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MEMORANDUM

DATE: June 30, 2005

TO: TechMIS Subscribers

FROM: Charles Blaschke

SUBJ: Preliminary Analysis of IDEA Draft Regulations With Implications for Products and Services in High Demand

Based upon our analysis thus far of the draft IDEA regulations published on June 23, we have prepared this Special Report which identifies opportunities which will increase, particularly for firms which have assessment and intervention-type products and administrative applications which are now required to meet some of the new provisions under IDEA. Also included is the November 30, 2004, IDEA Special Report which spells out the provisions in the Law which the regulations are supposed to clarify. Please give me a call directly if you have any questions.

**USED Publishes Draft IDEA Regulations:
Opportunities Exist for Certain Types of Products and Services
But Purchasing Cycles Will Vary
Among States**

*A Technology Monitoring and Information Service (TechMIS)
SPECIAL REPORT*

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June 30, 2005

On June 21, the IDEA draft regulations were published in the Federal Register. As we have noted in past TechMIS reports, there are numerous opportunities for firms with certain types of products and services. However, in certain areas, implementation at the state and district level will be slow and uneven and some states will postpone publishing state guidance until the final regulations are published -- around December 2005 -- in anticipation of changes in certain areas. Below, we highlight some of the rules which could have significant implications for many TechMIS subscribers, identifying factors which could significantly influence state interpretations and the implementation process.

Early Intervening Services, Section 300.226

Very similar to the language in the Law (see November 2004 Special Report which is enclosed for your convenience), the regulations allow an LEA the option of using up to 15 percent of its IDEA allocation to develop and implement coordinated “early intervening services” for students, with a particular emphasis on students in K-3 who have not been identified as needing special education or related services but need additional academic and behavioral support to succeed in a general education environment. Early intervening services 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.” By allowing professional development to focus on teacher use of instructional software,

USED implies that instructional software would be an allowable item under early intervening services. The proposed regulations also include, as an allowable use, “Providing educational and behavioral evaluations, services, and supports, including scientifically based literacy instruction.” The regulations also state that early intervening services should be coordinated and aligned with similar programs carried out under ESEA; the largest such program is Reading First.

The bottom line questions are twofold: (a) of the up-to-15-percent of IDEA funds (or approximately \$1.5 billion), how much will LEAs opt to reallocate from special education to “regular education” to conduct early intervening services; and (b) what types of instruments and interventions will likely be “allowable” for purchase.

On the first question, LEAs will likely take into account a number of factors. One will likely be the length of the “early intervening services.” If the intervention takes six or more months, few students will probably be placed in special education programs and included in the December 1 “counts,” which is the basis of state special education funding allocations. Use of such lengthy interventions could result in district loss of a significant amount of state funding for the year. A second factor is whether the LEA will want to take the time and effort to report to the SEA on the number of children receiving early intervening services and the number of children served who subsequently receive special education and related services, which is a requirement under the Law. Another consideration is whether the district wishes to implement intervening services instead of opting to reduce its local contribution to special education programs by up to 50 percent of the increase in IDEA funds. If a district’s IDEA allocation increases by \$100,000, and it decides to spend \$200,000 on early intervening services, then it may not select the option of reducing local contributions by \$50,000, as one option has to be adjusted for the other.

And last, high-level district officials may decide that the amount of funds taken out of the special education program budget and reallocated to regular education programs to operate early intervening services is not worth the bureaucratic and political problems which could be created among special education officials, whose budgets would be reduced.

A number of large districts, with whom we have discussed early intervening services, have piloted, or have already created structures within the district and at the school level for implementing early intervening services using a combination of Title I and special education funds. Those districts which are pleased with the results achieved thus far are likely to reallocate more of the IDEA funds to expand early intervening services to additional schools, particularly those with high minority enrollments of students who are yet to be considered for special education programs. While there are certain conditions and responsibilities at the SEA level which could constrain districts' decisions to select or expand early intervening services, for the most part, this is a district-level decision.

The major factor influencing the types of allowable products and services to be purchased under early intervening services is the degree to which forthcoming USED policy guidance and technical assistance imposes some of the requirements of Reading First upon early intervening services as addressed in more detail in the related regulations on "response to intervention" (RTI) as described in the next paragraph.

Determination of Eligibility, Section 300.306

Under this special rule, based on an assessment and evaluation measures, the regulations state a child must not be determined to be a child with a disability under this part – "(1) if the determinant factor for that determination is – (i) Lack of appropriate instruction in reading, including the essential components of reading instruction as defined in section 1208 (3) of the ESEA (Reading First); (ii) Lack of instruction in math; or (iii) Limited English proficiency." A strict interpretation here would be that the student must have received instruction in regular education using materials that "include the essential components" of Reading First.

In a related Section 300.307 regarding procedures for evaluating children with possible specific learning disabilities, the regulations strongly support the use of Response to Intervention models vs. IQ based discrepancy models in deciding whether a student has a specific learning disability or whether a student's low performance in up to eight areas (such as reading fluency, listening comprehension, among others), is due to the lack of high-quality research-based instruction in

regular education settings. The SEA has the responsibility in establishing “criteria” to determine whether a child has a specific learning disability. The state may prohibit the use of a severe discrepancy IQ model but may not require the use of such a model at the district level. On the other hand, it must permit “the use of a process that determines if the child responds to scientific, research-based intervention.” The state may also “permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability....” Most of the research justifying the RTI and alternative research-based procedures have been conducted by individuals who continue to have significant influence over the Reading First program, such as Dr. Joseph Torgeson, Dr. Reid Lyon, and Dr. Jack Fletcher, among others.

How states are going to respond to these proposed regulations and, subsequently, to the final regulations in coming up with their “criteria” which must be applied consistently across the state to all districts, is not clear in most states. However, California is one of a limited number of states which no longer allows the use of intelligence or IQ tests. Many states, such as Virginia and Minnesota, already have policies and procedures in place for districts to follow in implementing early intervening services and the RTI model, particularly for diagnosis. Some of these states have “fine tuned” existing SEA guidance to accommodate new requirements or delete others based upon the draft regulations but will not develop formal final state guidance until the final USED regulations on IDEA are published around December.

As we noted in the April Washington Update, the influence of Reading First advocates and entities continues to permeate special education under the new IDEA generally and specifically in areas related to reading assessment instruments and interventions. The three regional Reading First technical assistance centers recently received several million dollars from USED to provide technical assistance to states, which will be developing alternative tests with alternative proficiency levels tied to grade level content which could be used with “gap” students, allowing up to two percent who achieve proficiency on these tests to be counted toward AYP. As of June 23, of the 42 states which have filed amendments with USED to take advantage of the new “interim policy,” 17 states (see related item), according to Education Daily, have received verbal approval by mid-June. Some of the Reading First or their staff not only have reviewed third-party “instruments” and “interventions,” but

have developed some of their own internally, which are widely used through the country in Reading First. In addition, USED has announced it plans to develop and make available a “tool kit” to assist states in selecting/developing alternative instruments this summer.

Most of the “interventions” anticipated for “academically-impaired” students or “gap” students are also applicable for use as early intervening services before a decision is made as to whether a child has a specific learning or other disability. As many as 2.5-3 million special education students could fall under the new “two percent policy.” USED estimates between 1.5 and 2 million students annually are provided initial evaluations and assessments; this is a proxy for the number of students who could receive early intervention services. Even though the 3 million students who could be affected by the draft regulations and new USED policies under NCLB is not that large a group, the disproportionate larger amount of IDEA and NCLB funding is being allocated to meeting requirements and solutions for this student population. Firms with appropriate products and documentation and evidence on effectiveness would be well advised to have their products (especially those which have the essential components used in Reading First) reviewed by Reading First entities, including the three technical assistance centers or otherwise use their centers’ tools and rubrics to review appropriate products.

Firms with interventions which do not address all of the essential components required under Reading First should also explore the possibilities of bundling their specific interventions with with other interventions districts are planning to implement. This is particularly true in large urban districts which plan to implement RTI approaches this summer prior to receiving any guidance from the SEA regarding the “mandated” use of Reading First interventions. In many of these districts, after July 1 the process of reallocating IDEA funds to other regular education entities or Title I staff which can provide early intervening services or RTI approaches to students in regular education will occur.

Other Opportunities For Products and Services

In addition to the opportunities identified in the November 30 Special Report (enclosed), under

Section 300.208, Permissive Use of Funds, IDEA continues to allow products and/or services purchased for special education students and teachers also to be used, on an “incidental use” basis, with non-special education students and teachers. Although not stated, the major condition is that the cost for the product or service would be the same regardless of the number of non-special education students and teachers who use the product, such as under a schoolwide license. This Section also reinforces that IDEA funds can be used to develop and implement early intervening services. A new provision in the Law allows IDEA Part B funds to “purchase appropriate technology for record keeping, data collection, and related case management activities of teachers and related services, personnel providing services described in the IEP of children with disabilities that is needed for the implementation of those case management activities.” Case management tools apply equally to the use of RTI approaches.

Under Section 300.704, State Level Activities, an increased percentage of a state’s allocation, beginning (for most states) at nine percent, can be used for SEA administration and a number of authorized state-level uses, including:

- “To support paperwork reduction activities including expanding the use of technology in the IEP process”;
- “To improve the use of technology in the classroom by children with disabilities to enhance learning”;
- “To support the use of technology, including technology with universal design principles and assistive technology devices, to maximize accessibility to the general education curriculum for children with disabilities”;
- “To support the develop and provision of appropriate accommodations for children with disabilities or the development and provision of alternative assessments that are valid and reliable for assessing the performance of children with disabilities.”

A newly authorized use of the state set-aside is to provide technical assistance to schools and LEAs, including direct services such as supplemental educational services in LEAs that have been identified for improvement because of low achievement scores of special education disability subgroups. Set-aside funds could be used to provide professional development to both special and regular education teachers.

Under Section 300.206, an LEA can commingle with Title I funds in a schoolwide program of an amount equal to the district-wide per-pupil IDEA allocation times the number of special education students in the schoolwide program as long as:

- all special education students receive service in accordance with their IEP; and
- these students are afforded all the rights and services guaranteed to children with disabilities.

The new National Instruction Materials Access Standard is addressed in Section 300.210, and if an instructional program or basal text is purchased through the National Instruction Materials Access Center or if it is purchased independently by the LEA, the LEA must “assure” that instructional materials for blind persons or persons with “print disabilities” in an accessible format will be available in a timely manner. The deadline is December 3, 2006.

Throughout the Law and regulations there are numerous opportunities for professional development to which an increased portion of IDEA and NCLB funds will be allocated. These include: (1) training which determines eligibility for special education and placement in the areas of individual diagnostic assessments; (2) critical analysis of assessment data; (3) delivery of specially designed instructional instruction and services to meet the needs of students with SLD; (4) training for IEP team members in the area of accommodations, selection of alternative and ongoing assessments, and observation techniques (which is a new requirement for the “early intervening” group); and (5) training regular teachers in the use of high quality research-based instructional interventions to ensure that the instruction was delivered by “qualified personnel.”

As additional USED non-regulatory guidance becomes available, we will provide updates.