisions to the sequence of the special education process: "[o]ngoing monitoring of the IEP," and "[a]nnual review of the IEP."

E. Child Find, Ed 1105

The regulations pertaining to child find reflect the IDEA and the Federal regulations and are substantially similar to Ed 1103 (2002).

Ed 1105.01(a) requires that the LEA comply with 34 CFR 300.111(c), regarding child find procedures. Pursuant to Section 300.111(c), child find must include "[c]hildren who are suspected of being a child with a disability under § 300.8 and in need of special education, even though they are advancing from grade to grade; and [h]ighly mobile children, including migrant children."

The LEA must also develop a written child find system "which assures that any child who is potentially a child with a disability attending school and for any child 2.5 years of age up to 21 years of age residing within its jurisdiction is referred to the IEP team." Ed 1105.01(b). This differs slightly from Ed 1103.01(b) (2002), which states that the child find system must assure "that all potential children with disabilities residing within its jurisdiction are referred to the IEP team." (emphasis added).

The LEA's child find system must "contain specific provisions to meet the particular circumstances pertinent to [certain] groups of persons," including:

For children from 2.5 years of age, the LEA shall use the special education process to find, identify and evaluate all children who are potentially children with disabilities and who are suspected by the LEA of being in need of special education or special education and related services, thereby

ensuring that an IEP will be developed and implemented for any child who is eligible for special education by age 3 . . .

Ed 1105.01(c)(1).

Ed 1105.01(d) states that the child find system shall include children who have been unilaterally placed in a private school located “within the geographic boundaries of the local school district by their parents without involving the LEA.”

Ed 1105.02 describes the LEA Child Find program. This rule creates the following requirements that are not contained in Ed 1103.02 (2002):

- Additional reasons for referral:
 - Inability to progress or participate in developmentally appropriate preschool activities;
 - Receiving service from family centered early support and services;
 - Receiving academic or behavior warnings or suspension or expulsion from a child care or after school program. Ed 1105.02(b)(3), (5)-(6).

The following reasons are also listed as reasons for referral: failure to pass a hearing or vision screening, unsatisfactory performance on group achievement tests or accountability measures, and repeatedly failing one or more subjects. Ed 1105.02(b). Although Ed 1105.02(b) lists six reasons for referral, that provision makes clear that the list is not exhaustive.

- Coordination with area agencies and family centered early supports and services to establish a process of LEA notification of children served by family centered early supports and services consistent with the interagency agreement between the LEA and the area agencies providing family centered early supports and services. Ed 1105.02(c).
- Ensuring that child find activities are completed within the applicable timelines. Ed 1105.02(i).
- The establishment of “referral procedures” rather than “in-school referral procedures.” *Compare* Ed 1105.02(a) *with* Ed 1103.02(a) (2002).

Ed 1105.04, Child Find for Children Currently Receiving Early Supports and Services, is new. This provision requires LEAs “to develop a written early transition process for children exiting family centered early supports and services which assures that any child who is potentially a child with a disability is

evaluated and eligibility for special education is determined prior to the child's third birthday." Ed 1105.04(a). The rule goes on to state that "[i]f the child is determined to be a child with a disability eligible for special education and related services, the LEA shall ensure that an IEP is developed and implemented on or before the child's third birthday." Id.

The transition process "shall include a written interagency agreement between the LEA and the local area agencies, as defined by RSA 171-A:2, I-b responsible for the provision of family centered early supports and services in that community." Ed 1105.04(b). The agreement shall include but is not limited to LEA and area agency policies, practices and procedures regarding:

- Practices that will enable family centered early supports and services and LEA personnel to collaborate effectively;
- When and how data and information will be shared, including a statement of confidentiality;
- A plan for maximum efficiency of meetings, including consolidation of meetings when appropriate;
- A process to ensure that the transition conference planning activities and other meetings are scheduled at mutually agreeable times for families, family centered early supports and services and LEA staff;
- Transition activities that will be in place such as home and program visits, observations and evaluations as needed;
- LEA child find activities under Ed 1105 including details about LEA and family centered early supports and services, area agency responsibilities, and timelines for notification to the LEA for child find and referral to the LEA for eligibility determination;
- Coordination between LEA and family centered early supports and services to conduct evaluations and assessments for determination of eligibility for special education that includes how evaluations or assessments previously administered to the child will be conducted and utilized;
- Participation in transition meetings and who should participate in transition meetings, with the understanding that the special education process team for referral, evaluation, IEP development, and placement are the same; and

- Specific provisions that regardless of the child's date of birth in late spring, summer, or early fall, an IEP is developed and implemented on or before the child's 3rd birthday."

Ed 1105.04(c)(1)-(9).

F. Referral and Disposition of Referral, Ed 1106

Ed 1106.01, Process; Provision of FAPE, is substantially similar to Ed 1107.02 (2002). The rule states that the referral system shall be in place for children 2.5 years of age to 21 years of age. Ed 1106.01.

If the parent fails to consent to an evaluation or fails to respond to a request for an evaluation, then the LEA may take action consistent with 34 CFR 300.300. Ed 1106.01(g). Section 300.300 allows the LEA to pursue an initial evaluation by utilizing the IDEA's procedural safeguards, including mediation or due process. CFR 300.300(a)(3)(i). However, the LEA is not required to pursue the evaluation, and does not violate its obligations under Part B if it declines to pursue the evaluation. 34 CFR 300.300(a)(3)(ii).

G. Evaluation, Ed 1107

"The LEA shall comply with 34 CFR 300.301-34 CFR 300.311 relative to evaluations," and to "determining the existence of a disability." Ed 1107.01(a), (h).

Ed 1107.01(c) retains the requirement that the evaluation process, including a written summary report, be completed within 45 days after receipt of parental permission for testing. However, the rule permits the parties, with written consent, to extend the 45 day time limit "by no more than 15 days." Ed1107.01(d) (emphasis added).

With respect to court ordered evaluations, if the court fails to provide a time limit, then "the evaluation process, including a written summary report, shall be completed within 60 days after receipt of the court's directive." Ed 1107.01(f). Ed 1107.01(f) is silent with respect to extensions of time.

“For purposes of evaluating whether a child has a specific learning disability,” Ed 1107.02 states that: “one or more of the following criteria shall be used as described in 34 CFR 300.309:

1. A discrepancy model between intellectual skills and achievements.
2. A process that determines if the child responds to scientific, research-based intervention as part of the evaluation procedures described in 34 CFR 300.307(a)(2).
3. Other alternative research-based procedures as described in 34 CFR 300.307(a)(3).”

In addition, “[e]ach LEA shall adopt a policy describing the evaluation procedures and standards that will be used to evaluate whether a child has a specific learning disability.” Ed 1107.02(b).

Ed 1107.04, Qualified Examiners, now lists the required assessments, as well as the examiners qualified to administer the assessments. With respect to “developmental delay,” the rule now states that

In order to identify a child as educationally disabled as the result of a developmental delay, the IEP Team must determine that there are clear indicators present that the child may have one of the other educationally disabling conditions. Therefore, the required assessments and qualified examiners are the same as for the suspected disabling condition. Examiners must be qualified to evaluate the specific disabilities suspected of causing the developmental delay.

With respect to “Multiple Disabilities” the rule now states that this “Requires at least two concomitant disabilities which are evaluated and documented in the student’s evaluation record. This primary disability refers to concomitant impairments which cause several educational problems.” Table 1100.1.

The rules also state that the LEA is required, upon receipt of written request from parents, to “provide access to test results and other relevant educational records 5 days prior to the IEP team meeting.” Ed 1107.04(d) (emphasis added).

The Family Policy Compliance Office recently opined that schools are not required to comply with standing requests for access to records and are not required to automatically or periodically provide parents with access to education records. 107 LRP 64188 (FPCO, Sept. 28, 2007). Instead, schools are required to comply with individual requests for access to records.

H. The Individualized Education Program, Ed 1109

Ed 1109.01(a)(1)-(10) sets forth the required contents of all IEPs. They are:

1. The elements listed in 34 CFR 300.320, which are:
 - Present levels of academic achievement and functional performance including how the child’s disability affects his/her involvement and progress in the general education curriculum or, for preschool children, how the disability affects the child’s participation in appropriate activities;
 - Measurable annual goals, including academic and functional goals designed to meet the child’s needs that result from his/her disability to enable the child to be involved in and make progress in the general education curriculum and meet the child’s other educational needs that result from his/her disability and a description of benchmarks or short-term objectives for children who participate in alternate assessments;
 - How the child’s progress towards meeting the annual goals will be measured and when periodic progress reports will be provided to the parents;
 - Statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child and a statement of program modifications or supports for personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals to be involved with and make progress in the general

- Explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and activities
 - Statement of individual appropriate accommodations necessary to measure academic achievement and functional performance on State and district wide assessments;
 - The projected date for the beginning of the services and modifications and the anticipated frequency, location, and duration of those services and modification
2. The length of the school year and the school day required to implement the IEP;
 3. The types of service providers who would be responsible for implementing the IEP or the names of those providers;
 4. A statement identifying the party or parties assuming the financial responsibility for the implementation of the IEP;
 5. The signature of the parent or, where appropriate, student, and representative of the LEA stating approval of the provisions in the IEP;

6. Short-term objectives or benchmarks for all children <u>unless the parent</u> determines them unnecessary for all or some of the child's annual goals;

7. Short-term objectives or benchmarks for all children who take alternate assessments based on alternative achievement standards;
8. A statement of how the child's progress toward meeting the annual goals shall be provided to the parents;
9. A statement of how the child's progress towards meeting the annual goals will be measured and whether progress is sufficient to achieve the annual goals by the end of the school year;

10. A statement of transition services meeting the requirements of 34 CFR 300.43, except that the transition services detailed in 34 CFR 300.320 will be provided no later than the first IEP to be in effect when the child turns 14, or younger if determined necessary by the child's IEP Team; and
- 11.⁵ A vocational education component for each child with a disability for whom vocational education is to be provided.

Ed 1109.01(a)(1)-(11) (emphasis added). Effective January 1, 2009, short-term objectives or benchmarks will also be required by State law. See HB 766 (2008), amending RSA 186-C:7, III.

Ed 1109.02, Transportation, sets forth requirements pertaining to the provision of transportation to children with disabilities. “[C]ontracted providers of transportation for children with disabilities, including parents transporting children other than their own,” must comply with the standards of Ed. 1109.02(a)-(b). Ed 1109.02(d).

Ed 1109.02(a) requires that vehicles used to transport children with disabilities provided by or on behalf of a school district be maintained in safe working order and be inspected and licensed according to the New Hampshire department of safety rules as provided in Saf-C1307⁶ and RSA 266:7.⁷ Ed 1109.02(b) requires that the drivers of such vehicles be licensed according to department of safety rules.

“Each person who transports children other than their own in a private passenger vehicle to or from school or a school related activity shall not be required to obtain a school bus driver's certificate pursuant to RSA 263:29 and these rules, as long as he/she is not under contract or reimbursement agreement with a municipality.” Ed 1109.02(e).

⁵ The version of the rules that was adopted on June 11, 2008 contains two Ed 1109.01(a)(10)s and does not contain provision Ed 1109.01(a)(11).

⁶ NH Saf-C R. 1307 sets forth rules pertaining to school bus vehicle maintenance and inspection.

⁷ RSA 266:77 states:

The director [of the DMV of the department of safety] shall have authority, through his duly authorized agents, to inspect any motor vehicle used for the purpose of transporting school children to any school to determine its fitness for such purpose, and if he finds that such vehicle is unfit, he may refuse to permit it to be designated as a school bus. Said inspection shall be made before any motor vehicle transporting school children to any school is used for said transportation. The director shall cause to be issued some identification if such vehicle is approved as a school bus.

Parents who are transporting their own child(ren) are not required to meet the standards of Ed 1109.02(a) – (b). Ed 1109.02(c).

Ed 1109.03, When an IEP is in Effect, IEP Meetings, Development, Review and Revision of an IEP, Transition Services, contains new requirements for children with disabilities aged three through five. For children with disabilities who are between the ages of 3 and 5, or a 2 year old child with a disability who will turn age 3 during the school year when the LEA offers special education services to children with disabilities prior to age 3, the IEP Team must consider the contents of an IFSP in accordance with 34 CFR 300.323(b). Ed 1109.03(b).

Pursuant to 300.323(b), the IFSP must contain the content (including the natural environment statement) described in Section 636(d) of the IDEA, including an educational component that promotes school readiness and incorporates pre-literacy, language and numeracy skills for children with IFSP's. In addition, the IFSP must be developed in accordance with the IEP procedures; the IFSP may serve as the IEP for the child if the public agency and the parents agree. 34 CFR 300.323(b)(1)(ii). The public agency must provide the child's parents with a detailed explanation of the differences between an IFSP and an IEP and, if the parents choose an IFSP, must obtain informed written consent from the parents. 34 CFR 300.323(b)(2)(i)-(ii).

Ed 1109.03 also states that transition services (needed to assist a child with a disability in reaching his or her postsecondary goals) may be provided by a "participating agency other than the LEA consistent with 34 CFR 300.324(c) to ensure there is no interruption in the services detailed in the child's IEP," and that transition services "must be monitored by LEA personnel, no less than a weekly basis." Ed 1109.03(i)-(j). In accord with 34 CFR 300.324(c)(1), "[i]f a participating agency, other than the public agency, fails to provide the transition services described in the IEP in accordance with § 300.320(b), the public agency must reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in the IEP."

OSEP has recently opined that districts must obtain informed, written parental consent each time they invite a representative from an agency that is likely to be responsible for providing or paying for transition services to a team meeting. Letter to Gray, 50 IDELR 198 (OSEP March 17, 2008). The district must obtain parental consent before inviting the representative from the outside agency. Id. "[I]t is not permissible under this regulation for a public agency to obtain the consent of the parents or eligible child only one time before the transition planning process is initiated for the child until the child leaves school." Id. Annual consent is not sufficient if there will be more than one team meeting to discuss postsecondary goals and transition services during the 12-month period. Id.

Finally, Ed 1109.03(k) requires that LEAs “comply with RSA 186-C:9 relative to required special education.” RSA 186-C:9 states that:

[e]ach child determined by the local school district, or special school district established under RSA 194:60, as being educationally disabled in accordance with RSA 186-C:2 and in need of special education or special education and educationally related services shall be entitled to attend an approved program which can implement child’s individualized education plan. Such child shall be entitled to continue in an approved program until such time as the child has acquired a high school diploma or has attained the age of 21, whichever occurs first, or until the school district responsible for developing the child’s individualized education plan determines that the child no longer requires special education in accordance with the provisions of this chapter.⁸

Ed 1109.04, Copies of the IEP and Evidence of Implementation, is substantially similar to Ed 1109.05 (2002). The rule expressly requires that the LEA provide “a private school or non-LEA provider responsible for implementing the IEP with a copy of the IEP on or before the first day of the placement.” Ed 1109.04(a).

The rule also requires that “[a] summary of the child’s academic achievement and functional performance, including recommendations on how to meet secondary goals, . . . be provided to the child prior to the child’s eligibility termination described in 34 CFR 300.305(e)(2) [graduation with a regular diploma or exceeding the age of FAPE eligibility].” Ed 1109.04(c).

⁸ RSA 186-C:9 has been amended by HB 766. Thus, as of January 1, 2009, children with disabilities will be “entitled to continue in an approved program until such time as the child has acquired a regular high school diploma or has attained the age of 21, whichever occurs first, or until the child’s [IEP] team determines that the child no longer requires special education . . .” (Emphasis added).

Ed 1109.06(b), Monitoring and Annual review of IEPs, states that “[t]he LEA, upon a written request for an IEP team meeting by the parent, guardian or adult student,” must

1. Schedule a mutually agreeable time and date for an IEP team meeting;
2. Convene the IEP team on the mutually agreeable time and date; or
3. Provide the parent, guardian, or adult student with written prior notice detailing why the LEA refuses to convene the IEP team.

These activities must be completed within 21 [calendar] days following the receipt of the written request for the IEP team meeting. Ed 1109.06(c).

I. Extended School Year Services, Ed 1110

This rule contains a new provision, Ed 1110.01(c), which states that “ESY services, provided in non-special education or district programs, shall be supervised, on site, by appropriately certified LEA personnel no less than once per week.” (emphasis added).

The Office of Special Education Programs recently opined that the personnel providing ESY services meet the same requirements that apply to personnel providing the same types of services during the regular school program. Letter to Copenhaver, 50 IDELR 16 (OSEP Nov. 7, 2007). Thus, special education teachers employed during the summer months must satisfy the HQT requirements in the No Child Left Behind Act, and related service providers and paraprofessionals must meet the state’s qualifications.

In addition, Ed 1110.01(b) states that ESY services shall not be limited to summer months or “to predetermined program design.”

J. Placement of Children with Disabilities, Ed 1111

Ed 1111.01(b) states that children with disabilities “shall be admitted to regional vocational education center programs on the basis of vocational needs as outlined in the child’s IEP and availability of space. However, the LEA shall ensure that any child who requires vocational education as part of FAPE shall receive such services as determined by the IEP team in the least restrictive environment.”

Ed 1111.02 requires that preschool children be educated in a setting appropriate to implement their IEP or IFSP, and sets forth a continuum of

learning settings for preschool, at which preschool children with disabilities may receive their special education program. Ed 1111.02(b)-(c).

The continuum of learning settings for preschool is:

- Home setting
- Early childhood special education – partially integrated setting
- Early childhood special education – specialized/therapeutic setting
- Early childhood special education – general self-contained setting
- Early childhood special education – specialized self-contained
- Separate school setting
- Residential setting

Ed Table 1100.02.

In addition to the continuum of alternative learning environments for students ages 6-21, the rules now contain a continuum of alternative learning environments for preschool children, in which preschool children with disabilities may receive their special education program. Ed 1111.03(d)

The continuum of alternative learning environments for preschool is:

- Early childhood program (a preschool child with a disability attends an early childhood program)
- Home (a preschool child with a disability receives some or all of his/her supports and services in the child's home)
- Special education program (a preschool child with a disability attends a special education program)
- Service provider location (a preschool child with a disability receives supports and services from a service provider)
- Separate school (a preschool child with a disability attends a publicly or privately operated separate day school facility designed specifically for children with disabilities)
- Residential facility (a preschool child with a disability attends a publicly or privately operated residential school or residential medical facility on an inpatient basis)

Ed Table 1100.3.

Districts must “give evidence that the continuum of alternative learning settings from least restrictive to most restrictive set forth in Table 1100.[0]2,

'Continuum of Alternative Learning Settings for Preschool' and as set forth in Table 1100.3 'Continuum of Alternative Learning Environment' is available or would be made available as placements for children with disabilities, including children of preschool age." Ed 1111.03(b).

Ed 1111.04 states that "[t]he placement of a child with a disability in an approved private school, facility, or program by the IEP team shall provide special education and related services:

- a. At no cost to the parent;
- b. In the least restrictive environment;
- c. In accord with the child's IEP; and
- d. By personnel that meet the department's certification standards."

When a child is physically or mentally unable to attend school and the IEP team recommends that a school week of less than the number of hours detailed in Ed 1111.05(b)(3) [10 hours per week of specially designed instruction] be provided:

1. The superintendent shall provide written consent prior to the implementation of the shortened school week;
2. The parent shall provide written consent prior to implementation of the shortened school week;
3. The LEA shall send a copy of the written consent to the state director of special education;
4. The LEA shall send a copy of the written consent to the child's parents; and
5. The LEA shall place a copy of the written consent in the child's school records.

Ed 1111.05(c)(1)-(5). The Superintendent shall not grant consent "if it would cause a serious adverse effect upon the child's educational progress pursuant to RSA 193:1, I(c)." Id. at 1111.05(d). In addition, "[t]he LEA's obligation to provide a FAPE to the child shall still be in effect even if the child is provided services for less than the number of hours detailed in Ed 1111.05(b)(3)." Ed 1111.05(e).

When the IEP determines that an IEP for a child with a disability should be implemented at home for more than 45 days, the LEA shall:

1. Describe in writing, the specific circumstances resulting in the need for the home instruction;
2. Develop an IEP which includes all elements in 34 CFR 300.320; and
3. Develop a written plan for the transition of the child into a less restrictive environment which shall include the following:
 - a. Objective criteria for determining when the student will no longer require a home-based program and will receive special education services in a school-based program;
 - b. Specific activities for each phase of the transition; and
 - c. The specific time frame for each phase of the transition process.

Ed 1111.05(g).

If the IEP is to be implemented at home for more than 45 days, the LEA must, at least 10 days prior to the 46th day, submit the following documents to the state director of special education at the department of education:

1. The agreed upon IEP developed pursuant to Ed 1111.05(g)(2);
2. The name, title, employer, and a copy of the certification, license, or other appropriate statement of qualifications for each of the individuals implementing the home instruction, including all teachers, therapists, aides, consultants and supervisors;
3. Minutes of the IEP Team Meeting at which the decision to implement the home instruction was made, including:
 - a. The basis for the decision as set forth in Ed 111.05(g)(1); and
 - b. A list of the specific documentation reviewed by the team such as physician's reports, test results, reports of professionals knowledgeable about the child's disability, pertinent information from any other relevant source; and

4. The written plan for the transition of the child as described in Ed 1111.05(g)(3).

Ed 1111.05(h). The department's procedures for reviewing the request and for providing notice of its decision are substantially similar to the process in Ed 1115.05(g)-(h) (2002).

- K. Requirements for the Development and Operation of Programs for Children with Disabilities Administered by Local Education Agencies, Ed 1113

Ed 1113 applies to all public schools and public academies. Ed 1113.01.

"Positive behavioral interventions based on the results of a behavioral assessment shall serve as the foundation of any program used to address the behavioral needs of students." Ed 1113.04(a).

Aversive and deprivational behavioral interventions include:

- Any procedure intended to cause physical pain
- Aversive mists, noxious odors and unpleasant tastes applied by spray or other means to cause an aversive physical sensation
- Any non-medical mechanical restraint that physically restricts a student's movement
- Contingent food/drink programs
- Electrical stimulation
- Placement of a child in an unsupervised or unobserved room from which the child cannot exit without assistance, and
- Physical restraint, unless in response to a threat of imminent, serious, physical harm.

Ed 1113.04(c).

"All crisis or emergency intervention procedures that include aversive behavioral interventions shall be included in the student's IEP and shall comply with Ed 1113.04 [requiring positive behavioral interventions] except as detailed in Ed 1113.06 [use of aversive behavioral interventions]." Ed 1113.05.

"If authorized in writing by a physician and an IEP team, the following interventions may be used:

1. A non-medical mechanical restraint that physically restricts a student's movement;
2. Physical restraint, not in response to a threat of imminent, serious physical harm."

Ed 1113.06(a).

However, "aversive behavioral interventions may only be used when:

1. At least 2 written positive behavioral interventions were previously implemented without success;
2. The individual implementing the restrictive intervention has been trained and is knowledgeable in the use of positive interventions, restrictive treatment procedures, and alternatives for de-escalation of problem behavior;
3. A behavioral intervention plan detailing the use of the restrictive procedure has been developed and incorporated as part of the IEP;
4. A description of the target behavior that will be addressed using the restrictive intervention is included in the IEP;
5. A description of the measurable criteria stating the expected change in the target behavior or behaviors is included in the IEP;
6. A specific time limit for the use of the restrictive behavioral intervention procedure is detailed in the IEP;
7. A system is developed to record the frequency, duration, and results of the intervention;
8. A system is developed to regularly inform the parents of the progress in changing the target behavior using the restrictive intervention procedures; and
9. The parent or parents have given informed consent to the use of the restrictive intervention procedures separate from the consent for the IEP."

Ed 1113.06(b) (emphasis added).

Ed 1113.07 prohibits public agencies from requiring that parents obtain a prescription for certain substances as a condition of attending school, receiving an evaluation or receiving services.

Ed 1113.09(b) requires that the LEA “monitor the proper functioning of hearing aids, as required by 34 CFR 300.105, low vision aids, and other orthotic and prosthetic devices and assistive technology services and devices defined in 34 CFR 300.5⁹-300.6¹⁰ used by children with disabilities in school.” In addition, Ed 1113.09(b) requires that “[e]ach LEA . . . provide for the necessary repairs for hearing aids, low vision aids, and other orthotic and prosthetic devices and adaptive equipment.”

Ed 1113.10(d) expands on the requirements pertaining to class size and age range of children with disabilities in preschool programs.

Ed 1113.10(e) sets forth requirements pertaining to class size and age range for self-contained special education classrooms for grades K – 12. This provision limits the number of children in a self-contained classroom to 12 students. Ed 1113.101(e)(3).

Ed 1113.10(f), pertaining to class size and age range of resource rooms is substantially similar to Ed 1119.05(c) (2002), except that it caps the number of children with disabilities served in a K-12 resource room at any given time at 20. See Ed 1113.10(f)(4). The assistance of support personnel is required if more than 12 children with disabilities are being served in a resource room at any given time. Ed 1113.03(f)(3).

⁹ “Assistive technology device means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. The term does not include a medical device that is surgically implanted, or the replacement of such device.” 34 CFR 300.5.

¹⁰ “Assistive technology service means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device.” 34 CFR 300.6. Assistive technology services include: “The evaluation of the needs of a child with a disability, including a functional evaluation of the child in the child’s customary environment; purchasing leasing, or otherwise providing for the acquisition of assistive technology devices by children with disabilities; selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices; coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs; training or technical assistance for a child with a disability or, if appropriate, that child’s family; and training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of that child.” Id. at 300.6(a)-(f).

L. Standards for Approval of Private Providers of Special Education and Non-LEA Programs, Ed 1114

With the following exceptions, this provision is substantially similar to Ed 1133 (2002).

“A private provider of special education shall cooperate with the LEA by making staff available to participate in IEP meetings at mutually agreeable times and places.” Ed 1114.05(d).

“The private provider of special education or other non-LEA program shall not accept any students with disabilities for which the program is not approved.” Ed 1114.05(f).

“All administrative, instructional, and related service staff shall hold appropriate certification or licensure for the position in which they function as required by the state of NH, and other licensing entities. The determination of credentials required shall be made by the Department.” Ed 1114.05(j).

“Each private facility or other non-district program shall provide all transportation required for the implementation of any IEP, or portion of any IEP, which the program has agreed to implement. The private facility or other non-district program shall provide transportation in accordance with Ed 1109.02. All vehicles providing transportation for students must be insured as provided in Ed 1114.19(c)(2) and 1129.08(ak).” Ed 1114.06(c)-(e).

Ed 1114.07 sets forth new requirements pertaining to positive behavioral interventions. Ed 1114.07(a) states that: “positive behavioral interventions based on the results of a behavioral assessment shall serve as the foundation of any program used to address the behavioral needs of students.”

Ed 1114.07(f)-(g) prohibit the use of aversive behavioral interventions, which include, but are not limited to, procedures intended to cause physical pain, contingent food/drink programs, and use of unsupervised or unobserved rooms from which the child cannot exit without assistance. See also §K, above, discussing Ed 1113.04-1113.06.

Ed 1114.09, use of restrictive behavioral interventions, is identical to Ed 1113.06, discussed above.

Administrative, instructional, and related service staff shall hold appropriate certification. Ed 1114.10(a). Private providers of special education or other non-LEA programs must complete a background investigation and criminal history records check on every selected applicant prior to employment consistent with Ed 1114.11.

There is also a new requirement that the private providers or non-LEA programs, including any individual providing direct services to a student pursuant to Ed 1126.05, complete a background investigation consistent with RSA 189:13-a prior to a final offer of employment. Ed 1114.11(a).

M. Surrogate Parents, Ed 1115

This provision clarifies that “[a]ny employee of an LEA, the department, or a residential school or hospital, any physician, any judicial officer, or any other person who knows or believes that a child’s parent is not known, or is not able to be located, or that the child is under legal guardianship of DCYF, or any person who knows or believes that a court has issued a written order for a surrogate parent, shall initiate the appointment of a surrogate parent pursuant to Ed 1115.02(b).” Ed 1115.02(a).

This provision also expands on the reasons for terminating the appointment of a surrogate parent. In addition to the two reasons set forth in Ed 1121.06(e) (2002), the commissioner shall terminate the appointment of a surrogate parent for the following reasons:

1. The adult student rescinds his or her request for the appointment of a surrogate parent and will assume educational decision-making for him or herself;
2. In the case of a parent who has requested a surrogate parent because the parent is unable to act as the child’s educational decision maker, the parent notifies the LEA in writing that the parent is able to resume responsibility as the child’s educational decision-maker.

Ed 1105.05(h)(3)-(4).

N. Alternative Methods for the Appointment of Surrogate Parents, Ed 1116

This section of the rules is new, and applies to unaccompanied homeless youths who are, or may be, children with disabilities. Ed 1116.01. Pursuant to this rule, the school district of residence must immediately enroll the unaccompanied child for purposes of attending classes and participating in school activities. Ed 1116.02(a).

The District's homeless education liaison has a maximum of 30 days from the date of enrollment to appoint a surrogate parent. Id. at 1116.02(b). For purposes of this rule, the District of residence's homeless education liaison is a designee of the commissioner of education, permitted to select surrogate parents in accord with Ed 1115.06. Ed 1116.02(c)-(d).

Judges who oversee the care of a child are also considered to be designee of the Commissioner of Education, and, if the child is a ward of the state, the judge who oversees the care of that child shall appoint a surrogate parent to represent the child in education matters. Ed 1116.03(a)-(b). The surrogate parent must be selected and trained in accord with Ed 1115.06-1115.07, and the responsibilities of the surrogate parent shall be consistent with the responsibility set forth in Ed 1115.08. Id. at 1116.03(b)(1)-(3).

The director of a child placement agency licensed under RSA 170-E that has placed a child with a foster parent may assign a foster parent to act as a surrogate parent to make educational decisions on behalf of a foster child for the duration of the foster placement, provided that:

1. The natural parents' parental rights have been terminated by a court of law or by death;
2. The foster parent is an on-going, long term relationship with the child for at least one year;
3. The foster parent is willing to make educational decisions required of parents under federal and state law;
4. The foster parent has no interest that would conflict with the child;
5. The foster parent has demonstrated to the commissioner of the DOE or the Commissioner's designee that he or she has the knowledge and skills to represent the child adequately in educational decision-making by:
 - a. either fulfilling all of the requirements specified in Ed 1115.07(b) – (f) and successfully passing a background check which includes a fingerprints check; or
 - b. Attaining a minimum score of 80 on the final exam given to surrogate parent candidates and successfully passing a background check which includes a fingerprint check.

Ed 1116.04(b).

O. Incarcerated Children with Disabilities, Ed 1118

Although this section is substantially similar to Ed 1108 (2002), the definition of “eligible offender with a disability” has been slightly revised. The age requirements have been changed from “age 17 through 21, or less than 17 and adjudicated as an adult” to “age 18 through 21.” Ed 1118.01(a)(1).

Incarcerated individuals “under the age of 18...have the right to be evaluated, identified, and if appropriate, special education and related services provided [sic].” Ed 1118.03.

P. Procedural Safeguards, Ed 1120

With the following exceptions, this section is substantially similar to Ed 1123 (2002). Ed 1120.01(c) would permit a parent or adult student “to authorize an individual to act on their behalf pursuant to a duly executed Power of Attorney.”

The rule pertaining to parental consent, Ed 1120.04, requires the LEA to obtain informed, written consent from the parent of a child prior to “annual access to public insurance or when changes in services paid by public insurance are made; [and] each time the public agency proposes to access private insurance.” Ed 1120.04(a)(7)-(8). (emphasis added)

The LEA is also required to comply with 34 CFR 300.154 and He_M 1301 “when proposing accessing public and private insurance.” Ed 1120.08 (setting forth requirements that the LEA must follow in order to access public and private insurance).

If a parent refuses consent to an initial evaluation, Ed 1120.05(c) permits the LEA to pursue the initial evaluation by initiating a due process hearing. In contrast, if a parent refuses consent for the initial provision of services, then the LEA shall not pursue the initial provision of services by initiating a due process hearing. Ed 1120.05(d). The LEA has the authority to initiate court proceedings to authorize the initial provision of special education services. Id.

Ed 1120.05(e) retains the requirement that the LEA, in order to assure FAPE to a child, initiate a due process hearing if a parent refuses consent to “any proposal included in Ed 1120.04(a)(3) [annual review of the IEP and placement], (4) [determining or changing the disability classification], (5) [changing the nature or extent of the special education/related services], or (6) [conducting a reevaluation].”

Q. Alternate Dispute Resolution, Ed 1122

This section is substantially similar to Ed 1128.02 (2002), and sets forth the available alternative dispute resolution options. It contains one new requirement that requires the mediator or neutral to submit in writing to the DOE the results of the dispute resolution. The results must be submitted no later than 2 days after the dispute resolution is completed. Ed 1122.03(a).

R. Administrative Due Process Hearing Procedure, Ed 1123

This provision has been amended to reflect the revisions contained in the IDEA and its Federal regulations, including the sufficiency requirements, the requirement that a response to the complaint be submitted within 10 days of receipt of the complaint and notice, and the requirement that the LEA convene a resolution session within 15 days of receiving notice of the parent's complaint. Ed 1123.

It also states that the prehearing conference "shall be held no later than 17 days after the resolution meeting or the date the parties agree, in writing," that no resolution is possible or that the resolution session has been waived, and that the due process hearing "shall be held no later than 14 days after the conclusion of the prehearing conference." Ed 1123.02(e)-(f).

The "due process hearing process shall commence on the date the LEA or the parent or parents receive notice of a due process hearing complaint in accordance with Ed 1123.04, unless the request is withdrawn as provided in Ed 1123.10." Ed 1123.06(a).

Ed 1123.08 incorporates the provisions of 34 CFR 300.510, pertaining to resolution sessions. In accord with Section 300.510, within 15 days of receiving notice of a parent's due process complaint, the LEA must convene a meeting with the parent and relevant member(s) of the IEP Team who have specific knowledge of the facts identified in the due process complaint. One LEA representative must have decision-making authority, and the LEA may not invite an attorney unless the parent is accompanied by an attorney. Id. The purpose of the resolution session is "for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the LEA has the opportunity to resolve the dispute that is the basis for the . . . complaint." Id.

"The hearing shall be conducted no later than 31 days after:

- a. The parties agree in writing to waive the alternative dispute resolution session;

- b. The parties conduct an alternative dispute resolution session and do not reach a settlement agreement;
- c. The parties agree not to use alternative dispute resolution in Ed 1122;
- d. The complaint is not resolved during the 30-day resolution period provided in 34 CFR 300.510; or
- e. The due process complaint that meets the requirements of 34 CFR 300.507(c)-(f) has been filed by a public agency. “

Ed 1123.09(a)-(e).

The office of legislation and hearings shall provide the parties with a written notice, which shall include “[t]he name of the hearing officer who shall conduct the mediation; and [t]he name of the hearing officer who shall review the sufficiency statement and conduct the due process hearing.” Ed 1123.12(c)(8)-(9).

Ed 1123.19(a) permits hearing officers to “grant extensions of the time set forth in Ed 1123.18(e),¹¹ except as to expedited hearings, for specific periods of time at the request of either party if:”

- 1. The child’s educational progress or well-being would not be jeopardized by the delay;
- 2. A party would not have adequate time to prepare and present the party’s position at the hearing in accordance with the requirements of due process; and
- 3. The need for the delay is greater than any financial or other detrimental consequences likely to be suffered by a party in the event of delay.

If the parent and the LEA reach agreement prior to the hearing, the LEA Superintendent or his/her designee is required to provide written notice of the settlement to the DOE, requesting that the hearing be cancelled; this notice must be provided “within 5 business days of signing the agreement.” Ed 1123.16.

The rule also states that the DOE “shall enforce the elements of settlement agreements or [ADR] agreements only if they are adopted as

¹¹ Ed 1123.18(e) states that the “department shall ensure that not later than 45 days after the time for conducting an administrative due process hearing in Ed 1123.09: (1) a final decision is reached in the hearing consistent with RSA 541-A:35 and (2) a copy of the decision is sent by certified mail to each of the parties.”

amendments to an IEP and only if the agreement meets the requirements of the IDEA, [NH] RSAs, and the implementing regulations of those laws.” Ed 1123.17(k).

S. Disciplinary Procedures for Children with Disabilities, Ed 1124

Ed 1124.01 is substantially similar to Ed 1119.11 (2002), and requires LEAs to develop discipline procedures that are consistent with the provisions of 34 CFR 300.530-300.536.

Ed 1124.02 is new, and incorporates the requirement found in 34 CFR 300.530(d)(1)(i) that the LEA provide services to children with disabilities who have been removed from their current placement for more than 10 days in a school year. The rule states that LEA must provide services necessary to provide the child with a disability an opportunity to progress in the general education curriculum consistent with the child’s IEP. Ed 1124.02.

T. State Department of Education Enforcement, Ed 1125

This section sets forth enforcement procedures that “shall occur subsequent to the issuance of orders resulting from a complaint investigated in accordance with Ed 1121, a due process hearing conducted in accordance with Ed 1123, or a monitoring activity conducted in accordance with Ed 1126.” Ed 1125.01(a).

Ed 1125.02 is substantially similar to Ed 1131 (2002), but it expands on the enforcement action that the State may take. Such actions include, but are not limited to, the following:

1. Corrective action plan development, implementation and monitoring;
2. Voluntary and mandatory technical assistance as determined by the department;
3. Mandatory, targeted professional development s determined by the department;
4. Directives ordering specific corrective or remedial actions, including, but not limited to withdrawing program approval, pending an appeal;
5. Targeting or redirecting the use of federal special education funds in the areas of concern;

6. Formal referral to the Bureau of Credentialing for review in accordance with Ed 511.02;
7. Order the cessation of operations of discreet programs operated by a school district, collaborative program, private provider of special education, public academy, or state institution for the benefit of children with disabilities;
8. Require redirection of federal funds to remediate noncompliance of more than one year;
9. Making no further payments of state or federal funds for the LEA or other public agency until the department determines that there is no longer any failure to comply with orders;
10. Order, in accordance with the final state audit resolution determination, the repayment of misspent or misapplied state and/or federal funds;
11. In the case of an LEA or other public agency, refer the matter to the Department of Justice for further action; and
12. In the case of a private provider of special education or other non-LEA program, order all school districts with students placed in the private provider of special education to relocate the students for whom each district is responsible to other programs or facilities that are in compliance with the IDEA and Ed 1100.

Ed 1125.02(e)(1)-(12). Reviews of programs to ensure compliance will include desk audits, scheduled on-site reviews, and unannounced on-site reviews. Ed 1125.02(f)(1)-(3).

U. State Department of Education Monitoring of Educational Services and Programs for Children with Disabilities, Ed 1126

There are several changes to this section. They are as follows:

Ed 1126.01(b)(12) requires that the LEAs request for special education funds include a component that describes the LEAs reasonable steps to ensure that children with disabilities who need instructional materials in accessible formats receive those materials at the same time other children receive instructional materials.

Ed 1126.03, Program Approval of Public and Non-Public Programs, is a new section that pertains to all programs operated by LEAs, public academies,

private providers of special education, public agencies, and other non-LEA programs, and requires that the programs be reviewed pursuant to the approval process set forth in Ed 1126.02. This provision sets forth the steps that must be taken by the monitored programs that are found to be in noncompliance, and the requirements for program approval.

Ed 1126.04, Waiver Process for Placements in Approved In-State Programs, permits the LEA to submit an application to the DOE to place an additional student who does not meet the approved public or private in-state program's age range or program capacity. Ed 1126.04(a). Once the LEA's application has been approved, "the program may annually:

1. Accept one student who meets an approved special education program's 'disabilities served' but is below or above the age range by no more than one year, or
2. Accept one student who meets the program's age-range and disabilities served, but whose acceptance will result in the program exceeding its program capacity by no more than one additional student."

Ed 1126.04(c).

"No more than one student may be placed in any approved public or private special education program pursuant to Ed 1126.04." Ed 1126.04(d).

The LEA shall not place a student with a disability until it has received written approval from the DOE; the DOE must act on the LEA's request within 5 business days. Ed 1126.04(g).

Ed 1126.05, Placement in In-State Programs Not Currently Approved to Provide Special Education and Related Services, sets forth the mechanism by which the LEA may seek approval to place a child in a program not currently approved to provide special education and related services. This provision is substantially similar to Ed 1126.05 (2002).

Public agencies are prohibited from placing students in out-of-state programs that do not meet the standards of Ed 1114.07-1114.09. Ed 1126.06(b). The LEA may place students in out-of-state programs, schools, or classes that have been approved by the host state. Limitations on the out-of-state program's approval, "such as by category of disability served, shall apply to the schools, classes, and programs approved for New Hampshire children." Ed 1126.06(a).

V. Rate Setting, Ed 1129

The rules now define the term “executive,” as “the person performing the administrative functions and duties that are necessary to the general supervision and direction of the operations of the agency [private provider of special education services, approved by the DOE as a provider of special education and/or related services], including, but not limited to:

- Hiring and firing of personnel;
- Administrating supervision of the personnel;
- Supervising the maintenance of educational records;
- Maintenance of payroll, bookkeeping and other records; and
- Supervising the maintenance and repairs of the facility.”

Ed 1129.01(g)(1)-(5).

“ . . . Regardless of the actual salary, for NHDOE rate setting purposes, executive staff salaries shall be reported at a maximum of \$75,000 for the state fiscal year and subsequently increased annually by no more than the increase for that year in the consumer price index or other similar publications from the New Hampshire department of employment security . . .” Ed 1129.08(aq).