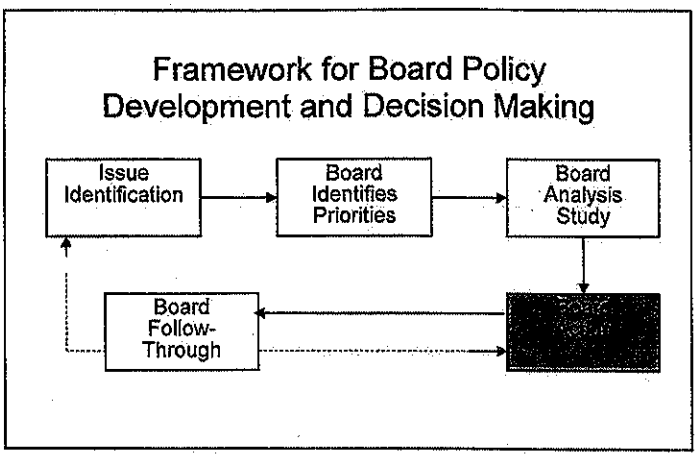
Iowa State Board of Education

Executive Summary

July 30, 2009



Agenda Item: Rules: Chapter 41 - Special Education (Notice)

Iowa Goal: All K-12 students will achieve at a high level.

Equity Impact Statement: This chapter will apply equally to all area education agencies and local school districts.

Presenter: Thomas Mayes, Legal Consultant
Bureau of Student and Family Support Services

Attachments: 1

Recommendation: It is recommended that the State Board give public notice of its intent to amend this chapter.

Background: This intended action makes technical corrections to chapter 41 resulting from revisions to the chapter in 2007, makes technical corrections required by federal regulatory changes in 2007 and 2008, makes clarifying changes regarding the role of general education, and makes clarifying changes concerning child find and eligibility determinations.

EDUCATION DEPARTMENT [281]

Notice of Intended Action

Pursuant to the authority of Iowa Code section 256B.7(5), the State Board of Education hereby proposes to amend Chapter 41, "Special Education," Iowa Administrative Code.

This intended action makes technical corrections to chapter 41 resulting from revisions to the chapter in 2007, makes technical corrections required by federal regulatory changes in 2007 and 2008, makes clarifying changes regarding the role of general education, and makes clarifying changes concerning child find and eligibility determinations.

No waiver provision is included because the Board of Education has adopted agency-wide waiver rules in 281— Chapter 4.

Any interested person may submit electronic, oral or written comments on or before October 13, 2009, by addressing them to Thomas Mayes, Legal Consultant, Bureau of Student and Family Support Services, Department of Education, Grimes State Office Building, Des Moines, Iowa 50319–0146; telephone (515) 242–5614; fax (515) 281–6019; e-mail Thomas.Mayes@Iowa.gov.

A public hearing will be held over the Iowa Communications Network (ICN) on October 13, 2009, from 2:00 p.m. to 4:00 p.m., with the origination site in the ICN Room, Second Floor, Grimes State Office Building, 400 E. Fourteenth Street, Des Moines, Iowa, at which persons may present their views orally or in writing.

The following ICN sites will be available:

Mississippi Bend Area Education Agency
Louisa Room
729 21ST ST
BETTENDORF

Great Prairie Area Education Agency
3601 West Avenue
BURLINGTON

Area Education Agency 267
3712 Cedar Heights DR
CEDAR FALLS

Kirkwood Community College
6301 Kirkwood Blvd SW
Linn Hall, Room 202
CEDAR RAPIDS

Area Education Agency 267
State Room
9184B 265th Street
CLEAR LAKE

Graphic Arts Technology Ctr. of Iowa
Room 16
1951 Manufacturing Drive
CLINTON

Green Valley Area Education Agency
Turner Room
1405 N Lincoln
CRESTON

Loess Hills Area Education Agency
24997 Hwy 92
COUNCIL BLUFFS

Keystone Area Education Agency
Room 2
2310 Chaney Road
DUBUQUE

Keystone Area Education Agency
1400 2ND ST NW
ELKADER

Great Prairie Area Education Agency
2814 N Court Street
OTTUMWA, IA 52501

Prairie Lakes AEA
500 NE 6th St.
POCAHONTAS

Northwest Area Education Agency
1382 4th Ave NE, Room 103
SIOUX CENTER

Department of Human Services
Trospar-Hoyt Building
4th Floor
822 Douglas Street
SIOUX CITY

Iowa Lakes Community College
1900 N. Grand Avenue, Room 118
SPENCER

These amendments are intended to implement the Individuals with Disabilities Education Act (20 U.S.C. §§ 1400-ff), its implementing regulations (34 C.F.R. Part 300), and Iowa Code chapter 256B.

If you require reasonable accommodations to participate in public hearings because of a disability, please contact the Iowa Department of Education at 515-281-3176 no later than October 1, 2009. All ICN sites are accessible to persons with disabilities.

A fiscal impact summary prepared by the Legislative Services Agency pursuant to Iowa Code § 17A.4(3) will be available at http://www.legis.state.ia.us/IAC.html or at (515) 281–5279 prior to the Administrative Rules Review Committee's review of this rule making.

The following amendments to chapter 41 are proposed.

ITEM 1. Amend rule **281—41.8(256B,34CFR300)** as follows:

281-41.8(256B,34CFR300) Child with a disability. "Child with a disability" refers to a person under 21 years of age, including a child under 5 years of age, who has a disability in obtaining an education. The term includes an individual who is over 6 and under 16 years of age who, pursuant to the statutes of this state, is required to receive a public education; an individual under 6 or over 16 years of age who, pursuant to the statutes of this state, is entitled to receive a public education; and an individual between the ages of 21 and 24 who, pursuant to the statutes of this state, is entitled to receive special education and related services. In federal usage, this refers to infants, toddlers, children and young adults. In these rules, this term is synonymous with "child requiring special education" and "eligible individual." A "disability in obtaining an education" refers to a condition, identified in accordance with this chapter, which, by reason thereof, causes a child to require special education and support and related services.

ITEM 2. Amend rule **281—41.9(256B,34CFR300)** as follows:

281—41.9(256B,34CFR300) Consent.

41.9(1) *Obtaining consent.* "Consent" is obtained when all of the following conditions are satisfied:

a. The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or ~~other~~ through another mode of communication;

b and *c.* No change.

41.9(2) No change.

41.9(3) *Special rule.* If a parent revokes consent in writing for their child's receipt of special education services after the child is initially provided special education and related services, the public agency is not required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent.

ITEM 3. Amend rule **41.18(256B,34CFR300)** by substituting "alternate academic achievement standards" for "alternate achievement standards," wherever that phrase may appear.

ITEM 4. Amend subrule **41.51(12)** as follows:

41.51(12) *School district of the child's residence.* "School district of the child's residence" or "district of residence of the child" is that school district in which the parent of the individual resides, subject to the following:

a and *b.* No change.

c. If an individual is physically present ("lives") in an intermediate care facility, residential care facility, or other similar facility, the individual's district of residence is deemed to be that of the individual's parents.

~~*c*~~ *d.* "Children living in a foster care facility" are individuals requiring special education who are living in a licensed individual or agency child foster care facility, as defined in Iowa Code section 237.1 ~~facility providing residential treatment as defined in Iowa Code section 125.2~~, or in an unlicensed relative foster care placement. District of residence of an individual living in a foster care facility and financial responsibility for special education and related services are determined pursuant to subrule 41.907(5)"a".

e. "Children living in a treatment facility" are individuals requiring special education who are living in a facility providing residential treatment as defined in Iowa Code section 125.2. District of residence of an individual living in a treatment facility and

financial responsibility for special education and related services are determined pursuant to subrule 41.907(5)"b".

~~d~~ *f.* "Children placed by the district court" are pupils requiring special education for whom parental rights have been terminated and who have been placed in a facility or home by a district court. Financial responsibility for special education and related services of individuals placed by the district court is determined pursuant to subrule 41.907(6).

ITEM 5. Amend subrule **41.103(1)** as follows:

41.103(1) *All means available to meet Part B requirements.* The state may use whatever state, local, federal, and private sources of support that are available in the state to meet the requirements of Part B of the Act.

ITEM 6. Amend rule **41.111(256B,34CFR300)** by adopting the following **new** subrules:

41.111(2) *High quality general education instruction; general education interventions.*

a. As a component of efficient and effective, high quality general education instruction, it shall be the responsibility of the general education program of each LEA to provide additional support and assistance to all students who may need such additional support and assistance to attain the educational standards of the LEA applicable to all children. Receipt of such additional support and assistance, standing alone, does not create a suspicion that a child is an eligible individual under this chapter. Activities under this paragraph shall be provided by general education personnel, with occasional or incidental assistance from special education instructional and support personnel.

b. General education interventions, involving activities described in rule 41.312(256B,34CFR300), are a recognized component of an AEA's child find policy under 41.407(1) and procedures under 41.407(2).

41.111(5) *Evaluation required when disability is suspected.* At the point when a public agency suspects a child is a child with a disability under this chapter, the public agency must seek parental consent for an initial evaluation of that child, pursuant to 41.300(1).

41.111(6) *Rule of construction: "suspicion of a disability."* As a general rule, a public agency suspects a child is a child with a disability when the public agency is aware of facts and circumstances that, when considered as a whole, would cause a reasonably prudent public agency to believe that the child's performance might be explained because the child is an eligible individual under this chapter.

ITEM 7. Amend rule **41.118(256B,34CFR300)** as follows:

281—41.118(256B,34CFR300) Children in public or private institutions. Except as provided in rule 41.149(256B,34CFR300) regarding agency responsibility for general supervision ~~for~~ <u>of</u> some individuals in adult prisons, the department must ensure that rule 41.114(256B,34CFR300) is effectively implemented, including, if necessary, making arrangements with public and private institutions such as a memorandum of agreement or special implementation procedures.

ITEM 8. Amend rule **41.156(256B,34CFR300)** by adding the following <u>**new**</u> subrule:

41.156(6) *Positive efforts to employ and advance qualified individuals with disabilities.* Each recipient of assistance under Part B of the Act must make positive efforts to employ, and advance in employment, qualified individuals with disabilities in programs assisted under Part B of the Act.

ITEM 9. Amend rule **41.211(256B,34CFR300)** as follows:

281-41.211(256B,34CFR300) Information for department. Each public agency shall provide the department with information necessary to enable the department to carry out its duties under Part B of the Act and this chapter, including, with respect to 34 CFR

Sections 300.157 ~~and 300.160~~, information relating to the performance of children with disabilities participating in programs carried out under Part B of the Act. This information, including such quantitative and qualitative data as the department may require, shall be submitted in a manner and at a time determined by the department. Failure to submit timely and accurate information may be considered by the department in making the determinations under rule 41.603(256B,34CFR300) or in taking any other action to enforce Part B of the Act or this chapter.

ITEM 10. Amend subrule **41.300(2)** as follows:

41.300(2) *Parental consent for services.*

a and *b.* No change.

~~*c.* If the parent of a child fails to respond or refuses to consent to services under 41.300(2)"a," the public agency may not use the procedural safeguards of this chapter, including the mediation procedures or the due process procedures under this chapter, to obtain agreement or a ruling that the services may be provided to the child.~~

~~*d.* If the parent of the child refuses to consent to the initial provision of special education and related services, or the parent fails to respond to a request to provide consent for the initial provision of special education and related services, the public agency:~~

~~(1) Will not be considered to be in violation of the requirement to make available FAPE to the child for the failure to provide the child with the special education and related services for which the public agency requests consent; and~~

~~(2) Is not required to convene an IEP team meeting or develop an IEP for the child for the special education and related services for which the public agency requests such consent.~~

c. If the parent of a child fails to respond to a request for, or refuses to consent to, the initial provision of special education and related services, the public agency--

(1) May not use the procedural safeguards in this chapter, including the mediation procedures rule 41.506(256B,34CFR300) or the due process procedures under rules 41.507(256B,34CFR300) through 41.516(256B,34CFR300) in order to obtain agreement or a ruling that the services may be provided to the child;

(2) Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with the special education and related services for which the parent refuses to or fails to provide consent; and

(3) Is not required to convene an IEP Team meeting or develop an IEP under rules 41.320(256B,34CFR300) and 41.324(256B,34CFR300) for the child.

d. If, at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency--

(1) May not continue to provide special education and related services to the child, but must provide prior written notice in accordance with rule 41.503(256B,34CFR300) before ceasing the provision of special education and related services;

(2) May not use the procedural safeguards in this chapter, including the mediation procedures rule 41.506(256B,34CFR300) or the due process procedures under rules 41.507(256B,34CFR300) through 41.516(256B,34CFR300) in order to obtain agreement or a ruling that the services may be provided to the child;

(3) Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services; and

(4) Is not required to convene an IEP Team meeting or develop an IEP under rules 300.320(256B,34CFR300) and 41.324(256B,34CFR300) for the child for further provision of special education and related services.

ITEM 11. Amend subrule **41.300(4)** as follows:

41.300(4) *Other consent requirements.*

a. No change.

b. Additional consent requirements. In addition to the parental consent requirements described in subrules 41.300(1) through 41.300(3), the state may require parental consent for other services and activities under Part B of the Act and of this chapter if it ensures that each public agency in the state establishes and implements effective procedures to ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE.

c. Limitation on public agency's use of failure to give consent. A public agency may not use a parent's refusal to consent to one service or activity under subrules 41.300(1) through 41.300(3) or 41.300(4)"b" to deny the parent or child any other service, benefit, or activity of the public agency, except as required by this chapter.

d and *e.* No change.

ITEM 12. Amend rule **41.312(256B,34CFR300)** as follows:

281—41.312(256B,34CFR300) General education interventions. Each LEA, in conjunction with the AEA, shall attempt to resolve the presenting problem or behaviors of concern in the general education environment prior to conducting a full and individual evaluation. In circumstances when ~~the development and implementation of general education interventions are not appropriate to the needs of the individual, the IEP team and, as appropriate, other qualified professionals, may determine that a full and individual initial evaluation shall be conducted~~ there is a suspicion that a child is an eligible individual under this chapter, the AEA or AEA in collaboration with the LEA shall

conduct a full and individual initial evaluation. Documentation of the rationale for such action shall be included in the individual's educational record.

41.312(1) No change.

41.312(2) *Nature of general education interventions.* General education interventions shall include ~~teacher~~ consultation with special education support and instructional personnel ~~working collaboratively to improve an individual's educational performance~~. ~~The~~ General education intervention activities shall be documented and shall include measurable and goal–directed attempts to resolve the presenting problem or behaviors of concern, communication with parents, collection of data related to the presenting problem or behaviors of concern, intervention design and implementation, and systematic progress monitoring to measure the effects of interventions.

41.312(3) and **41.312(4)** No change.

ITEM 13. Adopt **new** rule **41.314(256B,34CFR300)** as follows:

41.314(256B,34CFR300) Progress monitoring and data collection.

41.314(1) *Evidence of progress in general education instruction.* Each public agency shall establish standards, consistent with those the Department may establish, by which the adequacy of general education instruction, including the quality and quantity of data gathered, is assessed, including whether such data are sufficient in quantity and quality to make decisions under Part B of the Act and this chapter.

41.314(2) *Progress monitoring and determining eligibility.* Each public agency shall engage in such monitoring of each individual's progress during the process of evaluating whether a child is an eligible individual as the Department may require, and shall record such progress in any manner that the Department may permit or require. If the AEA or LEA serving an individual imposes additional requirements for the monitoring of progress of individuals during the process of evaluation, personnel serving that

individual shall comply with those additional requirements. The team determining the child's eligibility may increase the frequency with which the child's progress is monitored.

41.314(3) *Progress monitoring and eligible individuals.* Each public agency shall engage in such monitoring of each eligible individual's progress as the Department may require, and shall record such progress in any manner that the Department may permit or require. If the AEA or LEA serving an eligible individual imposes additional requirements for the monitoring of progress of eligible individuals, personnel serving that individual shall comply with those additional requirements. An IEP team may increase the frequency with which an eligible individual's progress is monitored.

ITEM 14. Amend paragraph **"c"** of subrule **41.320(1)** as follows:

c. For children with disabilities who take alternate assessments aligned to alternate <u>academic</u> achievement standards, a description of benchmarks or short-term objectives;

ITEM 15. Amend subparagraph **(5)** of paragraph **"b"** of subrule **41.324(1)** as follows:

(5) Consider whether the child needs assistive technology devices and services, <u>including accessible instructional materials</u>.

ITEM 16. Add the following **<u>new</u>** subrule **41.324(6)**:

41.324(6) *Rules of construction: Instruction in Braille.* For an eligible individual for whom instruction in Braille is determined to be appropriate, as determined in 41.324(1)"b"(3), that eligible individual is entitled to instruction in Braille reading and writing that is sufficient to enable the individual to communicate with the same level of proficiency as an individual of otherwise comparable ability at the same grade level. Braille reading and writing instruction may only be provided by a teacher licensed at the appropriate grade level to teach individuals with visual impairments.

ITEM 17. Rescind subparagraph **(1)** of paragraph **"c"** of subrule **41.408(2).**

ITEM 18. Renumber remaining subparagraphs of paragraph **"c"** of subrule **41.408(2)**.

ITEM 19. Rescind paragraph **"g"** of subrule **41.408(2).**

ITEM 20. Amend paragraph **"b"** of subrule **41.412(2)** as follows:

b. When individuals enrolled in nonpublic schools are ~~dually~~ enrolled in public schools to receive special education instructional services, transportation provisions between nonpublic and public attendance centers will be the responsibility of the school district of residence.

ITEM 21. Amend paragraph **"g"** of subrule **41.506(2)** as follows:

g. A written, signed mediation agreement is enforceable in any state court of competent jurisdiction or in a district court of the United States. ~~Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any federal court or state court.~~

ITEM 22. Add **new** paragraph **"h"** to subrule **41.506(2)** as follows:

h. Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any federal court or state court.

ITEM 23. Amend rule **41.600(256B,34CFR300)** by adding a **new** subrule, as follows:

41.600(5) *Correction of noncompliance.* In exercising its monitoring responsibilities under 41.600(4), the state must ensure that when it identifies noncompliance with the requirements of this chapter by an LEA, the noncompliance is corrected as soon as possible, but in no case later than one year after the state's identification of the LEA's noncompliance.

ITEM 24. Amend subrule 41.602(2) as follows:

41.602(2) *Public reporting and privacy.*

a. Public report. The state must:

(1) Report annually to the public on the performance of each LEA located in the state on the targets in the state's performance plan as soon as practicable but no later than 120 days following the state's submission of its annual performance report under 41.602(2)"b"; and

(2) Make the state's performance plan, the state's annual performance reports, and annual reports on the performance of each LEA located in the state available through public means, including, at a minimum, by posting these documents on the Web site of the department, distribution to the media, and distribution through public agencies.

(3) No change.

b and *c.* No change.

ITEM 25. Amend rule **41.624(256B,34CFR300)** as follows:

281—41.624(256B,34CFR300) Destruction of information.

41.624(1) No change.

41.624(2) *Mandatory and permissive destruction of information.* The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, and telephone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation. This permanent record must contain the information required by rule 281—12.3.

41.624(3) *Rule of construction: "No longer needed to provide educational services to the child."* For purposes of this rule, a record is "no longer needed to provide educational services" when it is no longer relevant to providing instructional, support, or

related services and it is no longer needed for accountability and audit purposes. At a minimum, a record needed for accountability and audit purposes must be retained for five years after completion of the activity for which funds were used.

ITEM 26. Amend rule **41.815(256B,34CFR300)** as follows:

281—41.815(256B,34CFR300) Subgrants to AEAs. ~~Each state that receives a grant under Section 619 of the Act for any fiscal year must distribute all of the grant funds that the state does not reserve under rule 41.812(256B,34CFR300) to AEAs in the state that have established their eligibility under Section 613 of the Act.~~ The state will make subgrants to AEAs consistent with 34 C.F.R. section 300.815.

ITEM 27. Amend rule **41.817(256B,34CFR300)** as follows:

281—41.817(256B,34CFR300) Reallocation of AEA funds. ~~If the state determines that an AEA is adequately providing FAPE to all children with disabilities aged three to five residing in the area served by the AEA with state and local funds, the state may reallocate any portion of the funds under Section 619 of the Act that are not needed by that AEA to provide FAPE to other AEAs in the state that are not adequately providing special education and related services to all children with disabilities aged three through five residing in the areas the other AEAs serve.~~ The state reallocates AEA funds under conditions listed and in a manner specified by 34 C.F.R. section 300.817.

ITEM 28. Amend rule **41.907(256B,282,34CFR300,303)** as follows:

281—41.907(256B,282,34CFR300,303) Program costs.

41.907(1) - (4). No change.

41.907(5) *Responsibility for special education for children living in a foster care facility or in a treatment facility.*

a. For eligible individuals who are living in a licensed individual or agency child foster care facility, as defined in Iowa Code section 237.1 ~~or in a facility as defined in Iowa Code section 125.2, the LEA in which the facility is located must provide special~~

~~education if the facility does not maintain a school~~ , or in an unlicensed relative foster care placement, shall remain enrolled in and attend an accredited school in the school district in which the child resided and is enrolled at the time of placement, unless it is determined by the juvenile court or a public or private agency of this state that has responsibility for the child's placement that remaining in such school is not in the best interests of the child. If such a determination is made, the child may receive an education in the district in which the child is placed and not in the district in which the child resided prior to receiving foster care. The costs of the special education required by this chapter, however and in either case, shall be paid by the school district of residence of the eligible individual.

b. For eligible individuals who are living in a facility as defined in Iowa Code section 125.2, the LEA in which the facility is located must provide special education if the facility does not maintain a school. The costs of the special education, however, shall be paid by the school district of residence of the eligible individual.

c. If the school district of residence of the eligible individual cannot be determined and this individual is not included in the weighted enrollment of any LEA in the state, the LEA in which the facility is located may certify the costs to the director of education by August 1 of each year for the preceding fiscal year. Payment shall be made from the general fund of the state.

41.907(6) No change.

41.907(7) *Proper use of special education instructional and support service funds.* Special education instructional funds generated through the weighting plan may be utilized to provide special education instructional services both in state and out of state with the exceptions of itinerant instructional services under subrule 41.410(1) and special education consultant services which shall utilize special education support service funds for both in–state and out–of–state placements.

41.907(8) and **(9)**. No change.

41.907(10) *Procedures for billing under rules 41.907(5) and 41.907(6).* The department may establish procedures by which it determines which district initially pays the costs of special education and related services and seeks reimbursement in situations where a parent of a child cannot be located, parental rights have been terminated, or parents are deceased.

ITEM 29. Amend paragraph **"a"** of subrule **41.1002(1)** as follows:

a. A request for a special education preappeal conference shall be made in the form of a letter which identifies the student, LEA and AEA, sets forth the facts, the issues of concern, or the reasons for the conference. The letter shall be mailed to the department, to the AEA, and to the LEA.