A Brave New World: How to Get Prescriptions Under Medicare Part D
Applying the Individuals with Disabilities Education Act in Preschools

[Editor's note: This article is adapted from one with the same title published in the Summer 2005 issue of the Child Care Law Center's Legal Update. That article in turn was an abridgment of a Child Care Law Center monograph, Preschool Inclusion Series: Individuals with Disabilities Education Act, which offers background information on California special education laws to those planning and implementing preschool programs and the legal staff with whom they work. For a copy of the full monograph, see www.childcarelaw.org.]

As universal preschool grows around the country, advocates and policymakers must not overlook the needs of young children with special needs—or the laws protecting these children. One study found that 12 percent of children in 2001 in the United States had special health care needs.1 The precise number of preschool children with disabilities is difficult to determine, but one report suggests that 5 percent to 8 percent of children under 5 years old have a disability or chronic health condition.2 Both the law and the children’s best interests require that these children’s needs be considered during planning for universal preschool so that they are fully integrated into universal preschool design.

To ensure that public schools meet the educational needs of children with disabilities, Congress passed the Individuals with Disabilities Education Act (IDEA) in 1975 and reauthorized it in 2004 as the Individuals with Disabilities Education Improvement Act, which took effect on July 1, 2005.3 The Individuals with Disabilities Education Improvement Act contains four parts: A through D. Part B

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guarantees all children with disabilities from age 3 through 18 (and in some circumstances up to age 21) a “free and appropriate public education” in the “least restrictive environment.” For many children the least restrictive environment is a regular classroom where they learn alongside their typically developing peers. Part C of the IDEA guarantees early intervention services to infants and toddlers up to age 3 in their “natural environments”—that is, settings that would be normal for the child’s peers who do not have disabilities. Part C also addresses the transition of infants and toddlers from early intervention services to preschool programs.4

States must protect the rights of children with disabilities to a free and appropriate public education at least to the extent the IDEA requires. However, states have the option to offer greater protection.

Historically most public school systems have not offered general education preschool programs, and thus finding places where preschool children with disabilities can be educated with their typically developing peers has been a challenge. National statistics show that preschool-age children are more likely than school-age children to be placed in special education classrooms with other children with disabilities—placements that are not necessarily the best way to meet these children’s needs. To provide placement in the least restrictive environment, school districts without public preschool programs at times have been obligated to pay for private preschool slots as well as the special education services that children need in that setting. The move toward universal preschool thus offers a dual opportunity: to educate all preschool children together, both those with and those without disabilities, and to develop publicly funded inclusive preschool programs that can serve the needs of children and families in a more cost-effective way.

IDEA Part B

Part B, which guarantees a free and appropriate public education to eligible preschool and school-age children, applies to all public education agencies and to any private facility where a public agency has placed a child, including preschools. In some cases it also applies to private facilities where parents have unilaterally placed children. An eligible child is one who has a disability as defined in the IDEA and who needs special education and “related services” (defined below) due to the disability. Beginning at age 3, an eligible child is entitled to a free and appropriate public education and to an individualized education program (IEP). Federal law prohibits placing eligible children on waiting lists for Part B services. If an appropriate program is full, the school district must offer comparable services; but a parent may choose instead to wait for an opening in a particular program.5

In 1982 the U.S. Supreme Court ruled that to be appropriate a placement must be (1) specifically designed to address the child’s unique needs, (2) “supported by such services as are necessary to permit the child ‘to benefit’ from the instruction,” and (3) in accordance with the IEP.6 The Court said the child must receive some educational benefit but not necessarily the “best education available.”7 Parents may challenge a school district’s failure to provide a free and appropriate public education through administrative hearings or in court; plaintiffs have prevailed in federal court on the basis of both procedural and substantive violations of special education law.

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5 Id. §§ 300.343(b)(1)(ii), 300.347(a)(6).
7 Id.; see also Capistrano Unified School District v. Wartenberg, 59 F.3d 884 (9th Cir.1995), and Fermin v. San Mateo–Foster City School District, 2000 WL 1130070, at 3 (N.D. Cal. 2000).
A fundamental requirement of the IDEA is that children be educated in the “least restrictive environment.” The law assumes that children with disabilities will be educated with typically developing children unless “the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”8 In the K–12 setting the “least restrictive environment” will often be a “regular” classroom, but, because there are so many types of preschool settings, defining a “regular” preschool classroom can be difficult. This dilemma should ease if the universal preschool effort “regularizes” preschool settings. In any event the likelihood of meeting the needs of all children is enhanced if a continuum of placements, from less to more restrictive, is available.

The IEP team, which includes, among others, the child’s parents, the child’s regular education teacher (if applicable), the child’s special education teacher, and someone who is knowledgeable about assessment results and placement options, must decide on the child’s placement.9 For preschool children, the “regular classroom teacher” should be an early childhood educator. The team may also, at the discretion of the parent or agency, include “other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate.”10 The team must review the placement when the IEP is reviewed and revised, and this must occur at least annually.11 Unless the IEP requires otherwise, placement must be in the school that the child would have attended if the child did not have a disability. If special equipment or a modification of the general curriculum or regular classroom would enable the child to be educated with typically developing peers, placement should occur in the regular classroom. Schools must also ensure, to the extent possible, that children with disabilities can participate in extracurricular activities.12

States have an affirmative obligation to find all eligible children, determine whether they are receiving services, and offer special education services. To comply with this mandate, local education agencies must develop written “child find” policies and procedures. Particularly for young children, the law seeks to ensure that services will be offered when the child is young enough to maximize the child’s chances of living independently as an adult.13 Universal preschool programs should be prepared to be integrally involved in these outreach or “child find” efforts.

A parent or other person may ask that a child be assessed; if the request comes from a nonparent, parental consent must be obtained. Assessments must be nondiscriminatory and must take children’s home language into account; if standardized tests are used, the tests must have been validated for the specific use and be given by someone trained to do so.14 Parents must have input into the assessment and receive copies of reports.15 Once an assessment request is made, strict timelines apply to conducting the assessment and developing the IEP.

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9“Parent” means natural or adoptive parent; a guardian (but not the state if the child is a ward of the state); a person acting in the place of a parent (such as a grandparent or stepparent with whom the child lives, or a person who is legally responsible for the child’s welfare); or a surrogate parent who has been appointed in accordance with 34 C.F.R. § 300.515. Unless prohibited by state law, a foster parent may also be a “parent” under the Individuals with Disabilities Education Act (IDEA). 34 C.F.R. § 300.20 (2004). The state is not included within the definition of parent. Id. § 300.344.
10Thus a child care teacher may be a member of an individualized education program (IEP) team.
1134 C.F.R. § 300.343. Under the reauthorized IDEA, up to fifteen states will be given the opportunity to be part of a pilot program that will extend IEPs up to three years (Pub. L. No. 108-446, § 614(c)(5)).
12Id. § 300.553.
13Id. § 300.1; see also id. § 303.12(d)(16).
14Id. § 300.352.
15Id. § 300.534.
Generally an IEP (1) addresses the child’s current level of academic achievement and functional performance, including for preschool children “as appropriate, how the disability affects the child’s participation in appropriate activities”; (2) sets out measurable annual goals; (3) states what special education, related services, and supplementary aids and services the school will offer to help the child meet those goals; and (4) states how progress will be measured. The IDEA requires that children receive services beyond the regular school year when necessary.

The special education that eligible children must receive includes both “instructional” and “related” services. Transportation, speech pathology and audiology, psychological services, physical and occupational therapy, recreation, school nurse services (added by reauthorization), and social work are examples of related services.16

Part B discipline procedures apply to all children with disabilities in both school district programs and nonschool district programs in which the school district placed the child. A child with a disability may be removed from a current placement for up to ten days under disciplinary policies that apply equally to children without disabilities, or for a longer period if additional protection provisions are offered. These protection provisions also apply to children not yet found eligible for Part B services if the district had “knowledge” of the child’s disability.17

Parents have the right to challenge a school district’s action or failure to act through an administrative process that the state must make available; the process must include voluntary mediation, filing of complaints, due process hearings with a right to appeal, and civil action in state or federal court.18 If a complaint is made, the most recently agreed-upon IEP and placement remain in effect until the dispute is resolved.

**IDEA Part C**

Part C, formerly Part H, provides for early intervention services for eligible infants and toddlers under 3. Regional centers and school districts are responsible for ensuring that the infants and toddlers receive services.

Federal law defines an eligible infant or toddler with a disability as one who needs early intervention services because the child experiences developmental delays or has a diagnosed physical or mental condition likely to result in developmental delay.19 States must have policies to prevent delays in services. As with Part B, if an appropriate program is full, the regional center or school district must offer comparable services unless the parent chooses to wait for an opening in a particular program.

Eligible infants and toddlers may receive services in one or more of five developmental areas: physical, cognitive, communication, social or emotional, or adaptive. Services include family training, counseling, and home visits; speech pathology; occupational and physical therapy; psychological and social work services; assistive technology devices and services; and transportation.20 Services must, to the maximum extent appropriate, be provided in “natural environments”—settings that are “normal for the child’s age peers who have no disabilities.”21 These may be the child’s home, child care setting, other community settings, or, for very ill children, a hospital.

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17 For requirements regarding disciplinary procedures, see 34 C.F.R. §§ 300.523–527 (2004).
18 The reauthorized IDEA requires a preliminary meeting with a local education agency representative who has decision-making authority before proceeding to a due process hearing.
A parent may ask either the regional center or local school district to assess a child for early intervention services; others, such as physicians, child care providers, and service providers may also request an assessment, but in this event the parent or guardian must consent to any testing. As with preschool children, the state must have a system to seek out eligible infants and toddlers and to coordinate efforts with other agencies, such as Head Start or health care providers, to identify eligible children. Again, any regional or statewide universal preschool system should coordinate with existing programs to ensure integration with their screening and assessment systems.

When the regional center or school district receives an assessment request, it must generally within forty-five days document the date, assign the family a service coordinator, give the parents written notice, and obtain their consent. A meeting with the parents to develop a written individualized family service plan must be held within forty-five days of determination of the child’s eligibility. The service plan must focus on both the child and the family, and parents must give their written consent before services are provided. Mediation or due process hearings are available to challenge a public entity’s denial of, reduction in, or termination of services.

### Transitions

Children receiving special education or early intervention services need to experience smooth transitions to the next stage of education. Federal law requires states to ensure a smooth transition from Part C early intervention services to Part B preschool special education services. The family must be included in the transition plan, and the lead agency must review the options available from the child’s third birthday to the end of the school year. Transition plans must also be prepared for children who received services under Part C but are not eligible under Part B due to different criteria. However, federal law offers no guidance on the transition from preschool to kindergarten or first grade.

The requirements for educating preschool children with special educational needs are extensive and complex. The IDEA emphasizes the importance of placing children with disabilities in regular classrooms with modifications or supports whenever possible. Those designing a universal preschool system must keep these principles in mind and be familiar with the legal requirements.