

# **Tri-State Regional Special Education Law Conference**

## **Rights and Responsibilities of Parents Under the IDEA**

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### **I. Introduction**

This session is intended to provide an overview of the IDEA's legal rights and responsibilities of parents of students with disabilities. Readers should be mindful that this outline does not address any state specific statutes or regulations which may exceed IDEA requirements.

### **II. Parent (IDEA Regulation 34 CFR 300.30)**

#### **A. Definition of Parent**

Parent means a natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent), a guardian (but not the State if the child is a ward of the State) or an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare or a surrogate parent.

The biological or adoptive parent shall be presumed to be the parent when more than one party qualifies under the IDEA definition of parent unless the natural/adoptive parent does not have the legal authority to make educational decisions or there is a judicial decree or order specifying a person to act as the parent for educational decisions. (300.30(b))

Note: The IDEA also allows a State to transfer parental rights to a student who reaches the age of majority unless a Court has determined the adult student be incompetent under state law.

### **III. Parent Right to Request an Evaluation (34 CFR 300.301)**

#### **A. An initial evaluation shall be conducted, pursuant to a request by the**

parents or the public agency, before the initial provision of special education and related services to a child with a disability.

Note: The school has a legal responsibility to provide the parents with a copy of their IDEA Procedural Safeguards for the first time when either a parent initiates a request for an initial special education evaluation or the school is initiating the request.

- B. The United States Department of Education issued a clarification memo that it would be inconsistent with the IDEA's evaluation procedures for a school to reject a referral for a special education evaluation from a parent and delay the provision of an initial evaluation on the basis that the student has not participated in an RTI (Response to Intervention) strategy or framework. The IDEA allows a parent to request an initial special education evaluation at any time.
- In addition, although the IDEA does not prescribe a specific timeframe from referral for evaluation to requesting parental consent to evaluate, it is the Department's policy that the school must seek parental consent within "a reasonable period of time" after receiving a referral. If the school does not feel a special education is warranted and denies the parent's request, the school must provide written notice of refusal to evaluate the student which is subject to a due process hearing or an administrative complaint should the parent challenge the school's decision. Memorandum to State Directors of Special Education 56 IDELR 50 (United States Department of Education, Office of Special Education Programs (2011)).
- C. The Court concluded that the school violated its responsibility under the IDEA's child find provisions since it required the parent to provide a medical diagnosis from the child's physician to complete the evaluation to determine if the student qualified under the Other Health Impairment category as a student with an ADHD. The Court stated that a school cannot shift their responsibility to parents for completing a special education evaluation including a medical diagnosis if necessary. The school is responsible to ensure that it assesses the student in all suspected areas of need before the evaluation can be complete. M.J.C. v. Special School District No.1 58 IDELR 288 (United States District Court, Minnesota (2012)).

#### **IV. Parent Participation (34 CFR 300.501)**

- A. The IDEA requires that parents be given an opportunity to participate in

meetings with respect to the identification, evaluation, educational placement and provision of a free appropriate public education. (300.501 (b)(1))

1. The parents must receive notice of the meeting early enough to ensure that they have the opportunity to participate. The meeting must be scheduled at a mutually agreed upon time and place and indicate the time, purpose, location and who will be in attendance. The parents must also be given the opportunity to bring other individuals with them who have the knowledge or special expertise about the child. (300.322 (a) and (b)).

Regarding who will be in attendance, the notice can state who by position will be attending. The notice is not required to provide names of specific staff members. Letter to Livingston, 21 IDELR 1060 (OSEP (1994))

2. A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans or coordination of services provision. A meeting also does not include preparatory activities that school personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting. (300.501 (b)(3))
3. If neither parent can attend the IEP Team meeting, the school must use other alternate means of participation such as a video conference or conference call if the parents and LEA agree. (300.322 (c) and 328)

In the event that the parent does not attend and the public agency is unable to convince the parents to attend, the agency must have a documented record of its attempts to arrange a mutually agreed on time and place for the meeting. (300.322 (d))

## B. Case Law

1. A parent of a student with autism emailed the school the morning of the scheduled IEP Team meeting informing the school that he was ill and would be unable to attend. The school contacted the parent to

attempt to reschedule the meeting before the expiration of the IEP but was unable to schedule a firm date that would accommodate both the parent's schedule and the school staff members' schedule. The school offered the parent the opportunity to participate via the telephone or internet but the parent stated he wanted to physically participate.

The school held the meeting without the parent before the current IEP expired. The IEP Team changed the student's placement from a private school to a public high school. The school sent the parent the IEP and scheduled a follow up IEP Team meeting with the parent a few weeks later. The parent requested a due process hearing the day before the follow up meeting.

The Court of Appeals, in reversing the hearing officer and District Court, stated that when confronted with the situation of complying with one procedural requirement of the IDEA or another, the school must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of a FAPE. The Court indicated that in such a scenario, the Court will allow the school "reasonable latitude in making that determination".

The Court held that under the circumstances of this case, the school's decision to prioritize strict deadline compliance over parental participation was clearly not reasonable. The failure to include the parent in the IEP meeting clearly infringed on his ability to participate in the IEP formulation process. That reason alone was cause to conclude that FAPE was denied. The school's argument that "it absolutely could not reschedule the IEP meeting for a date even a few days after the annual deadline in order to include [the parent] is untenable". The "after-the-fact meeting is not enough to remedy the [school's] decision to hold the initial IEP meeting, in which they created the IEP without parental participation. The Court remanded the case to the District Court to determine whether the private placement was "proper" under the IEP which would give the parent the right to be reimbursed for the cost of the private school. Doug C. v. State of Hawaii Department of Education 61 IDELR 91(United States Court of Appeals, 9<sup>th</sup> Circuit (2013))

2. The Court awarded reimbursement to the parents of a child with autism finding that the IEP was inappropriate due to procedural violations of the law. The failure to provide the parents with copies of requested evaluation reports prior to the IEP meeting interfered

with parental participation in the IEP formulation process undermining the very essence of the IDEA Amanda J. v. Clark County School District, 260 F.3d 1106, 35 IDELR 65 (United States Court of Appeals, 9<sup>th</sup> Circuit (2001)).

3. The Court concluded that the IEP developed for a student with autism denied FAPE since the school had an “unofficial policy” not to provide home based ABA services regardless of any evidence the parents provided concerning the individual needs of the student. Therefore, the parents were not afforded a meaningful opportunity to participate in the development of the IEP placement. Deal v. Hamilton County Board of Education, 392 F.3d 840, 42 IDELR 109 (United States Court of Appeals, 6<sup>th</sup> Circuit (2004)).
4. The parents were not denied a meaningful opportunity to participate at their child’s IEP meeting even though the school staff met before the meeting to discuss the student’s program. The IDEA allows schools to engage in “preparatory activities” to develop a proposal for the meeting as long as the school has an open mind as to the content of the IEP at the meeting. T.P. v. Mamaroneck Union Free School District, 554 F.3d 247, 51 IDELR 176 (United States Court of Appeals, 2<sup>nd</sup> Circuit (2009)).
5. The IDEA requires public agencies to ensure that IEP meetings are scheduled at a “mutually agreed on time and place”. Public agencies should be flexible in scheduling IEP Team meetings to accommodate the reasonable requests from parents. However, the IDEA does not require the public agency to schedule the IEP meeting outside of regular school hours or regular business hours to accommodate the parents or their experts. If the parent and the public agency cannot schedule a meeting to accommodate their respective scheduling needs, the public agency must take other steps to ensure parent participation by offering other means of participation (such as individual or conference telephone calls or videoconferencing) Letter to Thomas 51 IDELR 224 (United States Department of Education, Office of Special Education Programs (2008)).
6. A school district was found to have denied a student a FAPE since it did not properly involve the parents in the IEP Team process. The school notified the parents of the date and time of the IEP Team

meeting. The parents informed the school that they were not sure that they could attend the meeting on that date. Thereafter, the school made no attempts such as telephone calls, correspondence, etc. to reach a mutually agreed upon date and time for the meeting. Although they offered to have the parent participate by speakerphone, the Court held that the offer was of no consequence since such alternative methods are available only if neither parent can attend the IEP meeting.

The Court held that a school must include the parents in an IEP meeting “unless they affirmatively refuse to attend”. Drobnicki v. Poway Unified School District 52 IDELR 210 (United States Court of Appeals, 9<sup>th</sup> Circuit (2009)). Note: This is an unpublished decision. See also (Shapiro v. Paradise Valley Unified School District, 38 IDELR 91 (United States Court of Appeals, 9<sup>th</sup> Circuit (2003))).

7. The Court remanded the case for a determination whether the IEP Team violated the IDEA’s procedural requirements in making a predetermination of placement. In doing so, the Court stated that the standard for determining whether a predetermination of placement occurs is “when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives” H.B. v. Las Virgenes Unified School District, 48 IDELR 31 (United States Court of Appeals, 9<sup>th</sup> Circuit (2007)). This was an unpublished decision.

On remand, the Court affirmed the District Court’s holding that the school district predetermined the student’s placement. The decision to transfer the student from his private placement, made pursuant to a settlement agreement, back to the public school was made before the IEP meeting was held.

The Court found that the District's determination to remove the student from the private placement and place him in a public program did not evidence the sort of “open-mindedness” that is necessary. The Court’s conclusion was based on findings including the school district administrator’s comments at the beginning of the meeting that “we’ll talk about a transition plan” bringing the student back to the public school. The Team never discussed the possibility of keeping the student in the private placement even though the district was fully aware of the parents' wishes. H.B. v. Las Virgenes

Unified School District 110 LRP 15671 (United States Court of Appeals, 9<sup>th</sup> Circuit (2010)). This is an unpublished decision.

8. The Court held that the school did not violate the IDEA when it refused to allow the parent to tape record the IEP meetings. The United States Department of Education's Office of Special Education Programs issued guidance that tape recording of IEP meetings is a matter of state or local policy. If the policy prohibits or limits the use of recording devices at IEP meetings, there must be an exception if necessary to ensure that the parent understands the IEP process or other parental rights. The parent provided no evidence that an exception is necessary (such as a parent who is a non-English speaker or a parent with a disability who needs such accommodation).

In addition, the parents refused to participate at the IEP meeting since the school district had their attorney present. The Court held that neither the parents nor the school have authority to veto attendance by persons whom another party wants present. Note: The school must provide the parents notice of the meeting including who will be in attendance. (See IDEA regulation 34 CFR 300.322(b)(1)(i)) Horen v. Board of Education of the City of Toledo Public School District 655 F.Supp.2d 794, 53 IDELR 79 (United States District Court, Northern District, Ohio (2009)).

## **V. Prior Written Notice** (34 CFR 300.503)

### **A. Notice Requirements**

1. Parents must receive prior written notice whenever the agency proposes to or refuses to change:
  - a. identification
  - b. evaluation
  - c. educational placement; or
  - d. provision of a free appropriate public education

Note: Even if IDEA rights have been transferred to the adult student,

as provided under State law, the written notice must be sent to both the adult student and parents.

2. The notice must:
  - a. be in parent's native language, unless it is clearly not feasible to do so
  - b. describe the action
  - c. explain why the agency is proposing/refusing such action
  - d. description of other options considered
  - e. evaluations and other information used as a basis for the action
  - f. other relevant factors
  - g. how a copy of the procedural safeguards can be obtained
  - h. resources to assist parents

Parents may elect to receive notices by e-mail if the agency makes this option available.

3. Prior written notice under the IDEA is required a reasonable time before the public agency proposes or refuses to initiate or change the identification, evaluation, educational placement or the provision of FAPE. This written notice requirement applies even if the agency agrees with the change being proposed by the parent. A proposal to change the provision of FAPE requiring written notice involves a change to the type, amount or location of the special education and related services being provided the child under their IEP. Letter to Lieberman 52 IDELR 18 (United States Department of Education, Office of Special Education Programs (2008)).
4. An LEA must provide prior written notice when a school district proposes or refuses to initiate or change the provision of FAPE as a result of a decision at an IEP Team meeting. There is no requirement

in the IDEA regarding the point at which the written notice must be provided as long as it is provided a reasonable time before the LEA actually implements the action. This provides parents, in the case of a proposal or refusal to take action, a reasonable time to fully consider the change and respond to the action before it is implemented. Providing prior written notice in advance of an IEP team meeting could suggest that the public agency's proposal or refusal was determined before the meeting and without parental consent. Letter to Chandler 112 LRP 27623 (United States Department of Education, Office of Special Education Programs (2012))

5. The school must respond to the parents' revocation of consent for continued special education services with a prior written notice (meeting the requirements of 34 CFR 300.503) to the parent before ceasing the provision of special education and related services. (34 CFR 300.300(b)(4)(i)).

The Comments to the Regulations state that the prior written notice must inform the parent, in language understandable to the general public, regarding the change in educational placement and services that will result from the parents' revocation of consent. Although there is no specific timeline from revocation of consent to the discontinuation of services, it is expected that discontinuation occurs in a timely manner. In addition, the notice must include information on sources for parents in understanding the requirements of Part B of IDEA. (Federal Register, Volume 73, No. 231, Page 73008).

**Best Practice Recommendation:**

The prior written notice should also address the impact of the parents' revocation of consent for services on the child's rights under the disciplinary provisions of the IDEA discussed later in this outline.

## **VI. Consent Requirements**

### **A. Definition of Consent (34 CFR 300.9)**

1. Consent means that the parents have been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication; the

parent understands and agrees in writing to carry out the activity and that the granting of consent is voluntary and may be revoked at any time although the revocation is not retroactive, that is, it does not negate an action that has occurred after the consent was given and before the consent is revoked.

B. Consent for initial evaluation (34 CFR 300.9 and 300.300(a))

1. Consent is required for evaluations/assessments which are administered for the purpose of initially determining whether the student has a disability and is in need of special education and, if so, the special education and related service needs. Parental consent is not required before reviewing existing data as part of an evaluation or administering a test/evaluation administered to all children. In addition, screening by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation is not deemed an evaluation and therefore parental consent is not required.
2. The public agency must make reasonable efforts to obtain the informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability. The IDEA requires that the agency have a record of its attempts in requesting consent for the initial evaluation in meeting the reasonable measure requirement. These procedures include detailed records of telephone calls made or attempted and the results of those calls, copies of correspondence sent to the parents and any responses received, and detailed records of visits made to the parent's home or place of employment and the results of those visits.
3. The District may use mediation and due process hearing procedures to pursue the evaluation if the parent does not provide consent for the initial evaluation. The District does not violate its child find responsibilities if it declines to pursue the evaluation after making reasonable efforts to obtain parental consent.

If a parent of a student who is home schooled or parentally placed in a private school does not provide consent for the initial evaluation or reevaluation, the LEA may not use mediation or a due process hearing to override the parent's refusal. The LEA is not required to consider such child as eligible for services.

4. For a student on an IEP who transfers to a new state, the Comments clarify that if the new LEA determines that an evaluation is necessary, it would be deemed an initial evaluation requiring parental consent. (Page 46682)
5. If the parent revokes consent for special education services, the parent may request at any time that the student be re-enrolled in special education. In such case, the request shall be treated as a request for an initial evaluation. The Comments highlight that the parent may want to consider making an evaluation request when their child has a discipline issue or in meeting graduation requirements. There is no limitation on the number of times a parent may revoke consent for special education and then subsequently request reinstatement in special education. (Federal Register, Volume 73, No. 231, Page 73014)

In such case the student should be treated as any other student in the child find process. Depending on the data available the new evaluation may consist of a review of existing evaluation data. Based on a review of existing data that includes information provided by the parents, current classroom, local and/or State assessments and observations by teachers and related service providers, the IEP Team and other qualified professionals will determine what, if any, evaluation data are needed to determine whether the student qualifies for special education and, if so, the educational needs of the student. (Federal Register, Volume 73, No. 231, Page 73015)

C. Consent for reevaluations required. (34 CFR 300.300(c))

1. Each public agency must obtain informed parental consent prior to conducting any reevaluation of a child with a disability. Consent would not be required if the team determines that there is sufficient existing information and, therefore, the reevaluation would consist solely of a review of this existing information.
2. A District may conduct the reevaluation without consent if it has taken reasonable measures to obtain consent and the parent has not responded. The IDEA requires that the agency have a record of its attempts in requesting consent for reevaluation in meeting the reasonable measure requirement.

3. If the parent does not provide consent for the reevaluation If the public agency chooses not to pursue the reevaluation by using the consent override procedures and the public agency believes, based on a review of existing evaluation data on the child, that the child does not continue to have a disability or does not continue to need special education and related services, the public agency may determine that it will not continue the provision of special education and related services to the child. If the public agency determines that it will not continue the provision of special education and related services to the child, the public agency must provide the parent with prior written notice of its proposal to discontinue the provision of FAPE to the child including the right of the parent to use the mediation procedures or the due process procedures if the parent disagrees with the public agency's decision to discontinue the provision of FAPE to the child. Questions and Answers on Individualized Education Programs (IEPs), Evaluations and Reevaluations, Question D-2, 54 IDELR 297 (United States Department of Education, Office of Special Education and Related Services(OSERS) (2010). See also Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations, 111 LRP 63322 (OSERS 2011).

D. Consent is required for the initial provision of special education. (34 CFR 300.300(b))

1. A public agency that is responsible for making FAPE available to a child with a disability must obtain informed consent from the parent of the child before the initial provision of special education and related services to the child.  
The comments to the IDEA regulations clarify that “initial provision of services” means the first time a parent is offered special education and related services after the child has been evaluated and found eligible. (71 Fed. Reg. 46,633 (2006).
2. The public agency must make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services to the child.
3. 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 may not use the mediation or due process

hearing procedures in order to obtain agreement or a ruling that the services may be provided to the child.

4. If the parent refuses to provide consent for the initial provision of services, the public agency 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.
5. The public agency is not required to convene an IEP team meeting or develop an IEP for the child.
6. In obtaining parental consent, schools are required to provide the parent all information relevant to the activity so that the parent can signify in writing that he/she understands the action. In seeking consent for the initial provision of special education services, the school is seeking consent to services generally and is not asking the parent to signify that they understand the precise nature of all of the services that would be included in their child's IEP. Letter to Johnson, 56 IDELR 51 (OSEP 2010).
7. The U.S. Department of Education provided additional guidance on this issue by addressing the following question:

Does the requirement that a public agency obtain parental consent for the initial provision of special education and related services mean that parents must consent to each service included in the initial IEP developed for their child?

Answer:

No. Under 34 CFR §300.300(b)(1), a public agency that is responsible for making FAPE available to a child with a disability must obtain informed consent from the parent of the child before the initial provision of special education and related services. However, this consent requirement only applies to the initial provision of special education and related services generally, and not to the particular special education and related services to be included in the child's initial IEP. In order to give informed consent to the initial provision of special education and related services under 34 CFR §300.300(b)(1), parents must be fully informed of what special education and related services are and the types of services their child might need, but not the exact program of services that would

be included in an IEP to be developed for their child. Once the public agency has obtained parental consent and before the initial provision of special education and related services, the IEP Team would convene a meeting to develop an IEP for the child in accordance with 34 CFR §§300.320 through 300.324. Decisions about the program of special education and related services to be provided to the child are left to the child's IEP Team, which must include the child's parents, a public agency representative, and other individuals, consistent with 34 CFR §300.321. While the IDEA does not require public agencies to obtain parental consent for particular services in a child's IEP, under the regulations in 34 CFR §300.300(d)(2), States are free to create additional parental consent rights, such as requiring parental consent for particular services. In cases where a State creates additional parental consent rights, the State must ensure that each public agency in the State has effective procedures to ensure that the parent's exercise of these rights does not result in a failure to provide FAPE to the child. Questions and Answers on Individualized Education Programs (IEPs), Evaluations and Reevaluations, Question D-5, 54 IDELR 297 (OSERS 2010). See also Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations, 111 LRP 63322 (OSERS 2011).

8. The parents challenged the IEP team's decision to change their student's placement to a more restrictive setting. The parents argued that the IEP change was not valid because they objected. They contend that an IEP change must be agreed upon by the entire IEP team to be validly implemented. The court held that although the IDEA requires that parents be afforded a meaningful opportunity to participate in the IEP process and requires the IEP team to consider parental suggestions, the school is not required to obtain the parents' consent to implement an IEP change. The proper recourse for parents who disagree with the contents of their child's IEP is to request a due process hearing. K.A. v. Fulton County School District 59 IDELR 248 (United States District Court, Northern District, Georgia (2012)). *Note: It is important to check your state's legal requirements since some states require parental consent before making a placement or service change in an IEP.*

E. Revocation of consent for special education services (34 CFR 300.300(b)(4))

1. Parents have the right to revoke consent for continued IEP services for their child at any time by providing written notice to the school. The school must then provide the parents with written notice. The parents' right to terminate their child's IEP services is not subject to challenge in a due process hearing. If a parent subsequently requests special education services, the school district has an obligation to evaluate the student. Such evaluation shall be treated as an initial evaluation. If eligible, the school has an obligation to make a FAPE available to the child including the development and implementation of an IEP. (300.300(b)(4))
2. The comments to the IDEA regulations also clarify that the parents have the right to revoke special education services in their entirety. The IDEA does not give the parents a right to revoke consent just for a particular service. Federal Register 73,011 (2008).
3. In the case of parents who have equal legal authority to make educational decisions and one parent provides consent for IEP services and the other parent submits a written revocation, the LEA must provide written notice to both parents that IEP services will be terminated.  
The IDEA further provides that either parent, after services are ceased due to the revocation of consent, has the right to request an initial evaluation to determine if the child is IEP eligible. Letters to Cox and Ward (United States Department of Education, Office of Special Education Programs (2009 and 2010)).

F. Consent for Use of Insurance ( 34 CFR 300.154(d) and (e))

1. An agency must obtain written informed consent from the parents each time private insurance will be used to fund IEP services. Also, the parents must be informed that their refusal to permit the public agency to access their private insurance does not relieve the public agency of its responsibility to ensure that all required services in the IEP are provided at no cost to the parents.
2. An agency that is proposing to use public benefits or public insurance to cover the cost of IEP services must obtain a one-time

written consent from the parent after providing written notification before accessing the child's or the parent's public benefits or insurance for the first time.

This consent must specify (a) the personally identifiable information that may be disclosed (e.g., records or information about the services that may be provided to a particular child); (b) the purpose of the disclosure (e.g., billing for services); and (c) the agency to which the disclosure may be made (e.g., Medicaid). The consent also must specify that the parent understands and agrees that the public agency may access the child's or parent's public benefits or insurance to pay for services.

The written notification must be provided to the child's parents before accessing the child's or the parent's public benefits or insurance for the first time and prior to obtaining the one-time parental consent and annually thereafter. The written notification must explain all of the protections available to parents. (See 34 CFR §300.154(d)(2)(v)f.

G. Excusal of an IEP Team Member (34 CFR 300.321(e))

1. An IEP Team member may be excused from attending the IEP Team meeting, in whole or in part, if the parents and LEA agree in writing because the area of the curriculum or related service is not being modified or discussed. The agreement must be in writing.
2. An IEP Team member may be excused from attending the IEP Team meeting even if their curricular area or related service area is being discussed by the written consent of the parent and the LEA. The IEP Team member shall submit their input to the Team in writing prior to the meeting.

H. Participating Transition Agency Personnel (300.321(b)(3))

1. Parental consent is required before inviting a representative of any participating agency that is likely to be responsible for paying for or providing transition services to the IEP Team meeting.

I. Coordinating Evaluations for Private School Students (34 CFR 300.622(a)(3))

1. The parent must give written consent before their child's education records are shared between the LEA where a parentally private school is located and the LEA of the parents' residence.

## **VII. Procedural Safeguard Statements**

### **A. Notice of Procedural Safeguards (34 CFR 300.504)**

Shall be provided at a minimum:

1. Initial referral for evaluation
2. Once per year
3. Parental request for an additional copy
4. Filing a due process hearing complaint or administrative complaint
5. When the school is seeking a disciplinary change of placement.

### **B. Content of Procedural Safeguards must include a full explanation of: (34 CFR 300.504)**

1. independent educational evaluation
2. prior written notice
3. parental consent and revocation of consent
4. access to educational records
5. opportunity to present complaints to initiate due process
6. "Stay Put" – placement during pendency of due process
7. procedures for placement in an interim alternative educational setting
8. requirements for unilateral placements by parents seeking public payment

9. mediation
10. due process hearings - including disclosure of evaluation results
11. state level appeals (if applicable)
12. civil actions
13. attorneys' fees
14. state administrative complaint procedures
15. statute of limitations period to file complaints
16. resolution meetings
17. time period for filing an appeal with the Court

The Regulations add the requirement that the safeguards address the differences between the due process complaint and the State complaint procedures, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures.

#### C. Cases

1. The District's failure to provide the parents with their procedural safeguards, amounted to denial of FAPE. It is irrelevant whether the IEP provided educational benefit when the parents were not informed of their right to challenge the IEP. Jaynes v. Newport News School Board, 35 IDELR 1 (U.S. Court of Appeals, 4<sup>th</sup> Circuit (2001)). NOTE: This is an unpublished decision.
2. The Court held that the school was not required under the IDEA to affirmatively explain to parents the revisions in the procedural safeguard statement pertaining to the statute of limitations requirement. By providing the parents with a written copy of the revised procedural safeguards, the parents received notice as required by the IDEA. Therefore, the Court affirmed the dismissal of the due process hearing request as being untimely Natalie M. v.

Department of Education, State of Hawaii, 2007 Westlaw 1186835, 47 IDELR 301 (United States District Court, Hawaii (2007)).

### **VIII. Independent Educational Evaluation (34 CFR 300.502)**

- A. Parents have the right to obtain an Independent Educational Evaluation (IEE). Upon requesting an IEE, the public agency shall provide to the parents information about where an IEE may be obtained and the agency criteria applicable for IEEs.
- B. The IEE is at public expense if the parent disagrees with the district's evaluation unless the district initiates a due process hearing. A parent is entitled to only one independent educational evaluation at public expense each time the agency conducts an evaluation with which the parent disagrees. (300.502 (b)(5))
  - 1. District has the right to initiate a hearing without unnecessary delay to show that its evaluation is appropriate.
- C. The IDEA allows a public agency to ask for (but not require) an explanation by the parent why he/she objects to the agency's evaluation. Such request may not unreasonably delay payment or due process.
- D. The IEE at public expense must meet the same criteria as the district uses for its evaluations.
- E. The independent educational evaluation must be considered by the LEA in any decision made with respect to FAPE if the IEE meets the agency criteria. (300.502 (c)(1))
- F. Independent Educational Evaluation Cases
  - 1. The Court affirmed the District Court's decision which also rejected the school's argument that the IDEA requires the parents to first notify the school of their intention to seek an IEE and engage in discussions with the school as a precondition of being reimbursed. Phillip and Angie C. v. Jefferson County Board of Education 701 F.3d 691, 60 IDELR 30 (United States Court of Appeals, 11<sup>th</sup> Circuit (2012)).  
But see R.A. v. Amador County Unified School District 58 IDELR 152 (United States District Court, Eastern District, California

(2012)) where the Court denied reimbursement for an IEE based on the parent's failure to first notify the school district of their intent to obtain an IEE at public expense.

2. The parents were entitled to payment for an Independent Educational Evaluation (IEE) since the district failed to evaluate the student when there was reason to do so. Even though the parents did not "disagree" with the school's evaluation, as required by the IDEA, since there was no evaluation to disagree with, the Court held that the parents were entitled to reimbursement based on equitable considerations Los Angeles Unified School District v. D.L., 49 IDELR 252, 548 F.Supp. 2d 815 (United States District Court, Central District, California (2008)).
3. The United States Department of Education issued a letter clarifying that it would be reasonable for a school district to establish criteria for independent educational evaluations, including a requirement that it receive the entire independent evaluation report and not just the scaled scores by a certain time, to give the school the opportunity to review the IEE report prior to scheduling an IEP Team meeting to discuss the independent evaluation. Such criteria would need to be provided to parents in advance or otherwise made available publicly so that individuals seeking an independent educational evaluation are fully informed of the requirement. Letter to Anonymous 58 IDELR 19 (United States Department of Education, Office of Special Education Programs (2011)).
4. A school district adopted a policy that specified \$1,800 as the amount over which the school district "may refuse to pay" for an Independent Educational Evaluation (IEE). In addition, the policy provided that, if a parent desires an IEE outside of the district's criteria, the parent has the "opportunity to demonstrate that their child's unique circumstances justify an IEE outside of the District's criteria. If the total cost of an IEE obtained by the parent ... exceeds the District's cost criteria and there is no justification for the excess cost, the IEE will be publicly funded only to the extent of the District's maximum allowable charge."  
The parent requested an IEE by a particular evaluator to assess her child's progress in academics. The school district approved the IEE request up to the \$1,800 limit. The parent never presented any information suggesting that there were any "unique circumstances"

justifying an exception to the cost criteria. After learning the IEE would cost in excess of the limit, the parent did not obtain the IEE. The school provided the parent with six clinics where she could obtain an IEE within the cost limits, however, the parent never contacted any of the clinics.

The parents challenged the school district's decision. The Court, in affirming the hearing officer and state review officer, held that the school district's general cap of \$1,800 on IEEs was reasonable and, in any event, it may be exceeded in the case of exceptional or unique circumstances. The Court also noted that it was undisputed that there existed several psychologists or neuropsychologists in the area willing to perform IEEs for less than \$1,800, whom the parent never attempted to call due to an apparent desire to obtain an IEE only from a certain evaluator. M.V. v. Shenendehowa Central School District 60 IDELR 213 (United States District Court, Northern District, New York (2013)).

## **IX. Mediation (34 CFR 300.506)**

### **A. Mediation System Requirements**

1. States must offer mediation options to parents and LEAs even if a due process hearing has not been requested.
2. Mediation must be voluntarily agreed to by the family and the school district.
3. Mediation may not used to delay/deny parental rights including the right to go to a due process hearing.
4. Conducted by a qualified and impartial mediator
  - a. trained in effective mediation techniques
  - b. knowledgeable in special education law
  - c. list maintained by State
  - d. The SEA may select mediators on a random or rotational basis or some other impartial basis. A mediator could be an employee of a LEA not involved in educating the student

5. State shall cover cost of mediation
6. Written Mediation Agreement - A mediation agreement is a legally binding agreement enforceable in State or Federal Court. The agreement will provide that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence during subsequent legal proceedings. There is nothing to prohibit a State from using other enforcement mechanisms to enforce a mediation agreement provided that the use is not mandatory and does not delay or deny the right to seek enforcement in a Court.

**X. Due Process Hearings (34 CFR 300.507-515)**

**A. Due Process Hearing Procedures**

**1. Due Process Hearing Complaints**

- a. The parent or public agency may initiate a hearing on issues relating to identification, evaluation, educational placement or the provisions of FAPE. A due process hearing must be initiated within two years of the moving party either knowing of or should have known of the disputed decision, unless the state establishes an explicit state time limit. Exceptions are if the parent had not been informed or misinformed by the LEA.
- b. Either party requesting a due process hearing must file a written request to the other party and the SEA, which specifies the issues, the facts, and the proposed resolution to the extent known.

**2. Resolution Sessions (34 CFR 300.510)**

- a. If a party requests a due process hearing, a resolution meeting shall be held within 15 days with the parents and relevant members of the IEP Team who have knowledge of the facts identified in the request. No LEA attorney may attend unless the parent brings their attorney. A resolution meeting shall be

held unless waived, in writing, by both parties or mediation is requested.

- b. If resolution is reached, a signed, legally binding agreement will be developed which may be voided within three business days. Such agreement shall be enforceable in Court.
- c. A due process hearing will be scheduled if no resolution is reached within 30 days. Hearing timelines commence at this point.
- d. Except where the parties have jointly waived, in writing, the resolution process or to use mediation, the failure of the parents to participate in the resolution meeting will delay the timelines for the resolution process and the due process hearing until the meeting is held.
- e. If the LEA has been unable to obtain the parents participation in the resolution meeting after reasonable efforts have been made and documented (including the attempts to reach a mutually agreed on time and place for the meeting), the LEA at the conclusion of the 30 day period may request that the hearing officer dismiss the due process complaint.
- f. If the LEA fails to hold the resolution meeting within 15 days or fails to participate, the parent may seek the intervention of the hearing officer to begin the due process hearing timeline.

### 3. Stay Put

- a. During the pendency of any proceeding (such as a due process hearing or appeal to Court), unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then current educational placement of the child, or, if applying for the initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.
- b. The mere existence of a "stay put" order did not excuse the school district from its responsibility to have a statutorily

compliant IEP in place at the beginning of each school year. Neither the IDEA nor its implementing regulations qualifies any duty imposed on a state or local educational agency contingent upon parental cooperation. Anchorage School District v. M.P. 689 F.3d 1047, 59 IDELR 91 (United States Court of Appeals, 9<sup>th</sup> Circuit (2012)).

## **XI. State Administrative Complaints (34 CFR 300.151-153)**

### **A. State Administrative Complaints System Requirements**

1. An organization or individual may file a signed written complaint alleging Part B violations.  
The complaint must allege a violation not more than one year ago.
2. The State shall investigate, issue a report within 60 days and or corrective action, if warranted.

The State may order monetary reimbursement, compensatory education or other appropriate action to correct the non-compliance.

3. The public agency must be given an opportunity to respond to the complaint and to submit a proposal to resolve the complaint.
4. With the agreement of the parties, an opportunity to engage in mediation or other alternative means of dispute resolution must be afforded.

## **XII. Confidentiality (34 CFR 300.611-627)**

### **A. Confidentiality Requirements under the IDEA**

1. The State shall take steps to ensure the protection of any personally identifiable data, information and records collected by the SEA and LEAs.
2. The parents have the same rights as parents of nondisabled students under the Family Educational Rights and Privacy Act (FERPA) to access and to challenge alleged inaccurate or misleading information in their child's education records with the following additions:

- a. Timelines for inspections—Right to inspect and review their child’s education records without unnecessary delay, before an IEP meeting, resolution meeting or a due process hearing but in no case later than 45 days.
- b. Consent—The parent must give written consent before their child’s education records are shared between the LEA where a parentally private school is located and the LEA of the parents’ residence.
- c. Destruction of Records—The agency must inform the parents when personally identifiable information maintained under the IDEA is no longer needed to provide educational services to the student. The information must be destroyed at the request of the parent. However, a permanent record of the student’s name, address, phone number, grades, attendance records, classes attended, grade level completed and year completed may be maintained.

**Note: This outline is intended to provide workshop participants with a summary of selected Federal statutory/regulatory provisions and selected judicial interpretations of the law. The presenter is not, in using this outline, rendering legal advice to the participants. The services of a licensed attorney should be sought in responding to individual student situations.**