MISSOURI STATE BOARD OF EDUCATION AGENDA ITEM: **March 2010**

CONSIDERATION OF AN ORDER OF RULEMAKING TO AMEND 5 CSR 70-742.140, MISSOURI STATE PLAN FOR PART B, REGULATIONS IMPLEMENTING THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)

STATUTORY AUTHORITY: Sections 161.092 and 162.685, RSMo	☐ Consent Item ☒ Action Item ☐ Report Item

COMMISSIONER'S GOAL NO. 1:

Missouri students will rank in the top 10 as measured by the National Assessment of Educational Progress (NAEP) and other national and international measures of accountability.

SUMMARY:

On December 1, 2008, new federal regulations pertaining to the Individuals with Disabilities Education Act (IDEA) went into effect. In 2009, the U. S. Department of Education, Office of Special Education Programs, indicated that a change in state regulations was needed to align to the federal regulations. In response, the Department developed proposed changes to state regulations implementing IDEA.

During January 2010, the Department conducted three public hearings regarding the proposed changes. The hearings were conducted in Kansas City, Columbia, and St. Louis. The proposed state regulations were posted at http://dese.mo.gov/divspeced/stateplan/PublicHearing2010.html for public review and comment on December 1, 2009. Written comments were received for a sixty (60) day period during this time period.

The Department received few written comments on the proposed state plan. For the proposed changes receiving no written comments, the Department recommends the changes be implemented as proposed. A summary of the comments and the corresponding recommendations by the Department is provided in the accompanying chart. Changes made were primarily in the areas of parental rights, state-level due process hearings, public attention, and the Missouri Schools for the Severely Disabled.

A complete copy of the final proposed Part B state regulations is available upon request and will be available at the State Board meeting.

PRESENTER(S):

Jackie Bruner, Director of Compliance, will assist with the presentation and discussion of this agenda item.

RECOMMENDATION:

The Commissioner recommends the State Board of Education authorize publication of an order of rulemaking to amend 5 CSR 70-742.140, the Missouri State Plan for Part B of the Individuals with Disabilities Education Act in the *Missouri Register* and that the State Board finds these amendments necessary to carry out the purpose of Sections 161.092 and 162.685, RSMo.

Proposed Changes to the
State Regulations Implementing Part B of the Individuals with Disabilities Education Act (IDEA)
Summary of Comments and Responses from the Department (DESE)
February 2010

Section	Page	DESE Proposed Change	Reason for Proposed Change	Summary of Comments	DESE Response
I	3	None	N/A	One commenter noted that the definition for Highly Qualified Teacher addresses special education teachers who teach two or more core academic subjects, but does not specifically address teachers teaching one core area.	The definition for Highly Qualified Teacher tracks the language in the federal regulations Changes: None.
II	17	None	N/A	One commenter requested an addition to the first paragraph of "Children's Rights" to read: "All rights of privacy and educational records indicated herein with regard to parents shall pass to the child upon reaching age 18, **or otherwise emancipated under state law,** except in the case of a child with a disability who is...."	DESE agrees with this suggestion as it clarifies who is entitled to the transfer of rights. The section will be changed to: "All rights of privacy and educational records indicated herein with regard to parents shall pass to the child upon reaching age 18, **or otherwise emancipated under state law,** except in the case of a child with a disability who is...."
III	19	None	N/A	One commenter suggested changing the first sentence on page 19 to read: "Missouri Department of Elementary and Secondary Education will conduct the following statewide activities prior to November 1 each year:"	DESE declines to shift the child find responsibilities from the district to the State Changes: None.
	20	None	N/A	One commenter suggested the State Plan needs to include all language from Federal Register # 300.306.c concerning considerations for eligibility for special education.	All federal regulatory requirements regarding conduct of an evaluation and determination of eligibility are addressed in Section III of the state regulations. Changes: None.
	23-24	Letter B. at the top of the page – Delete "If not, the team must give careful consideration to other evaluative information and utilize professional judgment to determine the student's level of cognitive and adaptive functioning."	The State is proposing to eliminate the use of professional judgment to determine eligibility for Mental Retardation/ Intellectual Disability.	Several commenters questioned the elimination of professional judgment for determining eligibility for MR/ID. One commenter questioned whether removal of professional judgment would affect reevaluations.	In reviewing the Professional Judgment criteria in the current regulations for Mental Retardation (MR), it was determined that the existing criteria for Professional Judgment for MR was inappropriate for that category and that the deletion should remain. Changes: None. There is no requirement to meet initial criteria through a reevaluation. Therefore, removal of professional judgment for determining eligibility should only affect initial evaluations. Changes: None
	26	None	N/A	One commenter suggested the language in the last	DESE will review the supporting documents for

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				paragraph on page 26 is not the same as in other guidance documents for the use of Response to Intervention.	consistency of language. The following addition will be made: "...must have written procedures for implementation that, at a minimum, incorporate guidelines developed by the SEA **which are found on the DESE website.**"
	27	None	N/A	One commenter advised that the current State Plan uses both Language Impairment and Language Disorder in the criteria for eligibility for Speech or Language Impairment.	DESE agrees with this comment and has make the following changes: The term "disorder" has been replaced with the term "impairment" in the eligibility criteria for Language, Fluency, and Voice. The term "Sound System Disorder" has not been changed.
	28	Final paragraph under Sound System Disorder should read: Sufficient data is present in the evaluation report, which documents the existence of a disorder due to multiple errors in the sound system which compromise the child's intelligibility and/or the listener's perception even though the recorded errors are considered within normal developmental guidelines (professional judgment).	Use of professional judgment was omitted in previous state plan.	One commenter questioned what the actual change in eligibility criteria for Sound System Disorder was.	The use of Professional Judgment for this category had been inadvertently omitted from the prior State Plan. The proposed change is to include that option. Changes: None.
	35	Change last sentence to read, "A public agency must provide a child whose eligibility terminates due to graduation from secondary school with a regular diploma or due to reaching the age of twenty-one (21) with a summary..."	Clarification	None	Changes: None
	36	Item H. should read: H. whether the child: 1) does not achieve adequately..... 2) does not make sufficient progress... 3) exhibits a pattern of strengths...	Clarification	None	Changes: None
V	62	Add the following to the bottom of the page:	New federal regulations,	One commenter suggested we should add language pertaining to the public agency not using a refusal to	The language proposed is consistent with that of the federal regulations. The state declines to go

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		Parent Revocation (34 CFR 300.9 and 300.300) A parent may unilaterally withdraw a child from further receipt of special education and related services by revoking their consent for the continued provision of special education and related services to their to their children. A public agency may not, through mediation or a due process hearing, challenge the parent's decision or seek a ruling that special education and related services must continue to be provided to the child. Parental revocation of consent must be in writing. Upon receipt of the parent's written revocation of consent, a public agency: • must provide the parent with prior written notice before ceasing the provision of special education and related services • will not be considered in violation of requirement to make FAPE available to the child because of the failure to provide the child with special education and related services • is not required to convene an IEP team meeting or develop an IEP for the child • 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.	December 31, 2008	consent to one service or activity to deny any other service, benefit or activity.	beyond what is mandated by federal regulation. Changes: None.
	63	Add a new Number 6 6. PARENTS' BILL OF RIGHTS (162.850 RSMo) The Department of Elementary	New Missouri Statute	Commenters questioned the Bill of Rights and requested an explanation be included that it is a summary of the rights explained in the Procedural Safeguards.	The proposed section on the Parents' Bill of Rights is not required under IDEA; it is a state law requirement and the state law provides sufficient direction. Therefore, DESE has decided

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		and Secondary Education has developed a Parents' Bill of Rights which is posted on the division's website. LEAs can print the document to distribute to parents and may post it on their websites. LEAs must provide the Bill of Rights to parents when a child is determined eligible for special education services or when an Individualized Education Program (IEP) is developed and whenever the Procedural Safeguards notice is provided to parents.		Another commenter requested clarification for when the Parents' Bill of Rights must be provided to parents.	not to include this section in the State Plan. Changes: proposed provision has been removed.
	65	None	N/A	One commenter suggested the need for clarification as to when the timeline for Due Process activities actually begin.	DESE agrees and will add the following: "A complaint is filed on the date it is received by DESE if received during business hours of the Division of Special Education as posted on the Division website. Complaints received after business hours will be filed the following business day."
	66	None	N/A	One commenter suggested an addition to page 66 before "Responsible Public Agency Response to a Due Process Complaint." **Withdrawal of Complaint** **A complaining party can withdraw a complaint until the hearing is commenced by notifying the Division of Special Education of the withdrawal. Once the hearing has started any request for withdrawal should be addressed to and ruled on by the hearing chairperson.**	DESE agrees to add the following provision to the State Regulations **Withdrawal of Complaint** **A complaining party can withdraw a complaint until the hearing is commenced by notifying the Division of Special Education of the withdrawal. Once the hearing has started any request for withdrawal must be addressed to and ruled on by the hearing chairperson.**
	68	Strike "or by the Department of Elementary and Secondary Education" under Written Settlement Agreement.	Optional provision removed because of no mechanism to enforce.	One commenter disagreed with the deletion in Written Settlement Agreement and advised DESE should clarify enforcement activity by the Department through the Child Complaint process for procedural violations.	DESE declines to take enforcement action of settlement agreements. Changes: None.
	68	Under State-level Due Process Hearings, B. 2) is "represent themselves or be represented by a licensed Missouri attorney."	Clarification	None	Changes: None

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	68	None	N/A	One commenter suggested under State-level Due Process Hearings, letter A. should say, "The chair is a licensed **Missouri** attorney."	DESE agrees and will add "Missouri" in this sentence.
	69	Add section Finality of Decision. "Jurisdiction of the hearing panel ends when the final order is issued. There are no amendments to the order permitted."	Clarification	One commenter requested an addition to "Finality of Decision" to include 3 business days should be allowed for necessary corrections to and or clarifications of the decision.	DESE declines to make this change which appears contrary to the need for finality of decisions.
	69	None	N/A	One commenter suggested changing "order" in the Finality of Decision section to "decision."	DESE agrees and will make the following changes. *Finality of Decision* *Jurisdiction of the hearing panel ends when the final* ***decision*** *is issued. There are no amendments to the decision permitted.*
	70	Under "Timelines and Convenience," delete "of the appeal" from the first sentence.	Edit for clarification	None	Changes: None
	70	None	N/A	One commenter suggested under Hearing Officers, letter C. should be amended to remove "or an adjoining county of an adjoining state or demonstrate employment in Missouri or an adjoining county of an adjoining state." The rationale was that there are a sufficient number of qualified hearing chairs in Missouri.	DESE declines to make this change and sees no reason to further limit available qualified hearing officers from serving.
	71	Revise language for "Substitution of Hearing Officers" E. After the time has expired for substitution of the initial appointment, no substitution will be permitted if a hearing officer steps down or is removed.	Clarification	One commenter advised the new language for letter E. is not clear concerning which hearing officers are included. Another commenter suggested clarifying by whom the hearing panel member substitution will be done. Another commenter suggested the rule be revised to allow a party to request the substitution of a party-appointed panel member if (a) that party has not already exercised its right of peremptory substitution and (b) the panel member appointed by the opposing party is disqualified due to a conflict of interest or other good cause.	DESE will change section E to read as follows: **E. If any hearing officer is unable to serve on the panel, the party selecting that panel member shall select a substitute. If the replacement is made after the time has expired for substitution of the initial appointment, no substitution will be permitted.**
	71	Under Assignment of chairperson/Withdrawal and Refiling, add "If a case is withdrawn and re-filed within one year, no substitution is	Clarification	Under Assignment of Chairperson/Withdrawal and Refiling, one commenter suggested changing "case" to "request for a due process hearing."	DESE agrees and will make the change as follows. Assignment of Chairperson/Withdrawal and Refiling If a party withdraws a request for a due process

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		permitted."			hearing after a Chairperson has been appointed and files a new request within one (1) calendar year of the withdrawal, the same Chairperson shall be appointed by DESE, unless that Chairperson is unavailable or unless a conflict of interest arises. *If a request for **a due process hearing** is withdrawn and re-filed within one year, no substitution is permitted.*
	72	New section: Discovery – "The only discovery permitted in due process hearings is depositions. There are no written interrogatories or requests for document productions permitted."	Requested by hearing officers for clarification	Several commenters provided input for the proposed section entitled Discovery. Most of them suggested that the proposed language was too limiting and that parents and their representatives should be allowed to present evidence and examine witnesses. Some suggested the purpose of a due process hearing is to make a decision based on all evidence available. More than one remarked about the high cost in money and time involved with depositions. Another suggested that hearing panels have inherent authority to require a party to provide another party records or access to records as part of the obligation to conduct a fair and efficient hearing. Yet another commenter suggested this would limit the ability of schools to obtain necessary documentation that could be highly significant to a case. One commenter requested DESE clarify subpoenas may not be directed to the opposing party in a due process case because of the delays caused by such action.	DESE agrees with some of the comments submitted. DESE has looked to Chapter 536 RSMo provisions on discovery in the past, but has not specifically addressed it before in state regulations. Changes: insertion of the following language: **Discovery** **The only discovery permitted in due process hearings is by deposition and issuance of subpoenas and subpoenas duces tecum. There are no written interrogatories or requests for document productions permitted.**
	73	None	N/A	One commenter suggested the need to have consistency in the requirement for the length of the hearing and the need to show cause under Length of Presentations.	DESE agrees that there is an inconsistency. Changes: Two days will be referred to in both instances. B. Length of Presentations The Chairperson may limit the length of any presentation in order to proceed with the hearing in an expeditious manner. In general, a hearing should last no longer than two (2) days. Any hearing exceeding **two (2)** days requires good cause to be shown and must be documented on the record.
	76-79	Replaced the words "surrogate parents" with "educational	Change of language to	None	Changes: None

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		surrogates"	reflect term used in State of Missouri		
	79	None	N/A	Under Transfer of Parental Rights at Age of Majority, one commenter suggested adding language about emancipated students.	DESE agrees and the section will be changed to: When a student with a disability reaches the age eighteen (18) **or otherwise is emancipated in accordance with state law,** the local school district or responsible public agency shall...
	83	Under "Authority of Hearing Officer" add new paragraph: "The timeline for an expedited due process hearing may not be extended; however, the case may be withdrawn and re-filed. Cases re-filed will be assigned the same hearing officer."	Clarification	None	Changes: None
VI	95-96	None	N/A	One commenter noted that not all State Performance Plan goals are listed, and some do not reflect recent changes.	DESE agrees with the comment and has changed this section to incorporate the US Department of Education, Office of Special Education Programs, State Performance Plan (SPP) Goals (Indicators) by reference.
	96	Add new section 8 "Public Attention (34 CFR 300.606)" "If the State receives notice that an enforcement action is proposed or is being taken against the State by the Secretary of Education, DESE must take such actions as may be necessary to notify the public within the State of the pendency of that enforcement action. At a minimum, the State must post a notice on the DESE website and distribute the notice to the media and through public agencies."	Revised federal regulation, December 31, 2008	None	Changes: None
	98-99	None	N/A	One commenter noted that the language for #10. Suspension and Expulsion Rates and for # 12. Overidentification and Disproportionality varies and should be more consistent.	DESE disagrees. The language in these sections reflects requirements in Federal Regulations
	98			One commenter noted the lettering under Advisory Panel Procedures needs to be revised to reflect the	DESE agrees and will make the change.

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				deletion of letter B.	
	100	Under STATE ADMINSTRATION, add "D. make positive efforts to employ, and advance in employment, qualified individuals with disabilities in programs assisted under Part B of the IDEA."	Revised federal regulation, December 31, 2008	None	Changes: None
	106	None	N/A	One commenter noted some of the Personnel Standards need to be updated to align with the Core Data Manual.	DESE agrees and has made the following changes to update the Personnel Standards: Under Speech Implementer added "Elementary Education or Secondary Education" under Educational Qualifications and added "and annual approval by DESE" under Certificates or License.
	107-108	None	N/A	One commenter advised that the Certification required for Special Education Teachers may be vague and misleading.	DESE agrees and has changed the personnel chart to clarify the certification requirements of Special Education Teacher as follows: Separated the type of teachers by "Early Childhood Special Education, Specialized Instruction and Visually Impaired." Added clarifying language under "Responsibilities" and "Certificates or License."
	107	None	N/A	One commenter suggested there are new certifications for Speech /Language Pathologists and requirements for Speech/Language Pathology Assistants.	DESE agrees and has made the following changes in the Personnel Chart: Under "Certificates and License" for Speech Language Pathologists the wording has been changed to "Speech Language Pathologist Certificate issued by the State Board of Education or License issued by the State Board of Registration for the Healing Arts." Under Speech/Language Pathology Assistant the Educational Qualification for an Associate's Degree in SLP Assistant has been eliminated.
VII	111	Under PERMISSIVE USE OF FUNDS, C. add "In Missouri this is known as the 'High Need Fund.' Specific information	Clarification	None	Changes: None

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		about the high need fund can be found on the Department website."			
	115	None	N/A	One commenter questioned the need for the section entitled CLASS SIZE AND CASELOADS since this is no longer a requirement for funding.	DESE believes it is helpful for the field to have caseload recommendations. Changes: None
	116	None	N/A	One commenter requested revising caseload standards for ECSE service providers to include allowance for travel time of therapists, severity of the disability, and number of students on a caseload that exceed 60 minutes per week.	DESE agrees with the commenter and has made the following changes to caseload standards: • Decreased the caseload of an itinerant teacher from 12-50 to 12-22. • Created a Low Incidence Caseload for instructional Staff and Paraprofessionals. • Decreased the caseload of Related Services Staff from 45-50 to 35-50. • Decreased administrator/coordinator caseload from 200 to 180. • Decreased the secretary caseload from 200 to 180. The Class Size and Caseloads section of the regulations has been reorganized for clarity.
X	146-155	Changed references to State Schools for Severely Handicapped (SSSH) to Missouri Schools for the Severely Disabled (MSSD).	Name change effective July 1, 2009	None	Changes: None
	147	2) Add: "The local school district shall provide justification of why it is not the least restrictive environment for the student. The district must demonstrate why it cannot educate the student in the local school and justify why the services they have provided are not adequate to meet the needs of the student."	Clarify that LRE applies to referrals to MSSD.	None	Changes: None
	148	B. revise language under Eligibility Procedures	Optional procedure removed	None	Changes: None
	149	5) Add: students who are eligible for the Missouri Schools for the Severely	Clarify homebound vs. MSSD	None	Changes: None

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		Disabled based on the severity of the disability will not be accepted if they require permanent homebound placement as such a placement requirement would therefore preclude attendance at a separate day program such as MSSD. Students who otherwise qualify and require only intermittent homebound placement will be accepted for placement.	placement		
	149	None	N/A	One commenter questioned the statement in section 6) which states that parents have "a right to appeal the action to the local board of education."	DESE agrees and will change the section to: 6) Should the district be notified that the student is eligible for the Missouri Schools for the Severely Disabled (MSSD), the district may refer the student. **The district shall notify parents of the decision and submit the referral only after the parents have been offered all rights available to them as explained in the Procedural Safeguards notice.** If the IEP at the time...
		Entire Document Throughout the document, minor wording and editing changes have been made for clarification.	Clarification	None	Changes: None